

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 8, 2006 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- excused

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

Conferees appearing before the committee:
Representative Lance Kinzer
Kris Kobach, Professor of Constitutional Law, University of Missouri
Karl Peterjohn, Kansas Taxpayer Network
David Hanna, American for Prosperity
Patricia Riley, Kansas Supreme Court Nominating Commission
Retired Supreme Court Justice Fred Six
Rich Hayse, Kansas Bar Association
Jerry Palmer, Kansas Trial Lawyers Association
Gene Balloun, Attorney
Jim Robinson, Kansas Association of Defense Counsel
Fred Logan, Attorney
Janis McMillen, Kansas League of Women Voters

Chairman O'Neal opened the hearings on **HCR 5033 - governor would appoint supreme court judges, consented to by the senate; abolishing the supreme court nominating commission & HB 2770 - governor would appoint the court of appeals, consented to by the senate; abolishing the supreme court nominating commission.**

Representative Kinzer heard from constituents that they were feeling isolated when it came to the selection of justices and judges. The current system is intended to heighten confidence in the judiciary by isolating it from political influence. However, the reality is that this isolation serves to exacerbate public frustration and alienation from a process they see as elitist. The proposed bill would follow the appointment process of the federal judiciary.

The proposals would allow the Governor to nominate any attorney over the age of 30 to serve on the Kansas Court of Appeals or the Supreme Court. The Governor's nomination would then be subject to Senate Confirmation. (Attachment 1)

Kris Kobach, Professor of Constitutional Law, University of Missouri, informed the committee that six states use some variation of the federal model of appointment and confirmation when selecting judges & justices. He suggested that the current system being used in Kansas is a recipe for mediocrity. The nominating commission operates behind closed doors and the members are not known to the majority of the public. The Governor escapes responsibility because he only has to select a person from a list of three names that the commission has forwarded to him. There is the feeling that the nominee's of the commission have political connections instead of great credentials. (Attachment 2)

Karl Peterjohn, Kansas Taxpayers Network, agreed that the current process of selecting judges and justices is flawed and puts the average Kansan in a limited role of choosing the judiciary. The proposed bill would provide more public visibility. He suggested that the committee place a term limit on how long a person can be appointed to the courts. (Attachment 3)

David Hanna, Americans for Prosperity, commented that Kansas is currently experiencing a crisis of confidence among the people and their governments' s ability to provide equal and fair justice. The judiciary must remain independent of politics so they can rule fairly under the law without fear of reprisal. A system of gubernatorial appointment and senate confirmation does not threaten the judicial

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 8, 2006 in Room 313-S of the Capitol.

independence, but does level the political playing field by making those responsible for selecting our judges accountable to the people of Kansas. ([Attachment 4](#))

Patricia Riley, Supreme Court Nominating Commission, explained how the commission is appointed and the process they go through to select three individuals to be nominated to the Governor for appointment. ([Attachment 5](#))

Retired Justice Fred Six stated that if the state went to a senate confirmation of judges & justices, lawyers would be discouraged from running due to the contentious atmosphere of the confirmation process. ([Attachment 6](#))

Rich Hayse, Kansas Bar Association, opposed any change in the current appointment system of judges. He believes that the structure of the Kansas Supreme Court Nominating Commission was designed to separate the nominators from partisan political influence. This way they can nominate the best and brightest from the applications they receive. ([Attachment 7](#))

Jerry Palmer, Kansas Trial Lawyers Association, commented that he hadn't heard any proof that the federal system would be better than the current merit selection of judges. He suggested that the issues being heard today stemmed out of the Supreme Court decisions on school finance and the death penalty. The current system has continued to provide good judges and justices and does not need to be reformed. ([Attachment 8](#))

Eugene Balluon, Attorney, Shook, Hardy & Bacon, opposed the proposals because he believes that the current system has been working for the last 50 years with the quality of the court increasing since merit selection was enacted. ([Attachment 9](#))

Jim Robinson, Kansas Association of Defense Counsel, suggested that the proposals are the legislatures response of the court's decisions in the school finance and death penalty cases. Changing the constitution is not the answer, if citizens of Kansas have problems with the way the courts rule, then they can vote non-retention. ([Attachment 10](#))

Fred Logan, Attorney, Logan & Logan, wondered why any attorney would want to put themselves and their family through a senate confirmation process. He believed that it would actually dissuade individuals to place their name in the hat for a judiciary appointment. ([Attachment 11](#))

Janis McMillen, League of Women Voters of Kansas, saw the proposals as the first step towards election of all judges & justices and opposed the measures. ([Attachment 12](#))

The hearing on **HCR 5033** was closed.

Committee minutes from January 23, 24 & 25 were distributed by e-mail. Because no changes were requested by February 8th the minutes stood approved.

The committee meeting adjourned at 5:45 p.m. The next committee meeting is scheduled for 3:30 p.m. on Thursday, February 9, 2006 in room 313-S.

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HOUSE OF REPRESENTATIVES

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Thank you for this opportunity to discuss the important issue of judicial selection. HCR 50033 and HB 2770 propose changing the current method of appellate court judicial selection in Kansas. Under these proposals the Governor would be allowed to nominate any licensed Kansas attorney over the age of 30 to serve on the Kansas Court of Appeals or the Supreme Court of Kansas. The Governor's nomination would be subject to Senate Confirmation. Members of the Court would still stand for retention under the same criteria as the current system. The current judicial nominating commission process under which a commission of attorneys and political appointees select three candidates from which the Governor must choose in filling an appellate court vacancy would be eliminated. These proposals would leave the selection process for District Court Judges unchanged.

My basic rationale for this proposal is simple. When the President fills a U.S. Supreme Court vacancy he is not left to choose from among a list submitted by the American Bar Association or some other group. He or she is free to select the best available person for the job. The Governor should have this same authority; subject to review by the Senate to avoid cronyism or other abuse of power.

The current system is intended to heighten confidence in the judiciary by isolating it from political influence. I would contend that in reality this isolation serves to exacerbate public frustration with and alienation from a process they see as insular and elitist. Placing clear responsibility for judicial selection in the hands of politically accountable elected officials will provide an appropriate mechanism by which the people may at least indirectly participate in the process of judicial selection.

States currently use a wide variety of methods to select appellate court judges. Twenty-four states use some form of nominating commission process. Thirteen states utilize nonpartisan elections, Eight States utilize partisan elections. Four states select judges via gubernatorial appointment and two states follow the practice of legislative appointment.

This proposal is not radical in any way but rather follows the familiar pattern of the appointment process to the federal judiciary. For those who desire a more detailed discussion of the numerous advantages of this system I would direct your attention Federalist # 76 by Alexander Hamilton. For now I would simply suggest that we have nothing to fear from allowing the people at least an indirect influence over the judicial selection process. The Governor would remain free to consult with whatever experts she might choose in aiding her in the selection process. The Senate would be well positioned

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Attachment # 1

to serve as a check against any rash or ill advised appointment by the Governor. And the people would be empowered to demand that candidates for the office of Governor or Senator give an account of the standards and principles they would apply in serving their appointed roles in this process.



Judicial Selection in the States

Appellate and General Jurisdiction Courts

“Summary of Initial Selection Methods”

Merit Selection through Nominating Commission*	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Partisan Election	Nonpartisan Election	Combined Merit Selection and Other Methods**
Alaska	California (G)	Alabama	Arkansas	Arizona
Colorado	Maine (G)	Illinois	Georgia	Florida
Connecticut	New Jersey (G)	Louisiana	Idaho	Indiana
Delaware	New Hampshire (G)	Michigan**	Kentucky	Kansas
District of Columbia	Virginia (L)	Ohio**	Minnesota	Missouri
Hawaii	South Carolina (L)**	Pennsylvania	Mississippi	New York
Iowa		Texas	Montana	Oklahoma
Maryland		West Virginia	Nevada	South Dakota
Massachusetts			North Carolina**	Tennessee
Nebraska			North Dakota	
New Hampshire			Oregon	
New Mexico			Washington	
Rhode Island			Wisconsin	
Utah				
Vermont				
Wyoming				

*The following nine states use merit plans only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, and Wisconsin.

**See attached chart for details.

**Testimony of
Kris W. Kobach
Professor of Constitutional Law, University of Missouri (Kansas City)
Before the Kansas House, Committee on the Judiciary
February 8, 2006**

Introduction

Mr. Chairman and Members of the Committee, I come before you today in my capacity as a Professor of Constitutional Law at the University of Missouri (Kansas City). It is an honor and a privilege to testify before you today regarding what is one of the most important votes that you will take as Representatives of the People of Kansas—a vote on the method of selecting Supreme Court Justices.

I will present two factors that I believe weigh strongly in favor of HCR 5033: (1) the understandings of the Framers of the U.S. Constitution when they proposed the federal model on which HCR 5033 is based—understandings that proved completely correct; and (2) an argument that should be persuasive no matter what your political party or judicial philosophy—that the federal model produces better Justices. Before I do so, let me provide some background information that may be useful to the committee.

The Various Systems

In the 1950s, Kansas got caught up in a wave of judicial reform that was sweeping the nation as state after state abandoned systems of judicial election or selection by the executive or legislative branch and replaced such systems with judicial selection commissions. The theory behind the selection commissions was that they would produce courts free of political bias. That theory has proven false after half a century of experience.

Today, the methods of selecting supreme court justices in the 50 states are as follows. 23 states use some system of selection by nominating commission, most with retention elections thereafter. 21 states elect their supreme court justices. And the remaining six states use some variation of the federal model of appointment and confirmation by the political branches of government. (Those six states are California, Maine, New Hampshire, New Jersey, South Carolina, and Virginia.) HCR 5033 would return Kansas to the federal model.

The Virtues of the Federal Model

The Founding Fathers of the United States spent a great deal of time and ink on the subject of judicial nominations. They arrived at the system of executive appointment and Senate confirmation after extensive deliberation. This was not an aspect of our federal system that arose by accident or compromise.

The most famous defense of the federal model of judicial appointment was written by Alexander Hamilton in *Federalist Paper No. 76*. Hamilton compared the system of executive appointment to every other framework conceivable. His words ring as true today as they were in 1788.

Of particular relevance to our discussion today is Hamilton's reasoning as to why it is better that a single executive be charged with the responsibility of coming up with a nominee, rather than vesting that responsibility in a body of multiple people—or a commission:

“I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.”

Hamilton correctly surmised that by vesting the responsibility of selecting a nominee in one person—the executive—that executive would realize that his own political life was on the line. This would serve to focus the attention of the executive on merit, and exclude nominees of dubious quality. As every member of this committee knows, elections compel an officeholder to be accountable and to take responsibility for his or her decisions. Hamilton also maintained that the possibility that the Senate would reject the executive's choice would weigh heavily upon on any nomination:

“The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward ... candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”

In short, Hamilton surmised that Senate confirmation “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters...” Plainly the 217 years that this system has been in operation have proven Hamilton correct. Although we have our favorite Justices and there may be others whose opinions we dislike, it is difficult to make the case that the Justices of the U.S. Supreme Court have been unqualified or mediocre. On the contrary

the federal model has elevated many of the greatest legal minds in history to that august tribunal.

Nominating Commissions: A Recipe for Mediocrity

In contrast, nominating commissions have generally proven unsuccessful at selecting the best judicial minds that a state has to offer. Kansas is a case in point.

Although there are certainly some cases in which judges of truly outstanding qualifications rise to the top through the nominating commission process, such cases are the exception and not the rule. This stands in stark contrast to the situation in those states that use the federal model. In those states, a significantly higher percentage of justices are of exceptional caliber.

Placing a “qualified” or “unqualified” label on a judge is a difficult task that inevitably involves some subjectivity. Nevertheless, there are some hallmarks of judicial quality that are relatively objective. The American Bar Association Standing Committee on the Judiciary attempts to identify such objective factors in assessing the qualifications of federal judges in order to produce its well-known ratings. In evaluating the professional competence of appellate judicial nominees, the ABA Standing Committee on the Judiciary looks to academic talent, scholarship, the “ability to write lucidly and persuasively,” and “an unusual degree of overall excellence.”

Some of these qualifications are evident on the surface of a Justice’s resume, such as academic talent and positions held prior to elevation to the Supreme Court. I have presented to this committee the biographies of the Justices of the Kansas Supreme Court, as well as the biographies of the Justices of two states that use the federal model—New Jersey and Maine. I invite you to compare the qualifications of the Justices on the three courts, then rank the three courts according to the number of highly qualified Justices on each. I think it will become clear that New Jersey and Maine both possess a significantly higher percentage of Justices of exceptional caliber than does Kansas.

This is not an accident. The federal model forces a governor to place his or her reputation on a judicial nominee. The consequences of rejection by the state Senate, or by the voters are significant. Consequently, governors naturally seek those nominees with unassailable credentials. Their own political survival may depend on it.

In contrast, the nominating commission system operates behind closed doors; and the members of the commission are unknown to the vast majority of people in the state. Indeed, my guess is that most state legislators—people very well acquainted with Kansas government—would be hard pressed to name even one member of the nominating commission. No elected official has to stand up and take credit or blame for the nominee. The Governor escapes responsibility because he or she is limited to the names put forward by the commission. Moreover, the size of the commission means that no single member feels the “sole and undivided responsibility” of which Hamilton wrote.

It is an open invitation to dwell on a nominee's connections and politics rather than on his or her credentials. Thus we have the two great ironies of the nominating commission system. First, a system that was sold to the public as a way of producing candidates of the highest merit has had the opposite effect. Second a system that was supposed to remove politics from judicial selection makes it possible for political biases to dominate the system, because there is no public scrutiny and no individual responsibility before the voters.

In conclusion, let me simply state that Hamilton and the Framers were correct. Moreover, the quality of Justices produced by that system is hard to deny. This is a consideration that should be equally compelling to all, no matter where you sit on the political spectrum.

Kansas Supreme Court Justice Biographies

Hon. Kay McFarland

Chief Justice Kay McFarland was born on July 20, 1935, in Topeka. She was graduated magna cum laude from Washburn University with dual majors in English and history-political science in 1957. She is a 1964 graduate of the Washburn University School of Law and was admitted to the Kansas Bar the same year. She was in the private practice of law until January 1971 when she became judge of the probate and juvenile courts of Shawnee County. She defeated the incumbent to attain this position. Justice McFarland delivered the court reforms pledged in her campaign and reduced serious juvenile offenses by more than half in the two years she held that office. Justice McFarland was the first woman to be elected to a judgeship in Shawnee County. In January 1973, she became judge of the newly created Fifth Division of the District Court in Topeka, thereby becoming the first woman to be a district judge in the history of Kansas. Her election to this high office came after her victories over opponents in both the primary and general elections. On September 19, 1977, she was appointed by the governor to be a justice of the Kansas Supreme Court and was the first woman to hold that office. She became Chief Justice of the Supreme Court on September 1, 1995, upon the retirement of Hon. Richard W. Holmes.

Hon. Donald L. Allegrucci

Justice Allegrucci was born September 19, 1936, in Pittsburg, Kansas. He was graduated from Pittsburg State University with an AB degree in 1959 and from the Washburn University School of Law with a JD degree in 1963. Upon his admission to the bar, he entered into private practice from 1963 to 1982 in El Dorado and Pittsburg. His practice included serving as an assistant county attorney in El Dorado from 1963 to 1967 and as executive director of Mid-Kansas CAP Inc. from 1967-68. He also was an instructor of business and criminal law at Pittsburg State University from 1969 to 1972.

He was a member of the Democratic State Committee from 1974-1980 and served as a state senator from 1976-80. He was a Democratic candidate for the Fifth Congressional District in 1978. Gov. John Carlin appointed him to the Public Employee Relations Board in 1981 and as District Court Judge of the 11th District in 1982. He was appointed administrative judge of the 11th District by the Supreme Court in December 1983. While a district judge, Justice Allegrucci served as a member of the executive committee of the Kansas District Judges Association from 1982-1987, chairman of the KDJA Legislative Coordinating Committee from 1982-1986, and as a member of the Judicial Council Court Unification Advisory Committee from 1984-85. He also served as former president and member of the Crawford and Butler County Bar Associations. He is a veteran of the Air Force and served on active and reserve duty from 1959-66. He was appointed by Gov. John Carlin to the Supreme Court in January 1987.

Hon. Robert E. Davis

Justice Davis was born August 28, 1939, in Topeka. He was graduated from Creighton University, Omaha, Neb. with a bachelor's degree in 1961 and received his law degree from Georgetown University Law School, Washington D.C. in 1964. He engaged in private practice in Leavenworth from 1967 to 1984 when he was appointed associate district judge. While in private practice he served as Leavenworth County attorney from 1981 to 1984, and as an attorney for the State Board of Pharmacy from 1972 to 1984. Justice Davis also served as a magistrate judge in Leavenworth County from 1969 to 1976. After serving as an associate district judge for two years, Justice Davis was appointed to the Kansas Court of Appeals in 1986. He served in that capacity until his appointment to the Supreme Court.

A member of the U.S. Army Judge Advocate General's Corps, Justice Davis served as trial counsel in the Republic of Korea and as government appellate counsel in Washington D.C. from 1964- 1967.

Hon. Lawton R. Nuss

Justice Nuss was born in Salina, Kansas, on December 30, 1952. After graduating from Salina High School in 1970, he attended the University of Kansas on a Naval ROTC scholarship and graduated in January 1975 with a Bachelor of Arts in English and History. Following graduation, he served four years in the Marine Corps as a combat engineering officer. After his discharge, he entered law school at the University of Kansas and graduated in May 1982.

He began his law practice with the Salina firm of Clark Mize & Linville, Chartered in August 1982. For the next 20 years, he was involved in a wide range of legal issues and proceedings. He represented corporations and individuals as plaintiffs as well as defendants in civil cases. He also represented the government as well as defendants in criminal cases. During this time his professional activities included serving as a mediator for the U.S. District Court for the District of Kansas, as Chairman of the Board of Editors for the Journal of the Kansas Bar Association, and as President of the Kansas Association of Defense Counsel. He was appointed to the Supreme Court by Governor Bill Graves in August 2002, becoming the first Court member in more than 20 years to move directly from the bar to the bench.

Hon. Marla J. Luckert

Justice Luckert was born July 20, 1955, in Goodland, Ks. She received a bachelor of arts in history in May 1977 and her juris doctorate in 1980 from Washburn University of Topeka. While in law school, she served as technical editor of the Washburn Law Journal and received the faculty and alumni awards for best student note.

Upon her admission to practice in 1980, she joined the Topeka firm of Goodell, Stratton, Edmonds and Palmer. She had a general litigation and health law practice. She was selected by her peers for inclusion in The Best Lawyers in America. She also served as an adjunct professor of law at Washburn University. In 1992 she was appointed by Governor Joan Finney to the Third Judicial District Court. She was appointed by the Kansas Supreme Court to the Kansas Judicial Council where she served as chair of the Criminal Law Advisory Committee. In 2000 she became chief judge of the Third Judicial District. Governor Bill Graves appointed her to the Kansas Supreme Court effective January 13, 2003.

She has served as president of the Kansas Bar Association, the Kansas District Judges Association, the Kansas Women Attorneys Association, the Topeka Bar Association, the Sam A. Crow Inn of Court, and the Women Attorneys Association of Topeka. She is a fellow of the American Bar Foundation and the Kansas Bar Foundation. She has served as a delegate to the American Bar Association's (ABA) Conference of State Trial Judges and of the Young Lawyer's Division Assembly.

Hon. Carol A. Beier

Justice Beier was born in Kansas City, Kansas, on September 27, 1958. She attended Benedictine College in Atchison and the University of Kansas, Lawrence, where she obtained a B.S. in Journalism in 1981. Before law school, she worked as an editor at The Kansas City Times. Justice Beier received her law degree from the University of Kansas in 1985. She graduated from the University of Virginia School of law, Graduate Program for Judges in 2004, with an LL.M., Masters of Law in the Judicial Process. Before joining the Court on September 5, 2003, she had served as a judge of the Court of Appeals since February 2000.

She spent eleven years before joining the Court of Appeals at Foulston & Siefkin, L.L.P., in Wichita, where her trial and appellate practice focused on commercial disputes. Justice Beier also spent one year teaching and directing two student clinical programs at the University of Kansas School of Law. Prior to joining Foulston & Siefkin, Justice Beier practiced in Washington D.C., first as a staff attorney at the National Women's Law Center through the Women's Rights and Public Policy fellowship program of the Georgetown Law Center, and then at Arent, Fox, Kintner, Plotkin & Kahn, where her practice focused on white collar criminal defense. Immediately after law school graduation, Justice Beier had served as a clerk to then Judge James K. Logan of the U.S. Court of Appeals for the Tenth Circuit.

Hon. Eric S. Rosen

Justice Rosen was born in Topeka, Kansas, on May 25, 1953. He earned both a Bachelors and a Masters Degree with honors from the University of Kansas. Prior to law school Justice Rosen was employed by the Topeka Public Schools as a school social worker for 3 years and for 2 years chaired the social work department. He received his law degree from Washburn University in August of 1984.

He was sworn in as the newest member of the Kansas Supreme Court in November of 2005. Prior to his appointment to the Supreme Court he served as a State District Court Judge for the Third Judicial District, Shawnee County, Kansas from 1993 to 2005. His assignments included criminal and civil cases and he also headed the District Court's Domestic Division from 1993 to 1995. Justice Rosen was also appointed by the Governor in 1994 as one of the initial members of the Koch Crime Commission. Further, he served as lecturer at the Menninger School of Law and Psychiatry. Additionally, in 1996, 1997, 1999 and 2004 Justice Rosen was appointed to hear cases on the Kansas Court of Appeals. In July of 2002, he was appointed by the Chief Justice to the Kansas Sentencing Commission.

In September of 2002, Justice Rosen was appointed to the twenty-four person Presidential commission charged with commemorating the 50th Anniversary of the Brown v. The Board of Education decision of the U. S. Supreme Court. Also, in January of 2002, Justice Rosen received the Martin Luther King Living the Dream Humanitarian Award. In March of 2001, he was awarded an honorary diploma and certificate of honor for his many contributions made to Topeka High School. In April of 2000, he received the Attorney General's Victim's Service Award for Outstanding Judge and further was recognized as Kansan of Distinction For Law in 1999 by the Topeka Capital Journal.

Justice Rosen has previously worked as an adjunct professor for Washburn University School of Law. Prior to his appointments, he was a partner in the law firm of Hein, Ebert and Rosen. In addition, he previously served as Associate General Counsel for the Kansas Securities Commissioner, as an Assistant District Attorney and Assistant Public Defender in Shawnee County, Kansas.

New Jersey Supreme Court Judicial Biographies

Chief Justice Deborah T. Poritz

Chief Justice Poritz was nominated by Governor Christine Todd Whitman on June 20, 1996 to serve on the Supreme Court and was confirmed on June 27, 1996. On July 10, 1996, she was sworn in as the first female Chief Justice of the New Jersey Supreme Court. Prior to assuming this position, she served as New Jersey's first female Attorney General.

Justice Poritz was born on October 26, 1936 in Brooklyn, New York. She graduated from Brooklyn College in 1958, and taught at Ursinus College in Collegeville, Pennsylvania. She was a Woodrow Wilson Fellow in English and American Literature at Columbia University. After graduating from the University of Pennsylvania Law School in 1977, Chief Justice Poritz began her career as a Deputy Attorney General in the New Jersey Department of Law and Public Safety. In 1981, she was named Assistant Chief of the Environmental Protection Section and subsequently served as Deputy Attorney General in Charge of Appeals, Chief of the Banking, Insurance and Public Securities Section, and Director of the Division of Law. From February 1989 to January 1990, she was Chief Counsel to Governor Thomas Kean. From 1990 to 1994, Chief Justice Poritz was a partner in the Princeton law firm of Jamieson, Moore, Peskin & Spicer.

Justice Virginia Long

Justice Long was nominated to serve on the Supreme Court by Governor Christine Todd Whitman on June 17, 1999. Her appointment was confirmed by the Senate on June 21, 1999 and she was sworn in as an Associate Justice on September 1, 1999, by then-Justice Marie L. Garibaldi. At the time of her nomination, she was serving as a presiding judge of the Appellate Division of the Superior Court.

Justice Long was born on March 1, 1942 and attended parochial schools in Elizabeth. She graduated from Dunbarton College of the Holy Cross in 1963, where she was a dean's list student, and Rutgers Law School in 1966, where she was captain of the Appellate Moot Court team and winner of the competition prizes for Best Oralist and Best Brief.

A member of the bar for more than 30 years, she has served as a Deputy Attorney General; a litigation associate at Pitney, Hardin, Kipp and Szuch; Director of the New Jersey Division of Consumer Affairs and Commissioner of the former New Jersey Department of Banking. In 1978, Governor Brendan T. Byrne appointed her to the Superior Court, where she presided over civil, criminal and family law cases. From 1983 to 1984, she was the General Equity judge for the Mercer, Somerset and Hunterdon vicinages. In 1984, then-Chief Justice Robert N. Wilentz elevated her to the Appellate Division. During her tenure there, she penned more than 2,000 opinions. She became a presiding judge in 1995. She has also chaired and served as a member of numerous Supreme Court committees including Extra-judicial Activities and Judicial Performance.

Justice Jaynee LaVecchia

Justice LaVecchia was nominated by Governor Christine Todd Whitman to serve on the Supreme Court on January 6, 2000. She was confirmed by the Senate on January 10, 2000 and sworn in for a term to begin February 1, 2000. At the time of her nomination, Justice LaVecchia had been serving as the New Jersey Commissioner of Banking and Insurance since August 24, 1998. Prior to her appointment as commissioner, Justice LaVecchia had been the Director of the Division of Law within the Department of Law and Public Safety since August 1, 1984. As director, she was responsible for the legal work of all lawyers assigned to the civil side of the New Jersey Attorney General's Office.

In addition, Justice LaVecchia served as Director and Chief Administrative Law Judge for the Office of Administrative Law from 1989 through July 1994. She also served in the Office of Counsel to Governor Thomas H. Kean, first as an Assistant Counsel and then as Deputy Chief Counsel. She also has been in private practice and worked as a deputy attorney general in the Division of Law. Justice LaVecchia was born in Paterson on October 9, 1954. She is a 1976 graduate of Douglass College and graduated in 1979 from Rutgers School of Law in Newark. She has been a member of the New Jersey Bar since 1980. In 1996, she was elected a Fellow of the American Bar Association. She has chaired or served on various Supreme Court Committees, subcommittees, and other Court-assigned projects. She has been an active member of the Douglass College Alumnae Association.

Justice James R. Zazzali

Justice Zazzali was nominated by Governor Christine Todd Whitman to serve on the Supreme Court on May 18, 2000. He was confirmed on May 25, 2000 and sworn in on June 14, 2000 by Chief Justice Deborah T. Poritz. Justice Zazzali was born in Newark on June 17, 1937. He attended Seton Hall Preparatory School and was graduated from Georgetown College in 1958 and Georgetown Law Center in 1962. He served his clerkship with the Honorable Lawrence A. Whipple. He is admitted to the New Jersey, New York and District of Columbia bars.

Justice Zazzali served as Chief of the Appeals Division of the Office of the Essex County Prosecutor; General Counsel to the New Jersey Sports and Exposition Authority; Receiver for Bloomfield College; Chairman of the New Jersey State Commission of Investigation; Vice-Chairman of the Disciplinary Review Board, and as New Jersey Attorney General.

He was appointed by the United States District Court as Special Master for the county jails in Essex, Monmouth and Bergen Counties. He also served, at the request of the United States State Department, on delegations to the United Nations conferences. He was engaged in the practice of law in Newark and Trenton in the firm founded by his late father and his brother – Zazzali, Fagella & Nowak.

He is a former Adjunct Professor at Seton Hall Law School, former Associate Editor of the New Jersey Law Journal, and a contributor to various magazines, newspapers and law journals.

Justice Barry T. Albin

Justice Albin was nominated by Governor James E. McGreevey on July 10, 2002 to serve on the Supreme Court. He was confirmed by the Senate on September 12, 2002 and was sworn in as an Associate Justice by Chief Justice Deborah T. Poritz at a private ceremony on September 18, 2002. On October 3, 2002, he reaffirmed the oath of office in a public ceremony at the Trenton War Memorial. At the time of his nomination, Justice Albin was a partner in the Woodbridge law firm of Wilentz, Goldman and Spitzer.

Justice Albin was born on July 7, 1952, in Brooklyn, New York. He graduated from Rutgers College in 1973. After graduating from Cornell Law School in 1976, he began his career as a Deputy Attorney General in the Appellate Section of the New Jersey Division of Criminal Justice. Justice Albin then served as an Assistant Prosecutor in Passaic and Middlesex counties from 1978 to 1982. He began his association with the Wilentz firm in 1982, and was named a partner in 1986.

Justice Albin is a past President of the New Jersey Association of Criminal Defense Lawyers (1999-2000) and served as a member of the New Jersey Supreme Court Criminal Practice Committee from 1987 to 1992. He was selected by his peers to be included in the publication "Best Lawyers in America" (2000-2001).

Justice John E. Wallace, Jr.

Justice Wallace was nominated by Governor James E. McGreevey on April 12, 2003 to serve on the Supreme Court. He was confirmed by the Senate on May 19, 2003 and was sworn in as an Associate Justice by Chief Justice Deborah T. Poritz at a private ceremony on May 20, 2003. On June 4, 2003, he reaffirmed the oath of office in a public ceremony at Rowan University in Glassboro, New Jersey.

At the time of his nomination, Justice Wallace was a New Jersey Superior Court Judge, sitting in the Appellate Division. Appointed to the Superior Court in 1984, Justice Wallace was promoted to the Appellate Division in 1992. As a trial judge, Justice Wallace sat in Criminal and Civil Divisions, as well as the Family Part, in the Gloucester County vicinage. Prior to being appointed to the New Jersey Superior Court, Justice Wallace was a partner in the law firm of Atkinson, Myers, Archie & Wallace. During that time he also served as the Municipal Judge for Washington Township in Gloucester County. He was also an Associate at the Philadelphia law firm of Montgomery, McCracken, Walker & Rhodes, and an attorney for the Trustees of the Penn Central Transportation Co.

Justice Wallace was born in 1942 in Pitman, New Jersey. He received his B.A. from the University of Delaware in 1964 and his J.D. from Harvard Law School in 1967. Justice Wallace served in the United States Army from 1968 to 1970, attaining the rank of Captain. Justice Wallace is a member of the Gloucester and Camden County Bar Associations, the American Bar Association, the National Bar Association, the New Jersey State Bar Association, and the Garden State Bar Association. He has also served on the New Jersey Supreme Court Task Force for Minority Concerns, the New Jersey Ethics Commission, the Judiciary Advisory Committee on Americans with Disabilities Act, the Supreme Court Special Committee on Matrimonial Litigation, and the Appellate Division Rules Committee, and was the Chairman of the Supreme Court Ad Hoc Committee on Admissions.

Justice Wallace has received numerous honors from respected civic and legal organizations, including the Association of Black Women Lawyers of New Jersey (2001); the Orient of New Jersey Dedicated Service Award from the Valley of Camden (2000); the Washington Township Board of Education Appreciation Award (2000); and the Van J. Clinton award from the Garden State Bar Association (2002).

Justice Roberto A. Rivera-Soto

Justice Rivera-Soto was nominated by Governor James E. McGreevey on April 20, 2004 to serve on the Supreme Court. He was confirmed by the Senate on June 10, 2004, and was sworn in as an Associate Justice by Justice Virginia Long on September 1, 2004 in a private ceremony. On September 14, 2004, he reaffirmed the oath of office in a public ceremony at the Trenton War Memorial.

At the time of his nomination, Justice Rivera-Soto was a partner at Fox Rothschild, with offices in Princeton, New Jersey and Philadelphia, Pennsylvania. He had previously served as senior vice president, general counsel and corporate secretary of Caesars World, and as vice president, general counsel and corporate secretary of Greate Bay Hotel and Casino in Atlantic City. From 1980 to 1983, he was a litigation associate at Fox Rothschild, O'Brien & Frankel. From 1978 to 1980, he served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Eastern District of Pennsylvania. During 1977, Justice Rivera-Soto interned in the Office of the District Attorney of Delaware County, Pennsylvania.

Justice Rivera-Soto graduated from Colegio Nuestra Señora Del Pilar, Rio Piedras, Puerto Rico in 1970. He is a 1974 honors graduate of Haverford College, where he was the Jose Padin Scholar of the Class of 1974. He received his J.D. in 1977 from Cornell University School of Law, where he was a Charles K. Burdick Scholar, and a member of the Moot Court Board. Justice Rivera-Soto is a Certified Mediator in the U.S. District Court for the District of New Jersey; he also is a member and the current chair of the

District VII Ethics Committee of the Supreme Court of New Jersey; a former member of the Board of Directors of the Please Touch Museum; a former member of the Board of Directors of the New Jersey Development Authority for Small Businesses, Minorities and Women's Enterprises; a former alternate member of the Southern Nevada Disciplinary Board of the State Bar of Nevada; and a former Instructor in Trial Advocacy at Rutgers (Camden) School of Law.

Justice Rivera-Soto's work as an Assistant United States Attorney was recognized by the Attorney General of the United States when, in 1980, he was awarded the United States Department of Justice's "Director's Award for Superior Performance as an Assistant United States Attorney." Additionally, he received commendations from the Federal Bureau of Investigation of the United States Department of Justice, the Bureau of Alcohol, Tobacco & Firearms of the United States Department of the Treasury and the United States Custom Service.

Maine Supreme Court Justice Biographies

Hon. Leigh Ingalls Saufley

Chief Justice, Maine Supreme Judicial Court

Chief Justice Saufley graduated from the University of Maine at Orono, Phi Beta Kappa, in 1976. She is a 1980 graduate of the University of Maine School of Law. She was with Maine's Attorney General's Office for approximately ten years, becoming one of Maine's first female deputy attorneys general. Chief Justice Saufley was appointed to Maine District Court in 1990 and appointed to Maine Superior Court in 1993. She was appointed an Associate Justice of the Supreme Judicial Court in October of 1997. On December 6, 2001, she was sworn in as Maine's first female Chief Justice of the Supreme Judicial Court by Governor King.

Hon. Robert W. Clifford

Robert W. Clifford was born and raised in Lewiston, Maine. He graduated from Bowdoin College, and earned a law degree from Boston College Law School. He served in the United States Army in Europe from 1962 until 1964, attaining the rank of Captain. Justice Clifford practiced law in Lewiston-Auburn from 1964 until 1979. During this period he also served three terms on the Lewiston Board of Aldermen, one term as its President, and was elected to and served two terms as Lewiston's Mayor. He was elected to the Maine Senate and served in the 106th and 107th Legislatures. He was a representative from the Senate on the Commission to Revise Maine's Probate Laws, which drafted Maine's current Probate Code. In 1978 and 1979 he served as Chairman of the Lewiston Charter Commission, which drafted Lewiston's current City Charter.

He was appointed a Justice of the Superior Court by Governor Joseph E. Brennan in 1979. He became the first Chief Justice of the Maine Superior Court, being appointed to that position by Chief Justice Vincent L. McKusick in 1984. He served in that capacity until August 1, 1986, when he became an Associate Justice of the Supreme Judicial Court, being named to that position by Governor Brennan. Justice Clifford was reappointed to the Court in 1993, and in 2000. He was awarded an LLM in the Judicial Process from the University of Virginia School of Law in 1998. Justice Clifford serves as the Court's liaison to the Advisory Committee on the Rules of Criminal Procedure, and to the Maine Assistance Program. He also serves as an advisor to the Criminal Law Advisory Commission.

Hon. Howard H. Dana

Howard H. Dana, Jr. resides in Portland with his wife, Susan. He graduated from Bowdoin College in 1962 and received a law degree and Master's in public administration from Cornell in 1966 and a masters in judicial process from the University of Virginia in 1998. Following a clerkship with Judge Edward T. Gignoux, he practiced law with Verrill & Dana primarily in the field of corporate litigation until joining the Court in 1993. While a lawyer, he was appointed by Presidents Reagan and Bush to serve on the Board of Directors of the Legal Services Corporation (1982, 1990-93). He presently serves as the vice-chair of the Justice Action Group (JAG), chair of the Court Alternative Dispute Resolution Committee (CADRES) and co-chair of the JAG's Self-Represented Task Force. Justice Dana is the Court's liaison to the Lawyers' Fund for Client Protection. He represents the lawyers of Maine, New Hampshire, Vermont and Rhode Island on the American Bar Association's Board of Governors (2002-2005).

Hon. Donald G. Alexander

Donald G. Alexander was appointed to the Maine Supreme Judicial Court in 1998 by Governor Angus S. King. He previously served on the Maine Superior Court and the Maine District Court and as a Deputy Attorney General for the State of Maine. He served in Washington, D.C. as an assistant to Maine Senator Edmund S. Muskie and as Legislative Counsel for the National League of Cities. Justice Alexander is a

graduate of Bowdoin College and the University of Chicago Law School. He is the author of *The Maine Jury Instruction Manual* (4th ed. 2005); and *Maine Appellate Practice* (2nd ed. 2004), and the editor of *The Maine Rules of Civil Procedure with Advisory Committee Notes and Commentary* (2005 ed.). He is the Court's liaison to the Advisory Committee on the Maine Rules of Probate Procedure, the State Court Library Committee, and the Maine State Bar Association Continuing Legal Education Committee.

Hon. Susan W. Calkins

Susan Calkins resides in Portland with her husband. She is a graduate of the University of Maine School of Law and attended the University of Colorado School of Law. She received a Master's Degree from the University of Virginia School of Law. Justice Calkins received her undergraduate degree from the University of Colorado. She practiced law with Pine Tree Legal Assistance and is a former Executive Director of that organization. She has been an Associate Justice of the Maine Supreme Judicial Court since 1998. She previously served as a Superior Court Justice, Chief Judge of the District Court, and District Court Judge in District 13. Justice Calkins is the Court's liaison to the Board of Bar Examiners, the Judicial Ethics Committee, and the Advisory Committee on the Rules of Evidence. She is a member of the American Bar Association's Commission on IOLTA.

Hon. Jon D. Levy

Jon D. Levy resides with his family in York. He is a graduate of Syracuse University and the West Virginia University College of Law. Following law school Justice Levy served as a law clerk for U.S. District Judge John T. Copenhaver, Jr. in Charleston, W. Va. He was next appointed to the position of court monitor by U.S. District Judge William W. Justice in the Texas prison conditions class action *Ruiz v. Estelle*. He then practiced law in York, Maine for 13 years. He was confirmed as an Associate Justice of the Maine Supreme Judicial Court in 2002. Justice Levy previously served as the Chief Judge of the District Court, Deputy Chief Judge of the District Court and as a District Court Judge sitting in District Ten. As a District Court Judge, Justice Levy was one of the presiding judges in the Juvenile Drug Treatment Court. From 1996 to 2000 Justice Levy served as the chairperson of the Maine Family Law Advisory Commission. He is the author of the book *Maine Family Law*, which was first published in 1988. Justice Levy is the Court's liaison to the Advisory Committee on Professional Responsibility, Committee on Judicial Responsibility and Disability, and the CASA Advisory Board. He also serves as the chairperson of the Judicial Resource Team which is examining scheduling and resources in Maine's trial courts.

Hon. Warren M. Silver

Warren M. Silver was appointed to the Court by Governor John E. Baldacci in 2005. Justice Silver is a graduate of Presque Isle High School and Tufts University. He received his law degree from the Washington College of Law at American University in 1973 and has been in private practice in Bangor since 1977. Justice Silver had an active trial practice before assuming the bench. Justice Silver served on the Board of Governors of the Maine Trial Lawyers Association and also served as its President, and as Chairman of the Maine Supreme Judicial Court's Civil Rules Committee, and the Governor's Judicial Selection Committee. His wife, Dr. Evelyn Silver, is the senior adviser to University of Maine President Robert Kennedy. Justice Silver has also been active in many bar and civic organizations. The Silvers reside in Bangor.

KANSAS TAXPAYERS NETWORK

**P.O. Box 20050
Wichita, KS 67208
February 8, 2006**

web:www.kansastaxpayers.com

316-684-0082

Fax 316-684-7527

**Testimony Supporting HB 2770
By Karl Peterjohn, Executive Director**

HB 2770 is the companion bill to HCR 5033 covering the selection and retention of the members of the Kansas Court of Appeals. The reason that KTN supports this bill is very similar to the testimony provided in HCR 5033 and I would refer this committee to this testimony.

The average Kansan has a very limited role in this process. The Kansans vote for governor is the only area where they have a say. The governor has the authority to appoint four members to the current commission that selects three candidates for gubernatorial appointment. However, the majority of this commission is selected by an election held only among lawyers for five positions on this nine member commission.

This relegates the average Kansan to a second-class position behind the lawyers in Kansas. This raises a number of troubling questions from an equal protection or 14th Amendment perspective.

The current constitutional provision contains another significant flaw too. If the governor does not select from the three candidates provided by the commission, the selection process then goes to the chief justice of the Kansas Supreme Court. However, the flaw is contained within the provision that if the chief justice does not make a selection the judicial opening just sits there. I am not aware of this situation actually occurring since this provision has been in place but it certainly could happen.

The role of the courts has shifted and grown over time. Judicial decisions are not only playing a larger role in our nation but also within Kansas. The on-going Montoy lawsuit against the state demonstrates this point but it is far from the only controversial recent case coming from this court. This state's version of the Kelo eminent domain ruling, this court's death penalty ruling that is now before the U.S. Supreme Court, and the Limon decision are controversial to many Kansans.

The problem now arises with the average Kansan having no direct recourse to the courts and cannot petition, lobby, or advocate before them the way that I am doing so before this committee today and the entire legislature during the rest of this year's session.

HB 2770 would provide more clear accountability with legislative oversight through senatorial confirmation and a continuation of the retention process. I believe this procedure could also be improved by adding a term limit provision to the current age limits for these judicial appointments. This would help achieve the rotation in public office that goes back to a concept enacted in the early days of this republic. Even without a term limits provision, HB 2770 would be a significant improvement and deserves legislative approval so once again the people of Kansas can exercise the largely ignored provision contained within the second part in the Kansas Bill of Rights that says, "All political power is inherent within the people," and the people will finally have a meaningful public role in addressing these important public issues.

However, the Kansas Constitution clearly provides for the legislature to set up subsidiary courts beneath the Kansas Supreme Court. The provisions for this appellate court should be similar to the provisions for selecting and retaining the members of the Kansas Supreme Court. This is a legislative responsibility that HB 2770 addresses and deserves this committee's support.

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Date 2-8-06

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KANSAS TAXPAYERS NETWORK

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Wichita, KS 67208
February 8, 2006**

web:www.kansastaxpayers.com

316-684-0082

Fax 316-684-7527

Testimony Supporting HCR 5033

By Karl Peterjohn, Executive Director

The provision for selecting the top judges for the legal system in Kansas is flawed and needs to be corrected. HCR 5033 would transform the selection process in a way that would open the process and provide a more visible and public aspect to the selection and retention of the top judges in this state.

There are flaws that exist within the current process. The average Kansan has a very limited role in this process. The Kansans vote for governor is the only area where they have a say. The governor has the authority to appoint four members to the current commission that selects three candidates for gubernatorial appointment. However, the majority of this commission is selected by an election held only among lawyers for five positions on this nine member commission.

This relegates the average Kansan to a second-class position behind the lawyers in Kansas. This raises a number of troubling questions from an equal protection or 14th Amendment perspective.

The current constitutional provision contains another significant flaw too. If the governor does not select from the three candidates provided by the commission, the selection process then goes to the chief justice of the Kansas Supreme Court. However, the flaw is contained within the provision that if the chief justice does not make a selection the judicial opening just sits there. I am not aware of this situation actually occurring since this provision has been in place but it certainly could happen.

The role of the courts has shifted and grown over time. Judicial decisions are not only playing a larger role in our nation but also within Kansas. The on-going Montoy lawsuit against the state demonstrates this point but it is far from the only controversial recent case coming from this court. This state's version of the Kelo eminent domain ruling, this court's death penalty ruling that is now before the U.S. Supreme Court, and the Limon decision are controversial to many Kansans.

Some people support the court's ruling that the Kansas Constitution has some kind of hidden language indicating that for the fiscal year beginning July 1, 2005 there needed to be an additional \$285 million in state funding. Many other Kansans, including the Kansas Taxpayers Network and myself, could not find this judicial appropriation authority. The phrase "suitable education," does not exist in the Kansas Constitution. The problem now arises with the average Kansan having no direct recourse to the courts and cannot petition, lobby, or advocate before them the way that I am doing so before this committee today and the entire legislature during the rest of this year's session.

HCR 5033 would provide more clear accountability with legislative oversight through senatorial confirmation and a continuation of the retention process. I believe this procedure could also be improved by adding a term limit provision to the current age limits for these judicial appointments. This would help achieve the rotation in public office that goes back to a concept enacted in the early days of this republic. Even without a term limits provision, HCR 5033 would be a significant improvement and deserves legislative approval so once again the people of Kansas can exercise the largely ignored provision contained within the second part of the Kansas Bill of Rights on political powers that says, "All political power is inherent within the people," and the people will finally have a meaningful public role in addressing these important public issues.

My name is David Hanna, Communications Director for Americans for Prosperity, speaking on behalf of 5,000 AFP members across the state of Kansas.

Controversy surrounding the way judges are selected is nothing new. In fact, the colonists listed as one of their grievances against George III in the Declaration of Independence the way the Crown unilaterally and without input from the Colonies selected and controlled colonial judges. In our democratic system of "equal justice under the law," no one wants to think that the judiciary charged with interpreting and applying the law is in some way beholden to or controlled by any special interest or is completely isolated from the democratic will of the people.

We are currently experiencing in Kansas a crisis of confidence among the people in their government's ability to provide equal justice under the law. A primary factor contributing to lagging public confidence in the basic fairness of our judiciary is the growing sense that judicial selection in Kansas is controlled by an elite group of societal managers who, while purporting to be objective and neutral, in fact exercise political control over one-third of our government. Kansans, with our basic faith in our democratic institutions of government, are generally quite accepting of the judicial rulings handed down by our courts, even when they are adverse, so long as the system does not violate our fundamental common sense of fair play. The recent political acrimony over certain important judicial decisions in Kansas does not stem, as some have suggested, from an unwillingness or inability to be gracious in political defeat, but rather from an impression that the playing field is no longer level. Thus, one of the most important reforms this government can enact to restore public confidence in our judiciary is to adopt House Concurrent Resolution No. 5033 and House Bill No. 2770 which would return the selection of Kansas appellate judges to the democratic branches of government.

The procedure currently used in Kansas for the selection of judges, the so-called "merit system," is dominated by a small special interest group—Kansas lawyers. Because the nominating committee is controlled by a majority of Kansas lawyers, that group has become a powerful gatekeeper to one-third of our state government, all the way from the recruitment and screening of applicants through to the final selection and appointment. When the merit system was introduced and adopted in Kansas, its intent was to remove the process of judicial selection from the political realm. However, it is unrealistic and unwise to expect any powerful group—as Kansas lawyers have become—to function in a political vacuum. The founders of our great democracy understood this well and created a system of political checks and balances to overcome the divisiveness of political faction; and the greatest of these checks was, of course, accountability to the people. The merit system of selection in Kansas has delivered political power to Kansas lawyers far disproportionate to their numbers. And it should come as no surprise that as with any special interest group, Kansas lawyers have an emerging political bias and ideology. Because prospective judges in Kansas must curry favor with the Kansas Bar in order to have a chance at getting through the gate, they must either conform themselves to the political expectations of the Bar or cease to be candidates.

While it is naïve to think that our judicial selection process can ever be devoid of politics, it is not unrealistic to expect that insofar as political considerations impact the selection of the judiciary, those considerations be of the people through their democratically selected representatives. This is consistent with the sacred principle of "one man one vote" which forms the very foundation of our democratic institutions of government. The method of judicial selection currently in place, simply put, is not consistent with this most fundamental rule. The system proposed by HCR 5033 and HB 2770 of gubernatorial appointment with Senate consent, while avoiding the undue political influence peddling which can plague a

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system of direct election of judges, avoids the equally damning problem of control by an unaccountable societal elite. The founders of our country knew this, and their choice of this selection method of appointment with consent has served our country and the federal judiciary well for centuries.

It is true, our judiciary must be and remain independent of the shifting political sands; able to rule consistently and fairly under the law without fear of reprisal. But judicial independence applies to the judges, not to their selectors. A system of gubernatorial appointment with Senate consent does not threaten judicial independence, as witnessed by the independence of our federal judiciary. It does level the political playing field on which the judicial football is kicked around by making those responsible for selecting our judges accountable to the political will of the people of Kansas.

**Before the House Judiciary Committee
Hearing on HCR 5033 and HB 2770
Wednesday, February 8, 2006
Hearing Room 313-S**

**Testimony of Patricia E. Riley, Member
Supreme Court Nominating Commission
785-273-2020**

Thank you for the opportunity to appear today to give testimony in opposition to House Concurrent Resolution No. 5033 and House Bill 2770. My name is Patricia E. Riley. I appear today on behalf of the Supreme Court Nominating Commission.

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

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

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

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The starting point of the Commission's selection process typically begins with one to three dozen applications for a judicial position. Each member of the Commission receives and reviews a copy of every application. Any member of the Commission can make background inquiries about any one of the applicants; however, individual assignments are made to conduct background checks as to each applicant to ensure in-depth investigations. The background checks typically include interviews of colleagues, community members, and the judiciary, as well as a review of legal writings of the applicants. During interviews, each of the nine Commission members has the opportunity to ask questions and engage the applicant in discussion regarding his or her qualifications for the appellate judgeship. In the years that I have been on the Commission I have had the honor and privilege to participate in the nomination of Justice Eric Rosen to the Supreme Court and Judges Stephen Hill, Patrick McAnany, Nancy Caplinger and Michael Buser to the Court of Appeals. Throughout those proceedings there have been no discussions of an applicant's politics or positions on issues likely to come before the Court. The focus before the Commission is qualifications, not politics.

When the Governor receives three names from the Commission, they are three highly qualified individuals who have been chosen without regard to political consideration or how they would decide a particular issue if it were to come before the Court. We need an independent judiciary that makes decisions based upon the facts and the rule of law. We need a judiciary willing to make the hard decisions, even unpopular decisions when required by the law. This is more likely to occur through the current selection process, where the applicants' qualifications and commitment to the rule of law are the focus of the inquiry and there is no political or issue-oriented litmus test.

Many otherwise qualified attorneys and judges may be reluctant to subject themselves and their families to a contentious, highly political Senate confirmation process.

Under the current process there is judicial accountability. Each justice must stand for retention at the first general election following his or her appointment to the Court, and every six years thereafter. Each judge of the Court of Appeals likewise stands for retention, at four-year intervals.

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

Respectfully,
Patricia E. Riley, Member
Supreme Court Nominating Commission

SUPREME COURT NOMINATING COMMISSION

Date _____

Full Name _____

Residence Address _____

City, State, Zip _____ Telephone No. _____

Office Address _____

City, State, Zip _____ Telephone No. _____

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

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

Place of Birth _____

Are you a citizen of the United States? _____

Are you a resident of Kansas? _____

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

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

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

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

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

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

Signature of Nominee

July 2004

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

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

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

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

Personal Data of: _____

1. List each college and law school you attended, degrees earned, scholastic honors, major academic activities. Please also state your class ranking and grade point average on graduation from law school.
2. List all courts and administrative bodies before which you have been admitted to practice.
3. (a) List chronologically your legal and other work experience since your graduation from law school, including non-legal occupations. See K.S.A. 20-105 and 20-3002, which require a potential nominee to have been engaged in the "active and continuous practice of law" for at least ten years prior to the date of appointment. Include in your list the months and years of legal experience to verify that you meet this statutory requirement.

- (b) List published articles on legal subjects. Include as an attachment to this nomination form a sample of your legal writing in the form of a brief, memorandum, opinion, etc.
4. Summarize your experience in courts and describe the most significant litigated matter(s) you have personally handled.
 5. (a) Have you ever held judicial office? If so, provide copies or give citations to significant opinions.

(b) Have you ever submitted your name for a vacancy on one of the Kansas Appellate Courts? If so, when?
 6. State your approximate individual net worth and the nature of your substantial financial interests.
 7. If appointed, are there any business interests, offices, or positions you now hold from which you would be unwilling to resign or divest yourself if required by the Canons of Judicial Conduct?
 8. Have you ever been charged or convicted of a violation of any law except traffic offenses? [DUI violations and reckless driving offenses should be included.] If you answer "yes" to this question, please supply the information requested in Footnote 1.
 9. Has a tax lien or other collection procedure ever been instituted against you by federal, state, or local authorities? If you answer "yes" to this question, please supply the information requested in Footnote 1.
 10. Have you ever been sued by a client or been a real party defendant in interest in any other legal proceedings? If you answer "yes" to this question, please supply the information requested in Footnote 1.
 11. Have you ever been disciplined or cited for a breach of ethics or professional conduct at the state disciplinary level? If you are a judge, have formal proceedings ever been instituted against you by the Commission on Judicial Qualifications? If you answer "yes" to this question, please supply the information requested in Footnote 1.
 12. List all bar associations, professional associations, or professional societies of which you are or have been a member.

13. If you have been in the military service, state the length of service, the branch and dates you served, your rank on discharge, and the type of discharge.
14. State any other information which you believe should be disclosed in connection with the Commission's consideration of your potential nomination to the Appellate Courts.
15. List the names, addresses, and telephone numbers of five persons who are well acquainted with your legal ability and of whom inquiry may be made by the Commission.

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

Footnote 1.

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

HOUSE JUDICIARY COMMITTEE

Hearing on HCR 5033 and HB 2770
February 8, 2006, 3:30 PM
Hearing Room 313-S

Submission of Justice Fred N. Six (Ret.)
1180 East 1400 Road, Lawrence, KS 66046
785-843-8445
newtonsix@aol.com

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

COMMENTS IN OPPOSITION TO HCR 5033 and HB 2770

1. **The Birth of Kansas Merit Selection -- "The Triple Play of 1957" -- Politics, The Supreme Court, and Governor Fred Hall's "Why Not Me?" 49 Years Ago.**

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

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

House Judiciary

Date 2-8-06
Attachment # 6

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

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

3. HCR 5033 (and its Court of Appeals counterpart, HB 2770) Will Discourage Judges and Lawyers in Kansas from Becoming Nominees for Consideration as Members of the Supreme Court.

Under HCR 5033 (and HB 2770 for Court of Appeals appointments), if a majority of the Kansas Senate declines to consent to the Governor's Supreme Court appointment, failure to consent has the potential of damaging that person's professional reputation. Also, such failure to consent will discourage other persons from submitting their names for a future vacancy. The result will be fewer judicial applicants.

Reflect please on the contentious and battering Senate confirmation hearings of Judge Robert Bork and Justice Clarence Thomas, the nomination and withdrawal of Harriet Miers, and the recent confirmation hearing for Justice Samuel Alito.

Also, please consider the enormous time delays between the date of appointment and the date of the consent hearings encountered by lower court federal judicial appointees of both President Clinton and President Bush.

4. HCR 5033 and HB 2770 Have the Potential For Damaging the Working Relationship Between the Executive Branch and the Legislative Branch.

In the event the Senate should fail to "consent" to the appointment, the failure of the appointment will reflect directly on the Governor. Is not such a denial of a Governor's appointment also an affront to the Governor? Is not the working relationship between the Legislative and the Executive impaired? Is not a harmonious relationship between the Legislature and the Executive a goal of good government for Kansas?

Under our current merit selection system, because of the vetting done by the Nominating Commission at the front end and the retention election after each six-year term, a requirement of Senate consent is unnecessary.

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

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

6. The Kansas Current Merit Selection System Is in “Good Mid-West Company.”

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

7. The Kansas Merit Selection System, Adopted by the Voters at the November Election in 1958, Is a Judicial Vehicle that Has Been “Road Tested” Over the Past 47 Years.

Fifteen states appear to have the Kansas system, *i.e.*, gubernatorial appointment Supreme Court justices from judicial nominating commissions. At least eight other states use judicial nominating commissions to select justices or judges at some level. My information comes from: (a) the American Judicature Society’s web site, Current Methods of Judicial Selection, <http://www.ajs.org/js/>, (Attachment No. 1), and (b) Table 4, Selection of Appellate Court Judges, *State Court Organization 1998*, U.S. Department of Justice, Bureau of Justice Statistics, Office of Justice Programs (Attachment No. 2). A summary of the *State Court Organization* table by grouping based on the method of selection is also attached (Attachment No. 3). In two states that have gubernatorial appointment of Supreme Court justices, Delaware and Maryland, the governors have established a nominating commission by executive order to help with the selection process.

8. Will the Senate be in Session? It’s a Long, Long Time From April to December. The Cost Factor – Fiscal Impact--Additional Expense for the State Imposed by HCR 5033 (and HB 2770)

HCR 5033 requires the President of the Senate to convene the Senate for the sole purpose of voting on the appointment if the Senate is not in session or will not be in session within 30 days after the Senate receives the appointment (HCR 5033, page 2, Lines 5-8). How many days will the Senate be in special session? What will the Special Sessions cost the state?

The Kansas tradition is that of a citizen legislature. The 40 members of the Senate serve the people of Kansas part time as Senators and not as full time government employees. Members of the United States Senate are full time federal employees.

The United States Constitution, Art II, Sec 2 (powers of the President) requires a presidential judicial appointment to be made "with the advice and consent" of the Senate. The federal Senate Judiciary Committee has 18 members. Consider the recent confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito. "Squads" of full time Senate employees were utilized to prepare the 18 federal Senate Judiciary Committee members for the confirmation hearing vetting process. In addition, each Senator had his or her own staff team. Query: What is the staff employee situation for each member of the Kansas Senate?

9. The Following Justices, No Longer on the Court, Have Served on the Kansas Supreme Court. The Date After Each Name Represents the Date "Such Vacancy Occurred or Position Became Open" (HCR 5033, Page 1, Lines 38, 39)

Justices Fontron (9-17-75), Fatzer and Kaul (9-16-77), Owsley (12-30-78), Fromme (10-25-82), Schroeder (1-11-87), Prager (8-31-88), Miller (9-2-90), Herd (1-11-93), Holmes (8-31-95), Larson (9-4-02), Lockett and Six (1-13-03), Abbott (6-6-03), and Gernon (3-30-05).

A total of 15 justices have left office in the 31 years. Of the 15, only 4 (Schroeder, Herd, Lockett, and Six) vacated a position on the bench at the end of their final 6-year term.

Assuming HCR 5033 had been place, it would appear that a special session of the Senate would have been required to hold confirmation hearings for 9 of those 15 justices. Three appear to be marginal, *i.e.* they may have been subject to a confirmation hearing during a regular session of the legislature but a special session could have been required, and only three would appear to have been subject to confirmation during a regular session.

HCR 5033 gives the Governor sixty days to make the appointment (HCR 5033, page 1, lines 36-39). The Senate then has to vote on the appointment no later than thirty days after the appointment (HCR 5033, page 2, lines 3-5).

10. What About the District Court Nominating Commissions Under HCR 5033 and HB 2770?

HCR 5033 and HB 2770 mandate the abolition of the Nominating Commission for Kansas Appellate Judges. Kansas has 31 judicial districts. Seventeen are merit selection districts and 14 are partisan political districts. Under HCR 5033 and HB 2770, Kansas would have three methods of selecting judges. Such a concept is a "giant leap" backwards that goes counter to the efforts to effect statewide judicial unification in the 1970's.

11. Abolition of the Nominating Commission After Almost a Half-Century of Service Would Appear To Be an Unprecedented Move.

My inquiry reflects that, since the reform movement endorsing the independence of the Judiciary known as the "Missouri Plan" picked up momentum almost 50 years ago, no state that adopted merit selection has subsequently abolished its nominating commission.

12. HCR 5033, Together With HB 2770, Does Not Support the Independence of the Judiciary. Why Abolish the Nominating Commission and Merit Selection and Institute the Senate Consent Requirement Now in 2006 After Nearly a Half Century of Merit Selection for Supreme Court Justices and 29 years of Merit Selection for the Court of Appeals?

Two cases, *Marsh* (the death penalty case) and *Montoy* (the school finance case).

Since Justice John Fontron wrote his first published opinion as a merit selected Justice of the Kansas Supreme Court, the Court under merit selection has issued **8,155** published opinions. (These opinions appear in the *Kansas Reports* 192 Kan. through 280 Kan.)

The Kansas Court of Appeals, since its creation in 1977, has issued **3,184** published opinions (1 Kan. App. 2nd through 34 Kan. App. 2nd)

This represents a total of **11,439** published merit selection opinions. Both courts have written hundreds of unpublished opinions as well.

Marsh and *Montoy*, two published opinions, vs. 11,439 other published opinions, and HCR 5033 (together with HB 2770) surfaces in 2006 to abolish a nationally recognized judicial reform, merit selection, after almost one-half century of exemplary service to the citizens of Kansas.

"Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge [or court] is campaigned against because of a stand on a single issue or even in a single case. In such a situation, it is particularly important for lawyers to support the judicial process and the rule of law." [From American Bar Association Task Force on Lawyers' Political Contributions, Report (Part 2) of 6 (1998).

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

Respectfully Submitted,
Fred N. Six



Judicial Selection in the States

Appellate and General Jurisdiction Courts

“Initial Selection: Courts of Last Resort”

Merit Selection (24)	Partisan Election (8)	NonPartisan Election (13)	Gubernatorial Appointment (4)	Legislative Appointment (2)
Alaska	Alabama	Arkansas	California	South Carolina
Arizona	Illinois	Georgia	Maine	Virginia
Colorado	Louisiana	Idaho	New Hampshire	
Connecticut	Michigan ¹	Kentucky	New Jersey	
Delaware ²	Ohio ³	Minnesota		
District of Columbia	Pennsylvania	Mississippi		
Florida	Texas	Montana		
Hawaii	West Virginia	Nevada		
Indiana		North Carolina		
Iowa		North Dakota		
Kansas		Oregon		
Maryland ²		Washington		
Massachusetts ²		Wisconsin		
Missouri				
Nebraska				
New Mexico				
New York				
Oklahoma				
Rhode Island				
South Dakota				
Tennessee				
Utah				
Vermont				
Wyoming				

1. Candidates appear on the general election ballot without party affiliation but are nominated at political party conventions.

2. Merit selection is established by executive order.

3. Candidates appear on the general election ballot without party affiliation but are nominated in partisan primary elections.



Judicial Selection in the States

Appellate and General Jurisdiction Courts

“Initial Selection, Retention, and Term Length”

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
Alabama						
Supreme Court				X	6	Re-election (6 year term)
Court of Civil App.				X	6	Re-election (6 year term)
Court of Criminal App.				X	6	Re-election (6 year term)
Circuit Court				X	6	Re-election (6 year term)
ALASKA						
Supreme Court	X				3	Retention election (10 year term) ¹
Court of Appeals	X				3	Retention election (8 year term)
Superior Court	X				3	Retention election (6 year term)
ARIZONA						
Supreme Court	X				2	Retention election (6 year term)
Court of Appeals	X				2	Retention election (6 year term)
Superior Court (county pop. greater than 250,000)	X				2	Retention election (4 year term)
Superior Court (county pop. less than 250,000)			X		4	Re-election (4 year term)
ARKANSAS ²						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
CALIFORNIA						
Supreme Court		X(G)			12	Retention election (12 year term)
Courts of Appeal		X(G)			12	Retention election (12 year term)
Superior Court ³			X		6	Nonpartisan election (6 year term) ⁴

1. In a retention election judges run unopposed on the basis of their record.

2. In November 2000, Arkansas voters passed an amendment to the Arkansas constitution shifting judicial elections to a nonpartisan system.

3. The California constitution provides that local electors may choose gubernatorial appointments instead of nonpartisan election to select superior court judges. To date, no counties have chosen gubernatorial appointments.

4. If the election is uncontested, the incumbent's name does not appear on the ballot.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
COLORADO						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (8 year term)
District Court	X				2	Retention election (6 year term)
CONNECTICUT						
Supreme Court	X				8	Commission reviews incumbent's performance on noncompetitive basis; governor renominates and legislature confirms
Appellate Court	X				8	Same
Superior Court	X				8	Same
DELAWARE⁵						
Supreme Court	X				12	See Footnote 6
Court of Chancery	X				12	See Footnote 6
Superior Court	X				12	See Footnote 6
DISTRICT OF COLUMBIA						
Court of Appeals	X				15	Reappointment by judicial tenure commission ⁷
Superior Court	X				15	Reappointment by judicial tenure commission ⁷
FLORIDA						
Supreme Court	X				1	Retention election (6 year term)
District Court of Appeal	X				1	Retention election (6 year term)
Circuit Court			X		6	Re-election for additional terms
GEORGIA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
HAWAII						
Supreme Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Intermediate Court of Appeals	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Circuit Court and Family Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)

5. Merit selection established by executive order in Delaware, Maryland, and Massachusetts. In all other jurisdictions merit selection established by constitutional or statutory provision.

6. Incumbent reapplies to nominating commission and competes with other applicants for nomination by the governor. The governor may reappoint the incumbent or another nominee. The senate confirms the appointment.

7. Initial appointment is made by the President of the United States and confirmed by the Senate. Six months prior to the expiration of the term of office, the judge's performance is reviewed by the tenure commission. Those found "Well Qualified" are automatically reappointed. If a judge is found to be "Qualified" the President may nominate the judge for an additional term (subject to Senate confirmation). If the President does not wish to reappoint the judge, the District of Columbia Nomination Commission compiles a new list of candidates.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
IDAHO						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		4	Re-election for additional terms
ILLINOIS						
Supreme Court				X	10	Retention election (10 year term)
Appellate Court				X	10	Retention election (10 year term)
Circuit Court				X	6	Retention election (6 year term)
INDIANA						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (10 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Vanderburgh County)			X		6	Re-election for additional terms
Superior Court				X	6	Re-election for additional terms
Superior Court (Allen County)			X		6	Re-election for additional terms
Superior Court (Lake County)	X ⁸				2	Retention election (6 year term)
Superior Court (St. Joseph County)	X				2	Retention election (6 year term)
Superior Court (Vanderburgh County)			X		6	Re-election for additional terms
IOWA						
Supreme Court	X				1	Retention election (8 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court	X				1	Retention election (6 year term)
KANSAS						
Supreme Court	X				1	Retention election (6 year term)
Court of Appeals	X				1	Retention election (4 year term)
District Court (seventeen districts)	X				1	Retention election (4 year term)
District Court (fourteen districts)				X	4	Re-election for additional terms
KENTUCKY						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		8	Re-election for additional terms
LOUISIANA						
Supreme Court				X ⁹	10	Re-election for additional terms
Court of Appeals				X ⁹	10	Re-election for additional terms
District Court				X ⁹	6	Re-election for additional terms

8. Three of the judges run in partisan elections for 6 year terms then have to be re-elected for additional terms.

9. Louisiana judicial elections are partisan inasmuch as the candidates' party affiliations appear on the ballot. However, two factors lead a somewhat nonpartisan character to these elections: (1) primaries are open to all candidates; and (2) judicial candidates generally do not solicit party support for their campaigns.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
MAINE						
Supreme Judicial Court		X(G)			7	Reappointment by governor, subject to legislative confirmation
Superior Court		X(G)			7	Reappointment by governor, subject to legislative confirmation
MARYLAND¹⁰						
Court of Appeals	X				See fn 11	Retention election (10 year term)
Court of Special Appeals	X				See fn 11	Retention election (10 year term)
Circuit Court	X				See fn 11	Nonpartisan election (15 year term) ¹²
MASSACHUSETTS¹³						
Supreme Judicial Court	X				to age 70	
Appeals Court	X				to age 70	
Trial Court of Mass.	X				to age 70	
MICHIGAN						
Supreme Court				X ¹⁴	8	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
MINNESOTA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
MISSISSIPPI						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Chancery Court			X		4	Re-election for additional terms
Circuit Court			X		4	Re-election for additional terms
MISSOURI						
Supreme Court	X				1	Retention election (12 year term)
Court of Appeals	X				1	Retention election (12 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Jackson, Clay, Platte, Saint Louis Counties)	X				1	Retention election (6 year term)
MONTANA						
Supreme Court			X		8	Re-election; unopposed judges run for retention
District Court			X		6	Re-election; unopposed judges run for retention
NEBRASKA						
Supreme Court	X				3	Retention election (6 year term)
Court of Appeals	X				3	Retention election (6 year term)
District Court	X				3	Retention election (6 year term)

10. Merit selection established by executive order in Delaware, Maryland, and Massachusetts. In all other jurisdictions merit selection established by constitutional or statutory provision.

11. Until the first general election following the expiration of one year from the date of the occurrence of the vacancy.

12. May be challenged by other candidates.

13. Merit selection established by executive order in Delaware, Maryland, and Massachusetts. In all other jurisdictions merit selection established by constitutional or statutory provision.

14. Although party affiliations for Supreme Court candidates are not listed on the general election ballot, candidates are nominated at party conventions.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
NEVADA						
Supreme Court			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
NEW HAMPSHIRE¹⁵						
Supreme Court		X(G) ¹⁶			to age 70	
Superior Court		X(G) ¹⁶			to age 70	
NEW JERSEY						
Supreme Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Appellate Division of Superior Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Superior Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
NEW MEXICO						
Supreme Court	X				until next general election	See Footnote 17
Court of Appeals	X				until next general election	See Footnote 17
District Court	X				until next general election	See Footnote 17
NEW YORK						
Court of Appeals	X				14	See Footnote 18
Appellate Division of the Supreme Court	X				5	Commission reviews and recommends for or against reappointment by governor.
Supreme Court				X	14	Re-election for additional terms
County Court				X	10	Re-election for additional terms
NORTH CAROLINA						
Supreme Court			X ¹⁹		8	Re-election for additional terms
Court of Appeals			X ¹⁹		8	Re-election for additional terms
Superior Court			X		8	Re-election for additional terms
NORTH DAKOTA						
Supreme Court			X		10	Re-election for additional terms
District Court			X		6	Re-election for additional terms

15. Merit selection established by executive order in Delaware, Maryland, and Massachusetts. In all other jurisdictions merit selection established by constitutional or statutory provision.

16. The governor's nomination is subject to the approval of a five-member executive council.

17. Partisan election at next general election after appointment for eight-year term for appellate judges, six-year term for district. The winner thereafter runs in a retention election for subsequent terms.

18. Incumbent reapplies to nominating commission and competes with other applicants for nomination to the governor. The governor may reappoint the incumbent or another nominee. The senate confirms the appointment.

19. Beginning in 2004, these elections will be nonpartisan.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
OHIO						
Supreme Court				X ²⁰	6	Re-election for additional terms
Court of Appeals				X ²⁰	6	Re-election for additional terms
Court of Common Pleas				X ²⁰	6	Re-election for additional terms
OKLAHOMA						
Supreme Court	X				1	Retention election (6 year term)
Court of Criminal Appeals	X				1	Retention election (6 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court			X		4	Re-election for additional terms
OREGON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
Tax Court			X		6	Re-election for additional terms
PENNSYLVANIA						
Supreme Court				X	10	Retention election (10 year term)
Superior Court				X	10	Retention election (10 year term)
Commonwealth Court				X	10	Retention election (10 year term)
Court of Common Pleas				X	10	Retention election (10 year term)
RHODE ISLAND						
Supreme Court	X				Life	
Superior Court	X				Life	
Worker's Compensation Court	X				Life	
SOUTH CAROLINA						
Supreme Court		X (L) ²¹			10	Reappointment by legislature
Court of Appeals		X (L) ²¹			6	Reappointment by legislature
Circuit Court		X (L) ²¹			6	Reappointment by legislature
SOUTH DAKOTA						
Supreme Court	X				3	Retention election (8 year term)
Circuit Court			X		8	Re-election for additional terms

20. Although party affiliations for judicial candidates are not listed on the general election ballot, candidates are nominated in partisan primary elections.

21. South Carolina has a 10 member Judicial Merit Selection Commission that screens judicial candidates and reports the findings to the state's General Assembly. Since 1997, the Assembly is restricted to voting only on those candidates found qualified by the Judicial Merit Selection Commission. However, the nominating commission itself is not far removed from the ultimate appointing body, and cannot be considered to be nonpartisan as control over member nominations is vested in majority party leadership. Although most nominating commissions contain members appointed by the governor or legislature, no other commissions actually contain the governor or current legislators who have final approval over the candidate as voting members of the commission. In contrast, the Judicial Merit Selection Commission in South Carolina contains 6 current members of the General Assembly appointed by the Speaker of the House of Representatives, the Chairman of the Senate Judiciary Committee, and the President Pro Tempore of the Senate. State legislators also choose the remaining 4 members of the Commission who are selected from the general public.

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
TENNESSEE						
Supreme Court	X				until next biennial general election	Retention election (8 year term)
Court of Appeals	X				until next biennial general election	Retention election (8 year term)
Court of Criminal Appeals	X				until next biennial general election	Retention election (8 year term)
Chancery Court				X	8	Re-election for additional terms
Criminal Court				X	8	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms
TEXAS						
Supreme Court				X	6	Re-election for additional terms
Court of Criminal Appeals				X	6	Re-election for additional terms
Court of Appeals				X	6	Re-election for additional terms
District Court				X	4	Re-election for additional terms
UTAH						
Supreme Court	X				First general election	Retention election (10 year term)
Court of Appeals	X					Retention election (6 year term)
District Court	X					Retention election (6 year term)
Juvenile Court	X				3 years after appointment	Retention election (6 year term)
VERMONT						
Supreme Court	X				6	Retained by vote of General Assembly (6 year term)
Superior Court	X				6	Retained by vote of General Assembly (6 year term)
District Court	X				6	Retained by vote of General Assembly (6 year term)
VIRGINIA						
Supreme Court		X(L)			12	Reappointment by legislature
Court of Appeals		X(L)			8	Reappointment by legislature
Circuit Court		X(L)			8	Reappointment by legislature
WASHINGTON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
WEST VIRGINIA						
Supreme Court				X	12	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms

State and Court	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
	Merit Selection through Nominating Commission	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Non-Partisan Election	Partisan Election		
WISCONSIN						
Supreme Court			X		10	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
WYOMING						
Supreme Court	X				1	Retention election (8 year term)
District Court	X				1	Retention election (6 year term)



Bureau of Justice Statistics

State Court Organization 1998

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

Table 4. Selection of Appellate Court Judges

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

NOTE: This 1998 table, the most recent published edition of State Court Organization, does not reflect a change from partisan election to nonpartisan election in Arkansas and North Carolina.

6-16

Table 4. Selection of Appellate Court Judges

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

Table 4. Selection of Appellate Court Judges

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

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Table 4. Selection of Appellate Court Judges

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

Summary of Methods of Selection of State Supreme Courts

According to the American Judicature Society website at http://www.ajs.org/selection/sel_stateselect.asp, **merit selection through a nominating commission process is used in 24 states** to select justices and judges of the court of last resort. This would include the methods of selection for both unexpired terms and full terms of office. The following summary of the table, "Selection of Appellate Court Judges" from *State Court Organization 1998*, published by the U.S. Department of Justice, Bureau of Justice Statistics, provides more information about the methods of selection for full terms of office for justices and judges of the courts of last resort in each of the 50 states. A copy of the complete table also is attached.

Gubernatorial appointment from judicial nominating commission: 15 states

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

Gubernatorial appointment from judicial nominating commission with consent of the senate: 5 states: Delaware (nominating commission is established by executive order), Hawaii (with retention by reappointment by the judicial nominating commission), Maryland (nominating commission is established by executive order), Utah, and Vermont (with retention by legislative election, rather than by retention election)

Gubernatorial appointment with other variations: 5 states: California (with unopposed retention election), Maine (with gubernatorial reappointment), Massachusetts (from judicial nominating commission with approval by governor's council), New Hampshire (with approval of elected executive council), New Jersey (with consent of the senate, subject to gubernatorial reappointment and consent of the senate after an initial seven-year term)

Partisan election: 6 states: Alabama, Illinois, New Mexico, Pennsylvania, Texas, and West Virginia

Nonpartisan election: 16 states: Arkansas, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin

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

Legislative Election: 1 state: South Carolina



**KANSAS BAR
ASSOCIATION**

**TESTIMONY IN OPPOSITION TO HB 2770
PRESENTED BY RICHARD F. HAYSE
PRESIDENT, KANSAS BAR ASSOCIATION
BEFORE THE JUDICIARY COMMITTEE OF
THE KANSAS HOUSE OF REPRESENTATIVES
WEDNESDAY, FEBRUARY 8, 2006**

The Kansas Bar Association appears before this Committee in emphatic opposition to HB 2770. This bill would abolish an excellent system for selecting judges of the Kansas Court of Appeals based upon their individual merits and qualifications. In its place the bill would inject a purely political selection system with no merit qualifications.

Our independent Supreme Court Nominating Commission was created nearly a half century ago to remove the corrupting influence of politics from our courts. This merit-based selection process is premised on an unwavering commitment to the principle that a non-political court system is the individual citizen's best defense against government power.

Present Kansas law found in K.S.A. 20-3004(b) (Supp 2004) prescribes qualifications for a person nominated by the Commission to be a judge of the Court of Appeals. The statute requires the nominee to "be a person of recognized integrity, character, ability, experience and judicial temperament, to the end that persons serving as judges of the court of appeals will be the best qualified therefore."

In accordance with the statutory mandate, the Supreme Court Nominating Commission currently conducts a rigorous review of the qualifications of anyone who aspires to be a judge of the Court of Appeals. The Commission selects the three best candidates and forwards those names to the Governor. The Governor then selects the nominee from among the three whom the Governor believes to be the best person for the position. This has been an excellent system for judicial selection during the nearly 50 years it has been used in this state.

HB 2770 would repeal K.S.A. 20-3004 and related statutes, and would eliminate the use of the Supreme Court Nominating Commission. In its place, this legislation would allow the Governor to appoint any person, including a person with no qualifications whatsoever, subject only to confirmation by a majority of the Kansas Senate. Instead of a merit selection process this legislation would substitute a purely political selection process. Senate confirmation of judicial nominees would be similar to the federal process that so frequently leads to a highly politicized, circus-like confirmation hearing. However, once appointed, federal judges enjoy lifetime tenure, whereas Kansas Court of Appeals judges must stand for a retention election every four years.

Proponents of this proposed constitutional amendment would have you believe that the system of judicial selection in Kansas needs to be fixed with a political selection process. The truth is that the system we use now has served the citizens of this state extremely well. After selection our current system has accountability measures to insure that judges who misuse their power can be removed from office. In addition to standing for a retention election every four years, any judge of the Court of Appeals can be removed from the bench at any time by action of the Supreme Court.

House Judiciary

Date 2-8-06

Attachment # 7

A non-political court system is the individual citizen's best defense against big money and government power. It safeguards the right of every Kansas citizen to a "day in court." More than two-thirds of the states currently use a merit selection system. In the 16 states that use a political system to choose appellate judges, millions of dollars are spent by special interest groups to influence the process. This creates an environment conducive to a justice system that is more equal for some than others.

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

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

As citizens and as lawyers, the members of the Kansas Bar Association want the most qualified and competent people selected for our Court of Appeals whenever a vacancy occurs. HB 2770 would turn back judicial selection in Kansas 50 years to a system that was expressly rejected by the people of this state because of the abuses which it invited. We urge you not to report HB 2770 favorably.

* * *



**KANSAS BAR
ASSOCIATION**

TESTIMONY IN OPPOSITION TO HCR 5033
PRESENTED BY RICHARD F. HAYSE
PRESIDENT, KANSAS BAR ASSOCIATION
BEFORE THE JUDICIARY COMMITTEE OF
THE KANSAS HOUSE OF REPRESENTATIVES
WEDNESDAY, FEBRUARY 8, 2006

The Kansas Bar Association appears before this Committee in emphatic opposition to HCR 5033. This resolution would abolish an excellent system for selecting justices of the Supreme Court based upon their individual merits and qualifications. In its place the bill would inject a purely political selection system with no merit qualifications.

Our independent Supreme Court Nominating Commission was created nearly a half century ago to remove the corrupting influence of politics from our courts. This merit-based selection process is premised on an unwavering commitment to the principle that a non-political court system is the individual citizen's best defense against government power.

The Supreme Court Nominating Commission currently conducts a rigorous review of the qualifications of anyone who aspires to be a justice of the Kansas Supreme Court. The Commission selects the three best candidates and forwards those names to the Governor. The Governor then selects the nominee from among the three whom the Governor believes to be the best person for the position. This has been an excellent system for judicial selection during the nearly 50 years it has been used in this state.

HCR 5033 would eliminate the use of the Supreme Court Nominating Commission (page 1, lines 31-34, and page 3, lines 8-30). In its place, this legislation would allow the Governor to appoint any person, including a person with no qualifications whatsoever, subject only to confirmation by a majority of the Kansas Senate. Instead of a merit selection process this legislation would substitute a purely political selection process. Senate confirmation of judicial nominees would be similar to the federal process that so frequently leads to a highly politicized, circus-like confirmation hearing. However, once appointed, federal judges enjoy lifetime tenure, whereas Kansas justices must stand for a retention election every six years.

Proponents of this proposed constitutional amendment would have you believe that the system of judicial selection in Kansas needs to be fixed with a political selection process. The truth is that the system we use now has served the citizens of this state extremely well. After selection our current system has accountability measures to insure that justices who misuse their power can be removed from office. In addition to standing for a retention election every six years, any justice at any time can be removed from the bench through impeachment and conviction by the Kansas legislature, or by being declared unfit by the Supreme Court Nominating Commission.

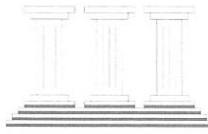
A non-political court system is the individual citizen's best defense against big money and government power. It safeguards the right of every Kansas citizen to a "day in court." More than two-thirds of the states currently use a merit selection system. In the 16 states that use a political system to choose appellate judges, millions of dollars are spent by special interest groups to influence the process. This creates an environment conducive to a justice system that is more equal for some than others.

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

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

As citizens and as lawyers, the members of the Kansas Bar Association want the most qualified and competent people selected for our Supreme Court whenever a vacancy occurs. HCR 5033 would turn back judicial selection in Kansas 50 years to a system that was expressly rejected by the people of this state because of the abuses which it invited. We urge you not to report HCR 5033 favorably.

* * *



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Representative Mike O'Neal, Chairman
Members of the House Judiciary Committee

From: Jerry R. Palmer
Palmer, Leatherman & White LLP
Kansas Trial Lawyers Association

Date: February 8, 2006

Re: House Concurrent Resolution No. 5033 and House Bill No. 2770

Mr. Chairman and Members of the Committee:

I appear before you today on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who represent consumers and advocate for the safety of families and the preservation of Kansas' civil justice system. I appreciate the opportunity to provide you with testimony on HCR 5033 and HB 2770.

The Kansas Trial Lawyers Association opposes both House Concurrent Resolution No. 5033 and House Bill No. 2770. Both the Bill and the Resolution seek the abolition of the process of merit judicial selection for judges of the Court of Appeals and justices of the Kansas Supreme Court. Others will review the relevant history of the adoption in 1958 of the merit selection of justices. The members of this body are aware that there really had been no serious discussion of change of the selection system until 2005 in the wake of the decision on the school case and the death penalty case in the Supreme Court. The school case, which caused the most alarm, was decided by a unanimous decision of three justices appointed by Republican governors and three appointed by Democratic governors. Can two decisions in 50 years be taken seriously as the basis for changing the constitutional model of merit selection of Appellate Judges and Justices?

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 •

E-Mail: triallaw@ink.org

House Judiciary

Date 2-8-06

Attachment # 8

It has never been suggested that any of the holders of that high office would have reached a different disposition had they been selected by a governor and confirmed by the Kansas Senate. No question has ever been raised about the qualifications or the integrity of anyone making those two controversial decisions. No one has suggested that the process of confirmation by the Senate would involve a more careful process of review of the qualifications for office or search of integrity than can be accomplished by the commission process. Considering the other business that the Senate has, one would wonder why the Senate would want the additional responsibility of scrutinizing and approving justices of the Supreme Court, judges of the Court of Appeals and by logical extension the many judges of the district court. The mechanical issue of nominations occurring when the legislature is not in session seems by itself as a significant distinction to the Federal Model.

With respect to the Court of Appeals, at least to this point, there has been no public debate or even statements by proponents of these changes to suggest that there is anything wrong with any of the judges who have served on the Court of Appeals or their decisions that would have been remediated by being subjected to the scrutiny that the Senate now gives to executive appointments. Especially with respect to the Court of Appeals no one has even tried to make a case that that selection process is broken and it needs to be fixed.

If this was a high school debate the question would be asked, "what is your "need" argument?" About the only argument that can be advanced with regard to the Court of Appeals is that this process would follow the precedent for the selection of the United States Supreme Court justices. That argument should be quickly met by the fact it would no longer be concordant with the selection of Kansas Supreme Court justices.

Is there anything in our recent experience with the selection of U.S. Supreme Court Justices that would argue in favor of that process being a superior process to the commission process we use in Kansas? Presumably if potential judges or justices were subjected to hearings on the scale of those for United State Supreme Court justices, issues pertaining to how they would decide cases in the future on topics that are described in party platforms would be met by the same type of answers all recent nominees to the Supreme Court have given. Likewise, there would be far less public record available for nominees to these courts than there would be for someone nominated for the United States Supreme Court. Although the U.S. Court of Appeals judges and U.S. District Court judges also receive approval and some scrutiny by the United State Senate, each member should consider whether they are aware of any information that came out during the hearings for confirmation of any of the sitting judges on the Tenth Circuit Court of Appeals or judges for the United States District Court for the District of Kansas. It may be worthy of note that since the judges of the U.S. District Courts select the United States Magistrates and the U.S. Bankruptcy Judges that they use a commission process to evaluate persons interested in those jobs, panels are presented and the judges then decide. So, even judges who have been selected by a Senate confirmation process utilize panels of citizens to review the qualifications of nominees and then select from the nominees on the panel.

As you are all aware, the governor selects one non-lawyer citizen for a four-year term each year to serve on the commission and that the lawyers in each congressional district elect a lawyer every four years from their district to serve on the commission, and then the bar at large elects one person to be the chairman. The terms of the commissioners cannot exceed two terms. The lawyers are elected on a non-partisan basis. (A similar system of the election of lawyer members is utilized in those districts with non-elected judges and with comparable citizen

appointees.) What will be interesting to see is if during any of these hearings you see either a non-lawyer or a lawyer who served on the Supreme Court Nomination Commission, who participated for a period of four to eight years in that decision-making process to come in to complain about the work of the commission or some horror story of how a panel was put together which would offend the sensibilities of this body. Since they are the only people that know what actually happens within the commission and because of the rotation of governors that we have had in this state, which has resulted in a virtually evenly balanced Supreme Court surely somebody with knowledge would be here to lay out the complaints of the dysfunction of that process if it was a poor process. That would be better information than to indulge in the speculation of what might happen within the process.

Surely if there was a dysfunction in the selection of the panels that were being given to the governor one or more of those judges or justices would have been implicated in some scandal or behavior subject to sanction. Likewise, if the competency or integrity of any of these judges or justices are questionable then once again we surely should have heard about it in the press at the time of their appointment, but the record is silent because the appointments have been good because the governors have been given good candidates from which to choose.

Let's think about what goes on before someone is appointed by the governor:

- (A) By self selection someone must believe that they have enough merit by experience and reputation that a lot of people they don't know would find them worthy to be on the list of nominees.
- (B) From that subgroup of something between 20 and 30 the commission then reviews their information forms which have been developed to search out their academic background, the names of judges and lawyers with whom

they have interacted, have reviewed their writing samples which would show their ability to communicate as well as their reasoning, review their professional career for experience that is relevant to the court and review their disciplinary record to find out what has occurred in their professional life. (Contact with persons from the candidates' community.)

- (C) The candidates are interviewed, and compared from each corner of the state, one layperson and one lawyer will make the ultimate judgment to select the panel of three.
- (D) After the review of the materials and an interview the selection process occurs. From the eight years I served on the commission, and from reports from commission members over the last ten years, there is almost always substantial concurrence on the best three candidates. When the initial poll is taken it is almost assured that the top three will come from the top five vote-getters and usually the first two nominees are selected in the first round.

That means a lot of people with a lot of relevant information, lay and lawyer, concur on the merits of the candidates. The governor then essentially is left with all good choices or the best choices from those who have put their names forward for selection. That doesn't mean that there weren't other good people on the panel and a review of the records will show that many of the persons who later became judges or justices had put their name in earlier. On one or more occasions, sometimes they were selected to the panel, sometimes they weren't. Certainly the same person's name has gone up to the governor, or different governors, on different panels. This is a system that works. About the only evidence that will be presented that the systems

doesn't work is a disagreement by members of this body with the two decisions referenced earlier in my presentation.

The importance of an independent judiciary cannot be overstressed in our system of checks and balances. Today we are promoting around the world that our system is one of laws and not of men.

The system in Kansas works; it isn't broken; it doesn't need to be fixed either by an act of the Legislature nor by a change in the Constitution. The gravity of a constitutional change requires much thought and reflection and of course the need for a supermajority is evidence of that fact. We have a good working system which has responsibility chosen judges and justices and it does not deserve to be radically reformed. There is nothing conservative about either of these proposals.

Respectfully submitted,

JERRY R. PALMER
On Behalf of the Kansas Trial Lawyers Association

**TESTIMONY OF J. EUGENE BALLOUN
PRACTICING ATTORNEY
SHOOK, HARDY & BACON L.L.P.**

**BEFORE THE KANSAS HOUSE JUDICIARY COMMITTEE
IN OPPOSITION TO HOUSE BILL 2270 AND
HOUSE CONCURRENT RESOLUTION 5033
February 8, 2006**

On the wall of the Kansas Judicial Center, above the doors, is written the promise of the Kansas court system to its citizens: **“Within these walls, the balance of justice weighs equal.”**

My name is Gene Balloun. I am a lifelong resident of Kansas, and a graduate of the Kansas University Law School. I have practiced law in Kansas for 50 years, and am a partner with the Overland Park firm of Shook, Hardy & Bacon. I have been admitted to practice before the Kansas Supreme Court, and all other Kansas courts, as well as the U.S. District Court for the District of Kansas, Tenth Circuit Court of Appeals, and U.S. Supreme Court. I have represented clients in courts throughout Kansas, and in more than 100 cases in the Kansas Court of Appeals and Supreme Court. I also served on the Tenth Judicial District Nominating Commission which selects Kansas trial court judges.

Proposals have emerged to amend the Kansas Constitution to change how justices are selected for the Kansas Supreme Court. (House Comm. Resol. 5033). The change would require senate confirmation of a justice selected and appointed by the governor. A similar appointment proposal (House B. 2770) would change the method of selection of judges of the Court of Appeals.

In order to evaluate the true effect of these proposals, a brief review of the current bi-partisan judicial selection processes is necessary. The current system is almost 50 years old (operative since 1958). The current system provides many benefits and improvements over past selection practices, such as the election of judges.

How Kansas Justices are Selected and the Difference from the Federal System

The Kansas Constitution was amended by a 60% majority vote in the general election of 1958 to establish the following “merit” or “Missouri plan” system utilized in a number of other states:

A committee composed of nine members, five lawyers and four laypersons, takes applications from those who wish to be considered for appointment to a vacancy on the Supreme Court. The chairperson of the selection committee is a lawyer chosen by secret ballot among all resident licensed lawyers in Kansas. The other four lawyer members, one from each of Kansas’ congressional districts, are chosen by secret ballot among all resident licensed lawyers in the district. The four laypersons, one from each

congressional district, are appointed by the Governor. The committee reviews credentials, investigates and interviews candidates, and selects the three they deem best suited for appointment to the Court. The committee submits those names to the Governor, who must make the appointment of one of the three nominees submitted. Thus, as a practical matter the three selections transmitted to the Governor have been chosen by their lawyer and citizen peers as the best among those who have agreed to accept the appointment if selected by the Governor. Which political party they belong to is irrelevant. The Governor's input then is significantly less than the President's power with respect to federal judge appointees. The justice thus selected is on the next state-wide general election ballot where there is a retention or non-retention choice for the voters. The justice then is subject to the same kind of vote each six years thereafter.

The Kansas system is quite different from the appointment of federal judges. In the federal system the President may nominate anyone the President chooses. The nominee is subject to a confirmation majority vote in the United States Senate. Once appointed the judge or justice serves for life subject only to being impeached by vote of the Senate. As a practical matter, the judge selected will probably be limited to persons affiliated in some way with the President's party, thus narrowing the field of candidates.

Changes Brought About by Adoption of the Kansas Merit Selection System

1. A larger number of candidates are available for consideration because those interested may include qualified candidates from any political party, or those without political affiliation.
2. Under the current system in Kansas, the citizens have a role in the nominating process of the commission, and also in voting on the retention of judges. In contrast, under the Federal system, the only input of the citizens is through Congressional representatives.
3. If the Governor is allowed to appoint judges without the nominating process currently used, the appointments will likely be more political and may be used as rewards for past political support.
4. The public is assured of nominees qualified to serve on the court because their experience and background have been scrutinized carefully by their lawyer and citizen peers and judged to be the best among all those who have agreed to accept the appointment if selected.
5. There being no confirmation hearings by the Kansas Senate, there can not be public spectacles such as have occurred, and are likely again, with appointments to the federal judiciary. Federal court confirmations generally follow political party lines, and rarely develop new information concerning the nominee that is germane to judicial qualifications.

6. Kansas Supreme Court justices come before the voters for a retention vote, where they are running on their record and work as justices, not on what they indicate (or promise) they will do on cases that may come before them in the future.

7. The Kansas system promotes a mix of change and continuity. Among the seven justices currently on the Supreme Court are appointments by four different Kansas Governors.

8. The current system, in place for nearly 50 years, since 1958, has been essentially without controversy until now.

IN THE SELECTION PROCESS, JUDGES SHOULD:

- Be selected based on: intelligence, integrity, industry, experience, judgment, temperament, decisiveness, independence, courage, fairness and impartiality.
- Make no pre-appointment promises beyond these qualities.
- Not be a representative of any special interest group
- Not make decisions to satisfy a special interest group.
- Not exhibit loyalty to
 - a political party
 - a social, ethnic, or religious group
 - a business or labor group
 - a geographic segment
- **Be loyal only to the Constitution and to the Law itself, and to the fair, prompt, and impartial administration of the law for all citizens.**

IN EVERY JUDICIAL DECISION, CITIZENS WANT AND DESERVE A DECISION:

- Based on the merits
- Not based on pressure of special interest groups
- Not based on fulfilling a pre-appointment promise
- Not based on fear of repercussions from an unpopular decision
- Not based on personal favoritism for or prejudice against a person or his/her lawyer due to:
 - political, ethnic, social or religious differences or affiliations
- Not based on the judge's personal view of what the law ought to be.

WHAT CAN WE EXPECT OF OUR JUDGES?

- Fair and prompt hearings
- Courteous treatment of all who appear in court: lawyers, parties, witnesses, jurors
- Prompt, well-reasoned decisions

- Decisions based on the law and the evidence, free of outside influence or prejudice

AN INDEPENDENT JUDICIARY: WHY IS THIS IMPORTANT TO ME, MY FAMILY, MY BUSINESS, MY COMMUNITY?

- An essential characteristic of dictatorships and repressive regimes throughout history is the lack of a functioning, independent judiciary— independent of the pressures of government and special interests—that can protect the people from the abuses of power.
- Examples:
 - The German courts that rubber stamped Nazi oppression in the 1930's
 - The courts of the Soviet Union, which were instruments for carrying out soviet state policy
 - The courts in Iraq during the Saddam regime
 - The courts in Afghanistan during the Taliban regime

CONTRAST THE AMERICAN EXPERIENCE:

- In the July 4, 1776 Declaration of Independence, almost half of the “abuses and usurpations” of King George III relate to the poor administration of justice:
 - “He has obstructed the Administration of justice, by refusing his Assent to laws for establishing Judiciary powers.”
 - “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”
- Alexander Hamilton, in *The Federalist No. 78*:
 - “There is no liberty, if the power of judging be not separated from the legislative and executive powers.”
 - “Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”
- President Woodrow Wilson: Government keeps its promises, or does not keep them in its courts. For the individual, therefore, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts.”
- Supreme Court Justice Anthony Kennedy: “The law makes a promise— neutrality. If the promise gets broken, the law as we know it ceases to exist.”
- Sandra Day O’Connor: “Judicial independence is not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied.”

A favorite method of attacking the courts is to label them as “activist.” In reality, the courts are doing their job – interpreting and applying the law. The Kansas School

Tuition Case is an example. A Kansas law was challenged by non-resident students. The litigation:

- Was decided by Federal Judge Richard Rogers in Topeka.
- Involved the validity of a law passed by the Kansas legislature that grants in-state tuition to undocumented immigrant children who attend a Kansas high school for at least 3 years and either graduate or get a GED.
- Resulted in Judge Rogers dismissing the case because the non-residents who brought the suit had no “standing” – they were not protected by Kansas law.
- Judge Rogers determined that even if the non-residents won, they would receive no benefit since they would still have to pay out of state tuition themselves, and therefore had no standing.
- Judge Rogers stated, “The decision on what to do concerning the education of illegal aliens . . . is probably best left to the United States Congress and the Kansas Legislature.”
- Dan Stein, spokesman for the group promoting the suit, then publicly stated that Judge Roger’s decision not to intervene but to leave the issue to Congress and the Kansas Legislature was **“an appalling exercise of judicial activism.”**

THIS IS THE PROMISE TO YOU FROM THE JUDGES OF KANSAS: WITHIN THE HALLS OF OUR COURTS, THE BALANCE OF JUSTICE WEIGHS EQUAL.



KANSAS ASSOCIATION OF DEFENSE COUNSEL

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TO: House Committee on Judiciary
FROM: Jim Robinson for the Kansas Association of Defense Counsel
DATE: February 6, 2005
RE: Judicial Selection

Chairman O'Neal, Members of the Committee:

Thank you for the opportunity to appear today as a conferee on House Concurrent Resolution 5033 and House Bill 2770. My name is Jim Robinson. I have practiced law in Wichita for 22 years. I am on the Board of Directors of the Kansas Association of Defense Counsel (KADC), and appear today as a representative of that group. KADC is a statewide association of lawyers who defend civil damage suits. KADC supports the current merit selection process for selecting justices and judges to the appellate courts.

What is “merit selection” of judges ?

Merit selection focuses on the intellectual and technical abilities of candidates who seek the important job of interpreting the laws. As with any position that requires rigorous analytical ability, the goal of those making the selection is to sift out less qualified and less experienced applicants and search out the most qualified.

The linchpin of merit selection in Kansas is the Supreme Court Nominating Commission. This is a nonpartisan commission composed of four lawyer members who are elected by their peers in each congressional district, four nonlawyer members who are appointed by the governor, and one additional lawyer member who serves as chairperson and who is elected by peers in a statewide election. Each member’s term is for four years and terms are staggered so that the terms of only two members—one a lawyer and one a nonlawyer—expire each year. Currently there are nonlawyer members who were appointed by both Governors Graves and Sebelius. Also, contrary to rumors, most of the current elected lawyers are from law firms of less than five lawyers. None are from firms of more than twenty lawyers.

The Commission’s work is familiar to anyone who has made an important hiring decision. It initially reviews resumes and an extensive application that must be completed by all applicants for the Supreme Court and the Court of Appeals. It then screens candidates and interviews the most qualified and investigates their references. After the applicants have been thoroughly vetted, the Commission submits the names of the three that in its consensus are the most technically able and experienced to the

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Governor, who must select an applicant from the list. Judges are selected for retention by the voters statewide in an uncontested election every six years for the Supreme Court and every four years for the Court of Appeals.

How does “merit selection” relate to judicial independence?

Judicial independence is the only way to assure fair and impartial justice for all Kansans. Courts have a duty to protect individual rights, including the rights of political, racial and ethnic minorities, no matter how unpopular their rulings may be. The legislative and executive branches may use focus groups or public opinion polls to make decisions; judges may not. The role of the courts is to enforce the law, whether it is the First Amendment rights of some radical group on either end of the spectrum to publish political views which most people find offensive, or the right of a child murderer to a fair and impartial trial. Courts necessarily make tough decisions regardless of whether they are popular at the time. Occasionally, the Kansas Supreme Court as the interpreter of the Constitution makes a tough decision that overturns legislation. The ensuing tension between the two branches is a healthy and expected byproduct of our system of government.

Fair criticism is essential in our democracy even with respect to improving the quality of the courts. But political attacks on the judiciary diminishes its independence and the public’s confidence in it. When state court judges are perceived as giving in to political pressures, the credibility of the judiciary suffers. When those responsible for nominating or confirming judges stack the courts with judges who are there to produce certain results, the quality of justice is diminished. When state judges are voted off the bench because of unpopular decisions, courts cease to be independent.

The Report of the American Bar Association Commission on the 21st Century Judiciary, *Justice in Jeopardy*, p. 31 (July 2003) aptly noted that when the political branch actors, whether it is the Governor or the Legislature, “use the weapons at their disposal to retaliate against the courts for making unpopular rulings and to encourage them to be more attentive to the will of the majority when deciding cases in the future, the net effect is to politicize the judiciary and, in some cases, threaten its institutional integrity and independence.”

The real value of merit selection is in minimizing the role of politics in selecting judges, which in turn limits the political influences that may hinder fair and impartial justice.

Does “merit selection” eliminate politics from judicial selection ?

No, because one assumes that politics will play into any gubernatorial appointment. However, merit selection minimizes the interplay between partisan politics and judicial selection because the Supreme Court Nominating Commission nominates candidates on the basis of their qualifications, not political affiliation. More importantly, the applicant is not required to raise funds, advertise, stump, or articulate a platform, all of which create a risk that judicial

independence could be compromised.

Kansas's merit selection system has avoided the political spectacle played out in the federal appointment process and in many state court judicial elections. Alabama Supreme Court races have been described as "battleground[s] between businesses and those who sue them."¹ A number of other states have witnessed significant political activity and campaign contributions by special interest groups, often led by national, rather than state organizations.² The Chief Justice of the Texas Supreme Court noted in his 2003 State of the Judiciary message, "[o]ur partisan, high-dollar judicial selection system has diminished public confidence in our courts, damaged our reputation throughout the country and around the world, and discouraged able lawyers from pursuing a judicial career."³

Why should "merit selection" in Kansas differ from the federal selection process used for the United States Supreme Court and the United States Courts of Appeals ?

The state process, unlike the federal process, does not grant lifetime judgeships. State judges, unlike federal judges, are held accountable to the voters in retention elections. Furthermore, under the federal process, unlike the state process described above, the President screens and then nominates a candidate. Senate confirmation in the federal process is a check against the President's exercise of appointment power.

Why not keep the existing process, but require Senate confirmation of the Governor's selection?

¹ Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999) (citing David White, *Campaign Cash Ready to Flow: Siegelman Has a Jump on James*, BIRMINGHAM NEWS, Mar. 26, 1998, at 1B).

² Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1395-1403 (2001).

³ <http://www.supreme.courts.state.tx.us/Advisory/SOJ.pdf>

Giving the Senate the power to examine and confirm persons approved by the Supreme Court Nominating Commission and nominated by the Governor would be a needless duplication of the extensive vetting of applicants by the Commission and would also undermine the input of lawyers in the judicial selection process. One of the reasons for reserving five positions on the Commission for attorneys is that they are most likely to be familiar with the field and the potential candidates.

If the desired purpose of such a confirmation process is to focus on the nominee's judicial philosophy in general or how the nominee might rule on the most divisive legal and constitutional issues of the day, Kansas would likely replicate the protracted and combative process in the federal system, all of which can be exacerbated when coupled with a highly politicized relationship between the Governor and the Legislature. There will be much frustration with the process when nominees invoke the sacred mantra of judicial nominees and refuse to comment on issues that might come before the court. As we have seen at the federal level these discussions can devolve into questioning about points of prejudice and personal pique that are calculated to tarnish the judge in the court of public opinion.

Regardless of whether such a process would be helpful, Senate confirmation introduces a political element into the selection process that diminishes judicial independence.

Why shouldn't the principle of one person, one vote apply to the selection of judges ?

The foundation of justice in our democracy is a fair and independent judiciary. The realities of getting elected can compromise a judge's independence.

This can begin with the nominating process where campaign work in previous party primaries and elections, support of party functions, and fundraising in past elections may be valued more highly than the candidates qualifications to serve as judge.

Raising money can be a problem. The most likely contributors are attorneys, some of whom will likely appear in front of those judges. There is nothing more important to the integrity of our judicial system than the public's expectation of getting a fair hearing. Political contributions naturally cause litigants to question a judge's impartiality. Imagine yourself as a litigant whose case was just dismissed by a judge who received a \$500 political contribution from your opponent's attorney.

Addressing issues can be a problem. The Kansas Code of Judicial Conduct says that judges and judicial candidates can't make traditional campaign promises—like promising to decide certain cases a certain way. Judges decide cases on the basis of the facts and the law, not on the basis of pledges or promises. Since candidates can make only general statements about their commitment to faithfully and impartially perform the duties of the office, voters have little or no meaningful information on which to base their choices.

As the federal courts continue to chip away at state restrictions, judicial elections are more likely to look like non-judicial elections. In 2002 the U.S. Supreme Court in *Republican Party of Minnesota v. White* held that Minnesota's prohibition against judicial candidates stating their views on legal issues that could come before the court for which they were running violated the First Amendment. Last week the U.S. Supreme Court declined to review a decision in *Dimick v. Republican Party of Minnesota* by the 8th Circuit U.S. Court of Appeals which struck down key provisions in Minnesota's code of judicial conduct which barred judicial candidates from personally soliciting contributions from donors and from accepting or using party endorsements and participating in partisan events. The 11th Circuit U.S. Court of Appeals has also struck down similar judicial campaign rules. Both courts based their decisions on the First Amendment.

As federal courts strike down restrictions on judicial campaign activities, as a practical matter, it will be impossible for states to have nonpartisan elections. This will open the door to activities that at least give the appearance of impropriety and the potential for corruption. If for example this state's prohibition against solicitation activities is invalidated it will be easier for judicial candidates to address parties who may come before them the next day and urge their support in an upcoming election.

As judicial elections become more partisan there will be more pressure on attorneys to seek the recusal of judges based on party affiliation, solicitation of contributions from attorneys or parties, or for pledges or promises made in the campaign. Now pending before the U.S. Supreme Court is a petition for *certiorari* in *Avery v. State Farm Automobile Insurance Co.* That case concerns a decision by the Illinois Supreme Court, which vacated half of a \$1.05 billion award against State Farm in a class action. Justice Lloyd Karmeier cast the deciding vote. The petition for *certiorari* alleges that Justice Karmeier spent more than \$4.8 million to win his seat on the Illinois Supreme Court and that a group of organizations closely associated with State Farm heavily contributed to his campaign. The petition asks: "May a judge who receives more than \$1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?"

On behalf of the Kansas Association of Defense Counsel, I submit that there be no changes to the current merit process for the selection of appellate judges. I have attached a table prepared by the American Judicature Society that describes the current process.

Respectfully submitted,

F. James Robinson, Jr.
robinson@hitefanning.com

Current Methods of Judicial Selection in Kansas

	Supreme Court	Court of Appeals	District Court
Number of judgeships	7	11*	160
Number of districts	---	---	31
Geographic basis for selection	statewide	statewide	district
Method of selection (full term)	gubernatorial appointment from nominating commission	gubernatorial appointment from nominating commission	gubernatorial appointment from nominating commission (17 districts); partisan election (14 districts)
Length of term	1 yr	1 yr	1 yr; 4 yrs
Method of retention	retention election	retention election	retention election/re-election
Length of subsequent terms	6 yrs	4 yrs	4 yrs; 4 yrs
Method of filling interim vacancies	gubernatorial appointment from nominating commission	gubernatorial appointment from nominating commission	gubernatorial appointment from nominating commission/gubernatorial appointment
When interim judges stand for appointment/election	next general election after at least 1 yr in office	next general election after at least 1 yr in office	next general election after at least 1 yr in office; next general election
Selection of chief judge/justice	seniority	supreme court	supreme court
Term of office for chief judge/justice	indefinite	indefinite	2 yrs
Qualifications	30-70 yrs old; 10 yrs active and continuous practice of law in state	30-70 yrs old; 10 yrs active and continuous practice of law in state	state resident; maximum age is 70; member in good standing of state bar > 5 years

*Until 2003, the court of appeals consisted of 10 judges. Under an act passed in 2001, the court of appeals will add one justice each year from 2003 to 2006 so that by 2006, there will be 14 judges on the court of appeals.

The above table was prepared by American Judicature Society, http://www.ajs.org/js/KS_methods.htm

**TESTIMONY OF FRED LOGAN
IN OPPOSITION TO HCR 5033 AND HB 2770**

My name is Fred Logan. I have practiced law in Kansas for almost thirty years and am presently a partner in the Prairie Village law firm of Logan & Logan, LC.

I also served as Chairman of the Kansas Republican Party from 1987 to 1989.

I appear before this committee to offer testimony in opposition to HCR 5033 and HB 2770. The proposed constitutional amendment and legislation would institute a gubernatorial nomination-senate confirmation process for the appointment of appellate court judges. My opposition to such an appointment process is informed by my experience both as a lawyer and as the former leader of a state political party. I want to address you from both perspectives.

My Perspective as a Lawyer

I am a longtime supporter of the merit selection process for appointment of judges. I was one of the leaders in Johnson County in the early 1980's in the campaign against the partisan election of judges. It is worth noting that Johnson County voters supported a merit selection process for appointment of judges by a wide margin. Nothing I have seen in the practice of law would lead me to conclude that the merit selection process for appointment of judges does not work well. Quite to the contrary.

The merit selection process in this state has produced judges at every level of high quality, of every political stripe, and of increasing diversity. I have seen over the years many lawyers of widely varying backgrounds obtain appointment to the bench through the merit selection process. My experience as a lawyer confirms that this system works well and is fair to all.

An appointment process that is based on gubernatorial nomination and senate confirmation for appellate court judges will introduce a political component to the judicial selection process that in my opinion is completely unnecessary, would achieve nothing positive that cannot be achieved under the present merit selection system, and could do considerable damage.

My Perspective as a Former
Leader of a State Political Party

I now wish to address my fellow Republicans from the perspective of a former leader of the Kansas Republican Party. My experience here is entirely consistent with my experience as a lawyer.

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I have had the opportunity to observe the absolute integrity and seriousness with which governors approach judicial appointments. In my opinion, they have been immeasurably aided in that approach by the merit selection system.

I have been honored to personally know John Anderson, Jr., William Avery, Robert F. Bennett, Mike Hayden, and Bill Graves, the five Republican governors who have served since the 1957 debacle in which Governor Fred Hall resigned and took a seat on the Supreme Court after his lieutenant governor appointed him to that position. I believe that it is telling that none of these five governors have called for an end to the merit selection process for appointment of judges.

I also respectfully suggest to my fellow Republicans that as they consider this legislation, they think back on the recent United States Senate confirmation hearing for Judge Samuel Alito. When one thinks about the windy and sometimes misleading questioning to which this outstanding judge was subjected, it is very difficult to see how such a process could improve the method for selecting judges in the state of Kansas. I suspect that Kansans of all political backgrounds will be confused by the assertion that such a senate confirmation process would be good for the state of Kansas.

CONCLUSION

I respectfully recommend that this committee reject HCR 5033 and HB 2770. The present merit selection process for the appointment of judges is a good one and has served this state well.

Fred Logan
February 8, 2006

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LEAGUE OF WOMEN VOTERS® OF KANSAS

February 8, 2006

Honorable Mike O'Neal, Chair
House Judiciary Committee
The Kansas House of Representatives

President
Janis McMillen
Overland Park

Chairman O'Neal and members of the Committee:

1st Vice President
Sharon Ailsieger
Wichita

I appreciate the opportunity to provide testimony on behalf of the League of Women Voters of Kansas on HB 2770.

2nd Vice President
Doris Slocombe
Emporia

On several occasions over a number of years, members of the Kansas League of Women Voters have studied the Kansas Court system. During these studies, League members adopted a position supporting merit selection of judges, a position we continue to support. Thus, we stand in opposition to HB 2770. Our issue is simply this: we must maintain the independence of the judiciary by keeping politics out of the selection system to keep politics out of the courts. To do away with the current, non-partisan selection/appointment process for Appeals Court judges would bring us a step closer to experiencing the impact of politics on fair and impartial courts.

Secretary
Carol Snyder
Overland Park

Treasurer
Leonore Rowe
Overland Park

Why are we advocates of the current merit system?

Directors
Mary Ann Bradford
Topeka

- The system has served us well for 50 years. There has been minimal, if any, interest in modifying the current process. When some want to amend our state Constitution in reaction to one or two of numerous Supreme Court rulings, it requires that we proceed with great caution.

Emma Doherty
Salina

- Over 30 states have adopted the merit system, and none have found it necessary to change.

Gwen Elliott
Topeka

- The public expects judges to be "above the political fray", and rightly so. If they are not, the perception, if not the reality, is that judges are susceptible to political pressure that may compromise their ability to be fair and impartial to all citizens. Kansans, by their nature, place a very high value on "fairness".

Ellen Estes
Wichita

- The public also recognizes the importance of maintaining the checks and balances that were put in place by the framers of our Constitution. Whereas the executive and legislative branches must be responsive to the will of the people, the courts have a duty to follow the rule of law.

Linda Johnson
Manhattan

- Perhaps the most disarming consequence of imposing another political component into the judicial process is the potential impact it may have on the protection of individual rights, as outlined in the Constitution. These rights are so fundamental to our freedoms that they must be protected, and that responsibility falls ultimately to the courts.

Bob Kruh
Manhattan

Carrie Moore
Lawrence

Bill Powell
Salina

In a recent appearance on C-SPAN, hosted by the American Bar Assoc., on International Justice and the Rule of Law, Justice Kennedy had this to say: "Judicial Independence for judges is to not do as they choose, but to do as they must."

The League of Women Voters urges that the current merit system be retained without modification.

Handwritten signature of Janis McMillen
Janis McMillen

House Judiciary



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