Approved: March 30, 2006
Date

MINUTES OF THE SELECT COMMITTEE ON SCHOOL FINANCE

The meeting was called to order by Chairman Kathe Decker at 9:00 A.M. on March 14, 2006 in Room 313-S of the Capitol.

All members were present except:
Valdenia Winn - excused

Committee staff present:
Art Griggs, Revisor of Statutes Office
Kathie Sparks, Legislative Research
Ann Deitcher, Committee Secretary

Conferees appearing before the committee:
Representative Mike O'Neal
Representative Lance Kinzer
Jim Clark, Ks Bar Assoc.

Representative Kinzer addressed the Committee as a proponent of **HCR 5032**. (Attachment 1).

Questions and answers followed.

Representative Mike O'Neal spoke in support of **HCR 5032**. (Attachment 2).

Jim Clark appeared as an opponent to **HCR 5032**. (Attachment 3).

Questions and answers followed.

The hearing was closed on **HCR 5032**.

A motion was put forward by Representative O'Neal that **HCR 5032** be worked as a Committee bill. Representative Merrick seconded the motion that passed on a voice vote.

Representative Crow called the Committee's attention to line 33 on page 1, of "Any existing order directing the legislative branch to make an appropriation of money shall be unenforceable as of the date this provision is adopted."

Representative Crow moved that this deletion be made in **HCR 5032**, the motion was seconded by Representative Phelps but failed on a voice vote.

Representatives Crow, Flaharty and Phelps wished to be recorded as yea votes.

A motion was made by Representative Crow that would delete the section of line 31 of **HCR 5032** "or to redirect the expenditure of funds appropriated by law," The motion was seconded by Representative Flaharty but failed on a voice vote.

Representatives Crow, Flaharty and Phelps wished to be recorded as yea votes.

Representative Crow moved and Representative Phelps seconded the motion that would strike from page 2, lines 7 through 13 starting with the words "The amendment" and ending with "for that purpose". The motion failed on a voice vote.

Representatives Crow, Flaharty and Phelps wished to be recorded as yea votes

Representative Crow asked that on page 2, line 17, the words "the existing" be replaced with "any existing".

A motion was made to this effect by Representative Crow and seconded by Representative Phelps. The motion passed on a voice vote.

Representative O'Neal moved and Representative Hayzlett seconded the motion that **HCR 5032** be passed as amended. The motion carried on a voice vote.

Representatives Crow, Flarharty and Phelps wished to be recorded as no votes.

The Chair called the Committee's attention to the copy of a House Resolution that had been distributed. (Attachment 4).

A motion was made by Representative Phelps and seconded by Representative Gordon to move this resolution out of Committee. The motion passed on a voice vote.

The meeting was adjourned at 10:20 a.m. The next meeting of the Select Committee on School Finance is scheduled for Wednesday, March 15, 2006.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

HOME ADDRESS:
12549 S. BROUGHAM DR.
OLATHE, KS 66062
(913) 829-6404

OFFICE:
STATE CAPITOL
TOPEKA, KS 66612-1504
kinzer@house.state.ks.us

TOPEKA

LANCE KINZER
REPRESENTATIVE, 14TH DISTRICT

TESTIMONY REGARDING HCR 5032

HCR 5032 and its predecessors HCR 5003 and SCR 1603, have been the subject of much consideration by this Legislature. During the special session as a member of the House Federal and State Affairs Committee I had the privilege of listening to many hours of testimony regarding this proposed amendment. I had the further honor of testifying before the Senate Judiciary committee on this same amendment. Moreover, I carried this proposed constitutional amendment on the floor of the House on two separate occasions during which it was vigorously and extensively debated. And as we all know this amendment was both debated and passed by the Senate. As if this were not enough this issue was also taken up during the off session by the Special Committee on Judiciary where extensive testimony was again provided by proponents and opponents. As a result I believe it is fair to say that the concurrent resolution you have before you today is no stranger to the legislative process. That having been said I am extremely grateful for this further opportunity to discuss with you what I believe to be an issue of paramount importance

In framing this issue I would like to turn to James Madison who as one of the primary authors of our Federal Constitution wrote that "No political truth is of greater intrinsic value than that… [placing the] authority of the legislative and judicial power in the same hands is the very definition of tyranny."

It is my belief that the *Montoy* decision represents a violation of the separation of powers that should exist between the legislative and judicial branches of government. In our system the Legislature alone may spend the peoples' money, because it is the Legislature that is accountable to them. The confinement of appropriations to the legislative branch under our system of government was not random. It reflected our national ideal that the power of appropriation must be under the control of those whose money is being spent. This basic idea was at the very core of why our country came into being in the first place.

It is important to remember in this regard the uniqueness of the founding of our nation. As historian Gordon Wood of Brown University has written; before the American Revolution, "the colonists knew they were freer, more equal, more prosperous, and less burdened with cumbersome feudal and monarchical restraints than any other part of mankind in the 18th century." Yet they rebelled anyway, but why? One need not be a great scholar of American history to know that "no taxation without representation" was the rallying cry of the revolution. As another historian has written, "Viewing the matter calmly from a distance, it must be confessed that no better or more equitable method of

taxing the colonies could have been found, that is if it be conceded that England has the right to tax them at all." But it was to this very point that the colonists would not concede, for to them taxation without representation was tyranny. And it was for this very reason that the founders gave control of the purse, of appropriations, to the representative branches alone.

Alexander Hamilton's set out this point very cogently in Federalist # 78:

"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The Legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."

Now either Hamilton and Madison were correct or they were incorrect. And if they were correct then judicial edicts directing the appropriation of money can not be squared with our system of government. I would further suggest that the framers of the Kansas Constitution and indeed the Courts of this State for most its history have agreed with this point. The Kansas Constitution, in its current form places the appropriation power under Art. 2, the section that sets forth legislative powers. Section 24 of Article 2 provides that, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." I would contend that virtually every criticism that I have heard directed at the proposed amendment applies with equal force to the existing constitutional provision as traditionally interpreted.

To prove my point I'd direct the committee's attention to the case of *Panhandle Eastern Pipe Line v. Fadley*, decided by the Kansas Supreme Court in 1962. In that case Panhandle Pipe Line paid a severance tax that was later declared unconstitutional. The district Court found, reasonably enough, that they were entitled to a refund and issued an order directing the same. The Kansas Supreme Court found this order to be inappropriate because courts lack the authority to issue orders that cause money to be drawn from the state treasury. Indeed the Kansas Supreme Court of that day wrote that Article 2 § 24 is an "insurmountable constitutional provision" even in the face of a case where the Court itself recognized that "morally and in good conscience it would seem plaintiff is entitled to recover." In other words there was a time when the Kansas Supreme Court clearly recognized that it is a Court of limited powers that can not invade the legislative prerogative over appropriations just because they'd really like to do so in a given case.

As Justice Frankfurter put it, the ultimate touchstone of constitutionality is the language of the constitution itself. With this in mind I would suggest that the Court in *Montoy* has abandoned fidelity to the language of the Kansas Constitution, both in the remedy it has ordered and in its underlying analysis of the substantive Article 6 question before it.

Now in saying that I know full well that some have argued the contrary, that the Court in *Montoy* had no choice but to reach the result and impose the remedy that they did. This is simply not the case. School finance litigation has occurred in many states and courts across the country have proven by their actions that many remedies were available to the Court short of directing a specific appropriation.

Furthermore, the underlying opinion itself was an example of judicial overreaching that stands in sharp contrast to the action of many other Courts. One example is found in the case of *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996). In that case, Article 10, Section 1 of the Illinois Constitution states that the Illinois legislature must provide "high quality educational institutions and services." Despite a standard arguably much higher than the "suitable provision for finance language" in the Kansas Constitution, the Illinois Supreme Court said this:

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

The Court did not have to act as it did in *Montoy* as to either result or remedy. They could have confined themselves to the text of the constitution as the Illinois Court did. And with the Illinois Court I would contend that it is a "transparent conceit" for the Kansas Supreme Court to claim that its order of $143 million, with another $568 million to come is derived form the actual language of the Kansas Constitution in any meaningful sense.

Indeed, one of the most shocking aspects of the *Montoy* decisions is the fact the Court specifically lists its "role as defined by the Kansas Constitution" as merely one of many factors to be considered in deciding the case. The Court has explicitly stated that its role as defined by the Kansas Constitution is not an absolute boundary to its authority, but merely a factor to be considered. This is astonishing to say the least.

The amendment that I have proposed is nothing more than attempt to clarify what should have been clear already; that the legislature and not the courts have the power have the purse.

What are the consequences if we do not act to reign in the remedy power of the Court as exercised in *Montoy*? First let me suggest that if the Court can order us to spend one dollar it can order us to spend a billion dollars. If we concede the Court's authority to direct appropriations in principle then the only lawful choice must be to obey. If we are to stand up for legislative prerogatives we must do so by working within the system via the amendment process.

I would ask you to consider that if we do not act this may well be only the beginning of judicial edicts regarding appropriations. Article 6 sec. 6 clearly applies not just to K-12 education but to regent's institutions as well. It is no great stretch to imagine that some lawyer is right now considering using the Court's reasoning in *Montoy* to require greater expenditures for higher education.

Or consider Article 7 Section 1 which says "institutions for the benefit of mentally of physically incapacitated, and such other benevolent institutions as the public good may require, shall be fostered and supported by law." Now given the Court's penchant for deciding cases based on dictionary definitions so I looked up the word "foster." Webster's says this word means "promote the growth and development of." It is not difficult to imagine the Court one day reading this language to mean we have an obligation to support ever growing programs for the disabled in an amount to be determined by the Court. In fact I would suggest that this is exactly the reason why certain groups will testify against this amendment here today.

I would like to briefly address a few of the more common objections I have heard to the amendment.

1) The amendment is not an attempt to limit the power of judicial review. Rather, it will help see to it that judicial review is conducted as that doctrine has been traditionally understood. I have heard many opponents of the amendment wrap themselves in the *Marbury vs. Madison* decision that established judicial review at the federal level. Curiously, these people never seem to mention that in that case Justice Marshall very specifically disclaimed the notion that Judicial Review provides any justification for the Court interfering with the prerogatives of another co-equal branch of government. Indeed he wrote that, "It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment."

2) Some have argued that Kansas is not bound by the same separation of powers doctrine that constrains the federal courts. Such a position is totally at odds with the traditional understanding of the Kansas Supreme Court as expressed in cases such as *Van Sickle v. Shanahan* where the Court opined that "The government, both state and federal, are divided into 3 departments, each of which is given the powers and functions appropriate to it. Thus a dangerous concentration of powers is avoided, and also the respective powers are assigned to the department best fitted to exercise them."

3) Some point to cases like the Kansas City, MO school desegregation case, where a Court ordered expenditure of funds and the continuation of a property tax provision without taxpayer approval. It is important to note that in that case the order was directed by a federal court to a school district, not to a co-equal branch of government. The analogous situation to the Montoy decision would be one where a federal court had directed the U.S. Congress to appropriate money. This has never happened.

4) Some have argued that in a technical sense the Court has not appropriated funds, but merely ordered the legislature to do so and as such its conduct might survive a technical reading of the appropriations clause. As U.S. Supreme Court Justice Anthony Kennedy once noted in a similar situation, such an argument is a mere conceit as a legislative vote taken under such circumstances clearly blurs the lines of legislative accountability by making it appear that a decision was reached by elected representatives when the reality is otherwise.

5) As suggested above, some argue that this amendment would unduly limit the ability of citizens who have been wronged by the State to seek full redress. It must be recalled that the State already enjoys sovereign immunity from suits for damages. The amendment in question makes it very clear that under circumstances where the legislature has acted to waive this immunity, as it has done under the Kansas Tort Claims Act, this amendment would not preclude damage judgments. No violence is done to separation of powers here because the Court is acting pursuant to a specific legislative grant of authority. In short, in any case seeking redress for past damages resulting from State action, third amendment would have no impact whatsoever on the current state of the law. As such the argument in this regard is vastly overstated by many of the amendments opponents.

The only "change", and this is only a change because of the Court's expansive interpretation of its remedy power in *Montoy*, would theoretically involve cases where the Court is not seeking to remedy a past wrong, but is instead attempting to direct future legislative conduct. And here I would again contend that for a court to act in such a fashion is inconsistent with the role of the judiciary. Courts routinely judge the constitutionality of past legislation. However, that is as far as the judicial power extends: courts lack the authority to compel a co-equal branch of government to pass specific statutes in the future. In other words, courts can create a void in the law by striking down particular statutes; but they cannot seize the reins of legislative power and attempt to fill that void. That is why the Supreme Court of the United States has never ordered Congress to pass a law. Put less technically, the amendment in question changes nothing of the law rightly understood. It merely restores the proper balance between the legislative and judicial branches.

In a related fashion some have argued that HCR 5032 could be construed to require an appropriation by the legislature every time a money judgment is entered against the State of Kansas. I would first contend that this is no greater a problem under HCR 5032 than it is under the existing language in the Kansas Constitution. Furthermore, the potential application of this concern is so narrow as to be illusory. Indeed this hypothetical objection could only apply to litigation where sovereign immunity was not applicable, where Kansas statute did not already authorize damages, and where the U.S. Constitution (including the Supremacy Clause) does not apply. Even were such a case to arise nothing in the amendment would prohibit an agency from paying such a judgment out of existing funds appropriated by the legislature for purposes of general agency expenses or agency expenses relating to the general subject matter of the judgment. In short, the situation in such a case would be no different than it is today under existing law.

6) Some have argued that passing this constitutional amendment is unwise in that it would be unduly provocative to the Court. I would simply note that many of the people who have advanced this argument were also claiming that they would be very surprised if the Kansas Supreme Court would ever order a dramatic remedy such as school closer. We all saw that the Court, via its July 2, 2005 show cause order, is in fact very ready to order the most dramatic measures possible in order to bully the legislature into complying with its wishes. And last September, in the issuance of concurrences by three justices we saw further evidence of just how aggressive this Court is prepared to be. Acting now to defend legislative prerogative is not an act of provocation, it is an act in defense of the right of the people to retain authority over the taxing and spending power of the State via their elected representatives.

But under our State Constitution, unlike many other states, the people can not act directly to amend the constitution and protect their rights. While the people are sovereign, they can only speak in their constitutional voice as electors if we allow them to do so by presenting a constitutional amendment to them for consideration. This amendment would provide the people that opportunity to exercise their voice and to reestablish the proper bounds of judicial authority as understood from the earliest days of our nation.

Allow me to conclude by saying that, all this having been said, it is comforting to remember that in our system of government it is the people, not the legislature or the courts who are ultimately sovereign. And it is with this in mind I believe that the wisest course for the legislature is to take the high road in this dispute, remembering that despite all appearances to the contrary the path of principle is indeed the safer path.

As such I believe our legislature must work within our constitutional framework by presenting to the people a constitutional amendment to reign in the judicial excess and restore the basic principles of representative democracy.

By this method a constitutional crisis can be avoided, balance can be restored among the branches of government, and we can look back to the sacrifices of our forefathers with a clear conscience saying we too have done our part to defend the principle of representative democracy for which so many have sacrificed so much. Thank you.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

MICHAEL R. (MIKE) O'NEAL

104TH DISTRICT
HUTCHINSON/NORTHEAST RENO COUNTY

LEGISLATIVE HOTLINE
1-800-432-3924

CHAIRMAN:
JUDICIARY COMMITTEE

VICE CHAIRMAN:
SELECT COMMITTEE ON SCHOOL FINANCE

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HCR 5032
If the Court can Order an Amount
They can also Direct the Distribution
Rep. Mike O'Neal
March 13, 2006

Many members of the legislature have praised the decision of the Kansas Supreme Court in *Montoy* as a bold statement of the legislature's alleged failure to make suitable provision for finance of the education interests of the state. They praise the decision because they agree with it. The "end", in their view, justified the court's "means", in getting there. The court, they say, must have the power to order the Legislature to appropriate a sum certain by a date certain because the court did it, and who are we to question a direct order from the court. To resist, they say, is to show disrespect for the judicial branch.

To those who argue that the court has the power, because they have undertaken to assume that power, I say: "Be careful what you ask for." The same people who claim the court has the power to order a sum certain by a date certain should take some time and reread the court's two preliminary orders, the Jan. 3, 2005 order and the June 3, 2005 order. The Jan. 3, 2005 order, e.g., contains the following:

> "…In particular, the plaintiff school districts (Salina and Dodge City) established that the SDFQPA fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, i.e., ***middle-and large-sized districts with a high proportion of minority and/or at-risk and special education students…"*** (Emphasis added.)
>
> …
>
> "…Specifically, the district court found that the financing formula was not based upon actual costs to educate children but was instead based on *former spending levels and political compromise*. This

TOPEKA ADDRESS

STATE CAPITOL BLDG., SUITE 143-N
TOPEKA, KS 66612-1504
785-296-7679
website: reponeal.com
e-mail: o'neal@house.state.ks.us

HUTCHINSON ADDRESS

> failure to do any cost analysis ***distorted the low enrollment***, special education, vocational, bilingual education, and at-risk student weighting factors." (Emphasis added.)
> ...
> "It is clear increased funding will be required; ***however, increased funding may not in and of itself make the financing formula constitutionally suitable. The equity with which the funds are distributed*** and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education. By contrast, ***the present financing formula increases disparities in funding***, not based on a cost analysis, but rather on political and other factors not relevant to education." (Emphasis added.)

Although the court reversed Judge Bullock's ruling that our formula was a violation of equal protection and found that "all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose" the court went on to hold that "the present financing formula increases disparities in funding." In so stating, the court was clearly critical of present weightings, particularly low enrollment weighting and the political compromises that went into it creation and maintenance.

H.B. 2247 was a good faith effort to address every expressed concern in the court's Jan. 3, 2005 order, including the call for a non-specific level of additional funding. On June 3, 2005 the court issued another interim order in *Montoy*. Most have focused on the court's order for the Legislature, by July 1, to appropriate an additional $143M for schools. There is much more in the court's opinion than that, however. Specifically, the court stated:

> "...no later than July 1, 2005, for the 2005-2006 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004-2005 school year, which includes the $142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the ***implementation*** beyond the 2005-2006 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion. (Emphasis added.)

The court devoted space in its opinion to a discussion of similar litigation in Ohio. Interestingly, the court didn't site the Ohio court's latest opinions on the subject, but rather cited an earlier decision (Ohio has since dismissed its case even though the

legislature there had, in its opinion, still failed to do what the court suggested should be done). Quoting from the earlier Ohio decision the Kansas court stated:

> "The legislature has the power to draft legislation, and the court has the power to determine whether that legislation complies with the Constitution. *However, while it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since* ***the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment,*** *to ensure that it is then constitutional.* If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy." (Emphasis added) *DeRolph v. State*, 89 Ohio St. 3d 1, 12, 728 N.E. 2d 993 (2000).

Clearly, the court has suggested in its opinion that the power to order an amount of funding includes the power to order the specifics of its distribution (implementation). With that in mind, consider other language in the court's opinion. With regard to base state aid per pupil the court noted:

> "…The plaintiffs, on the other hand, claim ***that increasing the BSAPP only exacerbates the inequities in the system because the formula was not adjusted to make distorted weights, such as the low-enrollment weight, correspond to actual costs.*** For example, for every $1 of base funding that middle-sized or large districts receive, some low-enrollment districts receive $2.14…" (Emphasis added.)
>
> …
>
> "At a minimum, the increased BSAPP provided for in H.B. 2247 substantially varies from any cost information in the record and from any recommendation of the Board or the State Department of Education."

With regard to at-risk funding the court parroted the A&M recommendations of .20 for districts with 200 or fewer students, .52 for districts with 1,000 students, .59 for districts with 10,000, and .60 for districts with 30,000 students ($1491 - $2,790 per student). As to bilingual, the court acknowledged the increased funding in H.B. 2247 but noted "it still differs substantially from the cost information in the record", namely, the A&M recommendation of weighting based on enrollment and ranging from .15 to .97 ($1,118 to $4,510 per student). With regard to special education funding, the court strongly suggested funding at the level of 100% of excess costs, ruling that there was no evidence in the record that districts had over-identified special ed students. Alternatively,

the court noted that A&M recommended a separate weighting range of from .90 to 1.50, "resulting in a nearly $102.9 million (in 2001 dollars) increase in funding – a stark contrast to the $17.7 million provided by H.B. 2247."

The court had harsh words for the LOB, noting that "the LOB does not address inadequate funding of middle-sized and large districts that have a high concentration of bilingual, at-risk, minority, and special education students, high pupil-to-teacher ratios, and high drop-out rates, but also have low median family incomes and low assessed property valuation." The court agreed with the plaintiffs and the SBOE that the increase in the LOB authority in H.B. 2247 exacerbates the wealth-based disparities between districts.

As to the Cost-of-Living provisions in H.B. 2247, the court noted that it was not the high cost-of-living districts that needed help with teacher salary enhancements but, rather, it was the "high-poverty, high at-risk student populations that need additional help in attracting and retaining good teachers." With regard to the new Extraordinary Declining Enrollment provisions of H.B. 2247, the court noted that "[t]hese provisions have the potential to be extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts."

As to all three of the local components the court noted that they "fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education already provided." However, while not striking down these provisions, the court stayed the provisions, presumably until after the 2006 legislative session. The fact the court has indicated it will retain jurisdiction until after the legislature has acted in 2006 suggests these provisions will be stayed no matter what action is taken by the Legislature in the Special Session.

The court had particularly strong concerns about low-enrollment weighting. The fact that the court lacks an understanding of this element is no comfort. The court noted:

> "Because of the significant impact of low-enrollment weighting on the financing formula, in our January opinion and April order we sought cost justification for it. In response to questions from

> the court at oral arguments, counsel for the state could not provide any cost-based reason for using the 1,750 enrollment figure or for the weight's percentage. This absence of support is particularly troubling when we consider the disparity this low-enrollment weighting may produce. H.B. 2247 has the potential to worsen this inequity because it eliminates correlation weighting for districts with 1,750 enrollment or more. The funds allocated for correlation weighting were transferred to the BSAPP; this gives low-enrollment districts even more of the funds that previously were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting."

In discussing the school finance formula as a whole the court noted that "counsel for the State could not identify any cost basis or study to support the amount of funding provided by H.B. 2247, its constellation of weightings and other provisions, or their relationships to one another."

Any doubt that the court's perceived power to order the Legislature to appropriate a sum certain by a date certain includes the perceived power to control the distribution of any appropriated funds should be laid to rest after review of the provisions of the court's June 3, 2005 order, which not only stayed the three local option provisions in H.B. 2247 but also ordered revision of the Legislature's cost study language in H.B. 2247. In that regard, the court ruled:

> "…The post audit study must incorporate the consideration of outputs and board statutory and regulatory standards, in addition to statutorily mandated elements of kindergarten through grade 12 education. Further, post audit's report to the legislature must demonstrate how this consideration was accomplished."

If the court has the power to amend legislation under the guise of "remedial" action, the court has the power to take whatever the Legislature passes and judicially legislate a different distribution or stay provisions they disagree with. The ONLY certainty there is if we pass a bill with additional funding is that it will be spent. There is NO certainty that the court will agree with our decision as to how it must be spent. The court stated that they were "guided not only by [their] interpretation of Article 6, sec. 6, but also by the present realities and common sense." In other words, the justices have reserved unto themselves the right to substitute their collective judgment for the will of the peoples' elected representatives.

Questions to ponder in considering various school finance proposals:

1. Would the court accept a plan that put money in the base, in light of its expressed concerns in the June 3 opinion?

2. Would the court accept any plan with local option budgeting involved, in light of the concerns expressed in its opinions?

3. Would the court accept any plan that changes funding for vocational education, e.g., in light of the fact that vocational weighting was not one of the areas the court expressed concerns about?

4. Would the court accept a plan that adds to at-risk, bilingual, and/or special ed funding without an adjustment to compensate for the court's perceived concerns over low-enrollment weighting?

5. Would the court accept a plan that varies from the A&M or LPA Cost Study recommendations with regard to particular weights, in light of the court's apparent reliance on the earlier A&M study?

It has been argued that while the court ordered us to appropriate a sum certain by a date certain, the court wouldn't undertake to order a distribution of future funds in a manner different than what is approved in the 2006 Session. My questions: What makes anyone think they wouldn't? Where do we go to look up the answer? What law book, constitutional provision, court rule, etc., says the court wouldn't take this additional extraordinary step. What about the court's decisions in *Montoy* thus far suggests they wouldn't?

To some the Special Session was and this session is about school finance. To others it's about separation of powers. To still others it is about BOTH. We must, as the peoples' representatives, first protect the separation of powers and the authority of the legislative branch to determine public policy and control the purse by passing this proposed constitutional amendment. Only then can we determine what is good public policy with regard to funding public education, free of undue influence from another co-equal, but not superior, branch of government.

KANSAS BAR ASSOCIATION

Testimony in Opposition to

HOUSE CONCURRENT RESOLUTION 5032

Presented by James W. Clark, Legislative Counsel
Kansas Bar Association
March 14, 2006

The Kansas Bar Association appears in opposition to **HCR 5032**, just as we appeared in opposition to **HCR 5003** and **SCR 1603** during the Special Session. All of the proposed amendments to the Kansas Constitution are a specific reaction to the Montoy decision, where the Kansas Supreme Court directed the Legislature to provide additional funding to finance public education. And all of the proposed amendments seek to limit such order by depriving the judiciary as well as the executive branch from any authority over appropriations, directly or indirectly.

Under the separation of powers doctrine, both in federal law as well as Kansas law, the power of appropriation lies solely in the legislative branch of government. And under the separation of powers doctrine in both federal law and Kansas law, the respective Supreme Court retains the power to interpret the respective Constitution. Inherent in that power of interpretation is the power of the court to order a remedy for violations of the Constitution, including appropriation of funds.

The effect of the proposed amendment is to depart from the delicate balance of powers of the federal system by reducing the power of the Kansas Supreme Court to order appropriation of funds as a remedy for violations of the Kansas Constitution. But the proposed amendment does not remove other methods of enforcement, such as holding legislators in contempt, or even closing schools to prevent them from operating in an unconstitutional manner.

The proposed amendment may also result in unintended consequences having nothing to do with financing of public education. For example, the proposal does not speak to mandates of federal statutes, many of which are enforced in state courts. Nor does it speak to enforcement of judgments against the state arising out of cases of ordinary negligence or condemnation. It may well be determined that under the proposed amendment, in these ordinary kinds of cases civil litigants will be deprived of a remedy unless there is a specific appropriation made by this Legislature.

Because the proposed amendment not only reduces the independence of the Kansas judiciary, but reduces the right of Kansas citizens to the redress of grievances, the Kansas Bar Association urges this Committee to take no action on **HCR 5032**.

* * *

Select Committee on School Finance
Date: 3-14-06
Attachment # 3-1

Testimony before the Members of the Special Committee on the Judiciary
Regarding Senate Concurrent Resolution No. 1603
By
Professor Jeffrey D. Jackson
Washburn University School of Law

This testimony is regarding a proposed amendment to the Kansas Constitution which would amend section 22 of article 2 to provide that *"[t]he executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States."* It appears that this proposed amendment is a response to the recent decision of the Kansas Supreme Court in the *Montoy* case, wherein the court directed the legislature to provide additional funding to the state school finance system. The proposed constitutional amendment appears to be an attempt to prevent orders of this nature in the future. However, the proposed language of the amendment, as it now stands, does not accomplish this goal. Further, it causes a change in the fundamental relationship between the legislative, executive and judicial branches in Kansas that has the potential to cause future problems unrelated to the school finance issue.

In the course of this testimony, I will be discussing four issues: 1) the relationship between the three branches of Kansas government, especially the relationship between the legislative and the judicial branches; 2) the *Montoy* decision in the context of this relationship; 3) the effect of the proposed constitutional amendment on cases such as the *Montoy* case; and 4) the possibly unintended consequences of the proposed constitutional amendment.

The Relationship of the Branches of Government in Kansas

Generally, when talking about the role of the various branches of government, the phrase most often used is "separation of powers". The United States Constitution sets up a system of checks and balances such that the power of the federal government does not reside in any one branch. Rather, each branch has certain powers that it alone can exercise. However, these powers are not absolute, but are generally subject to certain "checks" from the other branches.

It should be noted that, contrary to popular belief, State governments do not have to follow the federal government's separation of powers doctrine. Thus, States are free to take an approach to separation of powers that is in fact different than that dictated by the federal government's doctrine. However, States are generally very reluctant to do so, and instead have chosen to establish, in their own constitutions, frameworks which closely mirror that of the federal government. Kansas is one of those states, and the powers of the different governmental branches in Kansas closely mirror those of the branches under the Federal Constitution.

One of the areas in which Kansas has chosen to follow the federal government's separation of powers is in the area of appropriations. The Kansas Constitution, in article 2, section 24, provides that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." This very closely tracks with the language in the Appropriations Clause, Article I, Section 9, clause 7 of the United States Constitution, which provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The two sections have generally been interpreted in an identical manner.

The Effect of the *Montoy* Decision on the Traditional Separation of Powers

A common argument that has been raised is that the Kansas Supreme Court's decision violated the "separation of powers" arrangement in the Kansas Constitution. However, it is clear that, at least as far as the federal Separation of Powers Doctrine goes, the Kansas Supreme Court's decision in *Montoy* was in fact well within its bounds.

Ever since the case of *Marbury v. Madison* was decided in 1803, it has been generally accepted that the judicial branch has the power to establish remedies for violations of the provisions of the Constitution. Further, the judicial branch has great discretion in determining what those remedies are.

The perceived violation of separation of powers at issue in *Montoy* appears to be based on the idea that the judicial branch should not be able to order the legislature to appropriate money to remedy a constitutional violation. However, as a matter of settled constitutional law, such an order does not violate either the Appropriations Clause of the United States Constitution or the federal Separation of Powers doctrine. Rather, it is well settled that the courts may in fact order legislative bodies to use their appropriation power if such is necessary to remedy constitutional violations. At least ten United States Supreme Court cases, dating as far back as 1861, have recognized this power.[1]

Thus, the Kansas Supreme Court's decision in *Montoy* was clearly consistent with the separation of powers concept created by the United States Constitution. Once again, Kansas is not bound to follow the United States Constitution's provisions with regard to

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[1] See, for example, *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Griffin v. Prince Edward County School Board*, 377 U.S. 218, 233 (1964); *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909); *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464 (1906); *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395 (1881); *United States v. New Orleans*, 98 U.S. 381, 25 L.Ed. 225 (1879); *Heine v. Levee Commissioners*, 19 Wall. 655, 657, 22 L.Ed. 223 (1874); *City of Galena v. Amy*, 5 Wall. 705, 18 L.Ed. 560 (1867); *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L.Ed. 403 (1867); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 16 L.Ed. 735 (1861).

separation of powers. However, it should be understood that the amendment at issue here does in fact move Kansas's concept of separation of powers away from that of the United States Constitution, and into relatively uncharted territory.

The Effect of the Proposed Constitutional Amendment on Cases such as *Montoy*

If the purpose of Senate Concurrent Resolution No. 1603 is to prevent the courts from ordering remedies such as the one in *Montoy*, its effectiveness in accomplishing that purpose is questionable. The genesis of the Supreme Court's opinion in *Montoy* was the "suitable provision for finance" of education mandate contained in article 6, section 6 of the Kansas Constitution. Because the amendment does not address that constitutional duty, it will not prevent courts from enforcing that provision. While the proposed amendment might theoretically prevent courts from actually affirmatively ordering the legislature to appropriate funds, it is questionable whether the language in the amendment would curtail other remedies that would ultimately have the same effect, such as holding government officials in contempt for failing to suitably finance, or shutting down the school system. In fact, the amendment, as currently written, appears to be tailor-made to induce many further rounds of costly litigation over the limits of judicial enforcement powers. If the concern is to prevent further orders such as that in *Montoy*, any proposed amendment would be better addressed to the suitable provision for finance mandate in article 6, section 6 of the Kansas Constitution.

Further Unintended Consequences

In addition to its questionable value in preventing orders such as the one in *Montoy*, the proposed constitutional amendment contained in Senate Concurrent

Resolution No. 603 has the potential to result in consequences that were presumably not intended by its authors, any one of which could prove to be very costly for the state.

The first of these problems arises with the failure of the amendment to consider federal laws. While the amendment contains language which recognizes that courts may order the appropriation or redirection of funds if such is necessary to comply with the United States Constitution, it does not mention (and therefore does not allow) courts to order the appropriation or redirection of funds if necessary to comply with federal statutes. There are many instances where violations of federal statutes may be litigated in State courts. The effect of this amendment as written will be to essentially force all of those cases into federal courts, because only federal courts will be able to order a remedy. Generally speaking, federal courts are often less concerned with the impact of their orders on the state treasury than a comparable state court would be.

A second problem that is sure to spark litigation involves the amendment's prohibition on "redirecting the expenditure" of state funds. It is conceivable that the prohibition would prohibit state courts from awarding damages against the State in any case, including routine negligence cases. While such an extreme interpretation is unlikely, the amendment is almost certain to spawn years of litigation attempting to determine exactly what orders constitute a redirection of state funds.

Conclusion

As currently worded, the language of the proposed constitutional amendment in Senate Concurrent Resolution No. 1603 has the potential to spawn consequences that were presumably unforeseen by its authors. These consequences have the potential to be very costly for the State of Kansas. In addition, if the purpose of the amendment is to

prevent courts from ordering remedies such as the one contained in the decision of the Kansas Supreme Court in *Montoy*, the amendment's effectiveness in doing so is highly questionable. What is certain is that the current language of the amendment will spawn years of litigation aimed at determining its parameters, and will move the State away from the traditional separation of powers model created by the United States Constitution and into relatively uncharted waters.

SPECIAL COMMITTEE ON JUDICIARY
September 15, 2005

Written Testimony Concerning SCR 1603

submitted by Richard E. Levy
Professor of Law, University of Kansas School of Law

I appreciate the opportunity to appear before the Special Committee on the Judiciary to discuss the legal implications of SCR 1603 which, if passed by the Legislature and approved by the electorate, would amend Article 2, § 24 of the Kansas Constitution. That section currently provides that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." The proposed amendment would add the following language at the end of the current section:

> The executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States. Any existing order directing the legislative branch to make an appropriation of money shall be unenforceable as of the date this provision is adopted.

This amendment is a possible response to the Kansas Supreme Court's actions in *Montoy v. State*, in which the Court determined that the Legislature had failed to "make suitable provision for finance of the educational interests of the state" as required by Article 6, § 5 of the Kansas Constitution.

Obviously, the *Montoy* case and the Legislature's response to it, including this proposed amendment, are of vital importance to the State of Kansas, its government, and its citizens. My objective in testifying to the Committee is to provide a careful and balanced assessment of the legal effects of the proposed amendment. I hope this information will be of use to the Committee and the Legislature as it weighs this important matter.

Background

The Court in *Montoy* interpreted the Legislature's duty to make "suitable provision for finance" to mean that funding decisions must be based on the actual costs of providing an education. This in turn required that educational funding must include both adequate funding and an equitable allocation of those funds. Based on the evidence in the record, the Kansas Supreme Court affirmed the district court's finding that the Legislature had failed to meet each of these duties. Again relying on the evidence in the record, the Supreme Court concluded that substantial funding increases were required. Although the Legislature provided for nearly $150 million additional funding during the 2005 session, in a June 2005 order the Supreme Court concluded that the additional funding was inadequate and specified that a total increase of $285 million dollars for the 2005-06 school year was necessary to satisfy constitutional requirements. The order further indicated that this amount

represents only a third of the total additional funding that will be required. This order led to a special legislative session in which additional funds sufficient to satisfy the Court were eventually appropriated. The Legislature also considered, but did not adopt, several constitutional amendments responding to *Montoy*, including SCR 1603.

SCR 1603's Components

SCR 1603 contains three distinct components which I will analyze separately. First, it provides that "[t]he executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money. . . ." Second, it provides that executive and judicial branches shall have no authority "to redirect the expenditure of funds appropriated by law," with an exception for federal constitutional requirements. Third, it provides that upon adoption of the Amendment, "[a]ny existing order directing the legislative branch to make an appropriation of money shall be unenforceable. . . ."

Authority to Direct Appropriations. The provision denying the executive and judicial branches the authority to direct the Legislature to make an appropriation makes explicit a proposition that is arguably implicit in the separation of powers and in current language requiring an "appropriation made by law." In *Panhandle Eastern Pipe Line Co. v. Fadely*, 189 Kan. 283, 369 P.2d 356 (1962), for example, the Kansas Supreme Court held that Article 2, § 24 prevented a lower court from ordering the Director of Revenue to refund taxes that had been paid into the treasury, even though the taxpayer was legally entitled to the refund. *Montoy* differs from *Panhandle* because the Kansas Supreme Court did not require money to be taken from the treasury without an appropriation.

The objection to *Montoy* to which this amendment responds is that the Kansas Supreme Court ordered the Legislature to make an appropriation. To the extent that is what the Court did, if SCR 1603 were adopted it would certainly prevent similar orders in the future (and in view of the last sentence of the amendment, might nullify the Court's existing orders). This provision, however, would not prevent the Kansas Supreme Court from declaring that the level of funding and the funding formula for schools are constitutionally inadequate, nor would it prevent the Court from enjoining the expenditure of funds for schools, as suggested in the Court's "show cause" order of July 2, 2005.

Arguably, the threat to close down the schools if the Legislature does not appropriate a specific dollar amount is tantamount to a direct order to make an appropriation. Indeed, every order from a court is essentially a threat to take some action if the party subject to the order does not comply. At the same time, the SCR 1603 does not address the underlying questions presented by Article 6 of the Kansas Constitution. The Court would therefore continue to review the constitutional adequacy of school finance and, if it concluded that the system was constitutionally deficient, it would have to fashion some remedy for the deficiency. Whether a particular combination of findings and remedies would amount to a directive to the Legislature to make an appropriation in violation of this provision of SCR 1603 would likely be a matter of degree.

Authority to Redirect Appropriations. The second provision of SCR 1603 denies to the executive and the judiciary any power to redirect appropriations that have been made by the Legislature. Depending on its interpretation and application, this provision could have a significant impact on the manner in which judgments against the state are satisfied. Although *Montoy* is distinctive because the Kansas Supreme Court's order appeared to impose a duty to appropriate directly on the Legislature, the State of Kansas may be held liable for monetary compensation or subject to judicial orders that require the expenditure of funds. Examples of this would include "inverse condemnation" actions in which a landowner establishes that government action has "taken" his or her property and that he or she is entitled to "just compensation" for the taking, personal injury actions against the state pursuant to the Kansas Tort Claims Act, or actions for unpaid compensation by state employees.

When a state agency is found liable under these circumstances, it is my understanding that the award is usually paid out of the agency's available funds. The question would be whether this kind of payment constitutes redirecting an appropriation in violation of SCR 1603. If so, then SCR 1603 could have the effect of requiring specific legislative appropriations to satisfy judgments against the state or state agencies. This might be addressed through a general appropriation from which judgments may be drawn or by specific appropriations for particular agencies or even particular judgments. It is more likely, however, that the Kansas courts would follow the lead of other states to find that judgments may be satisfied using appropriated funds from budgetary items that are sufficiently related to the judgment. On the other hand, redirecting funds from one recipient to another or from a statutorily specified use would likely be prohibited.

The case of *Butt v. State*, 4 Cal. 4th 668, 842 P.2d 1240 (Cal. 1992), is illustrative. In that case the California Supreme Court held that the state had a duty to step in and provide funding for a school district that had announced it was going to shut down six weeks early because it had run out of funds. The California Supreme Court affirmed portions of a lower court order requiring the state to expend funds, but it reversed those portions of the order directing that the moneys be taken from unused funds in a particular program and in another district. Those portions of the order violated the California Constitution's appropriations clause (Article XVI, section 7), which is very similar to current Article 2, § 24, of the Kansas Constitution. On the other hand, the California Supreme Court indicated that courts could order agencies to satisfy judgments from general operating expenses and catchall budget items.

Two other cases are also suggestive. First, in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (S.C. 2002), the court held that the governor could not take concerted action to have funds that had been appropriated to colleges and universities from an unrelated escrow account returned to the state's general revenue fund. South Carolina's Constitution does not contain any provision analogous to Article 2, § 24, but the court relied on general separation of power principles and reasoned that "there is no provision in the South Carolina Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money." Second, in *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (W. Va. 1995), the Court upheld a writ of mandamus directing the state controller to disburse

treasury funds so as to satisfy a judgment awarding overtime pay to state troopers, even though the state constitution contained the following provision:

> No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated or provided. . . . (Art. X, § 3).

The court reasoned that the Legislature had already made an appropriation for personal services and that appropriation included a requirement that the funds be expended in accordance with the law, which required the overtime payments. The West Virginia Supreme Court has also ordered full payment of state pensions, reasoning that "once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests." *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995).

These cases suggest to me that the extent to which courts and executive agencies can or should be allowed to "redirect" appropriated funds so as to satisfy judgments is a difficult problem that the language of SCR 1603 does not necessarily resolve. The question would remain what constitutes the redirection of funds. It seems likely that the amendment would prohibit the use of funds appropriated for a specific purpose or a specific entity to be used for any other purpose or entity. On the other hand, an agency probably could satisfy a judgment, or be required by a court to do so, using funds appropriated to it provided that appropriation is sufficiently broad or the judgment sufficiently related to the appropriation so as to justify the conclusion that payment is within the scope of the appropriation. In such a case, the funds have not been redirected. It is hard to say, however, just where that line would be drawn and what impact it would have on the current practice of state agencies in satisfying judgments.

Nullification of Existing Orders. The final provision of SCR 1603 declares that an existing order directing the Legislature to make an appropriation would be "unenforceable." This language appears to be directed specifically at the Supreme Court's order in *Montoy*. Because the Legislature already appropriated sufficient funds to satisfy the Kansas Supreme Court for this academic year, this provision might have no immediate impact. If, however, the Kansas Supreme Court were to issue similar orders in the course of the ongoing litigation before the adoption of SCR 1603, it could have the effect of making those orders unenforceable.

As discussed above, however, it is not entirely clear whether the order in *Montoy* actually directs the Legislature to make an appropriation. Ultimately, the action that the Court would have taken in the absence of a sufficient appropriation would be to enjoin the expenditure of appropriated funds. If a similar order arises and the threatened injunction is seen as the "enforcement" of an order "directing" an appropriation, it would be precluded. But if the Court simply declared the statute appropriating funds and providing for their allocation to be unconstitutional and enjoined its enforcement, this provision would have no effect.

A lingering issue is whether there is a constitutional problem with nullifying an order in an existing case. As a matter of state constitutional law there would be none because SCR 1603 would amend the constitution. To the extent that the such an order created vested legal rights in the plaintiffs, however, there might be a federal due process issue because the amendment is retroactively destroying a vested right. The argument for such a result is not especially strong, but it remains a possibility.

Larger Questions

Two larger questions warrant some discussion. In the broadest terms, the issues surrounding *Montoy* and SCR 1603 require that two competing sets of values be balanced. On the one side, the principle of representative government and the political accountability for taxing and spending are core values that SCR 1603 seeks to protect. On the other, the rule of law and the judiciary's responsibility for enforcing constitutional rights are also at issue. How best to reconcile these competing values is an important task that warrants careful consideration.

Second, a system in which every person who wins a judgment against the state must obtain a specific appropriation from the Legislature to satisfy that judgment could raise significant constitutional issues at the federal level. In some circumstances, it is the failure of the state to provide a remedy that creates a federal constitutional violation. In those situations, the failure of the Legislature to act could convert state law claims into federal civil rights claims.

HOUSE RESOLUTION NO. ____

By Representative Decker

A RESOLUTION memorializing the United States Congress concerning the No Child Left Behind Act.

WHEREAS, The Kansas House of Representatives believes that the federal mandate of no child left behind has caused undue pressure and unfair criticism of the students, teachers and administrators of our Kansas schools; and

WHEREAS, Everyone hopes that every child will attain 100% proficiency in their studies, but it is the belief of the Kansas House of Representatives that the establishment of the deadline that by 2014 100% proficiency will be met by all students in the areas the federal government has deemed appropriate is unreasonable and unacceptable; and

WHEREAS, Kansas students have high test scores that continue to rise. Each school in the state has met accreditation standards, and progress is being made inclosing achievement gaps. The federal government has created a system for schools, teachers and students to be labeled as failures while every measure of improvement is showing that improvement is being accomplished; and

WHEREAS, The Kansas House of Representatives requests that the Kansas State Board of Education not adopt the federal mandate of 100% proficiency by the 2014 deadline. The Kansas House of Representatives requests that the Kansas State Board of Education create a mechanism of performance targets in reading, writing, mathematics, history, government and science that will help students achieve 100% of their potential. The Kansas House of Representatives commends the state board of education for unanimously voting to develop a student growth model; and

WHEREAS, The people of the state of Kansas believe in a quality education for every child. Kansas has maintained and will continue to maintain high expectations for its educational system. The Kansas House of Representatives believes it is demeaning to have a system whereby a student, teacher or school is deemed a failure, and that the federal government is being unreasonable in its refusal to modify the No Child Left Behind

Act: Now, therefore,

Be it resolved by the House of Representatives of the State of Kansas: That we urge the United States Department of Education, the Kansas State Board of Education and the Congress of the United States to address the issues contained in this resolution, and to make changes and permit flexibility that will ensure success for schools, teachers and students; and

Be it further resolved: That the Chief Clerk of the House of Representatives provide an enrolled copy of this resolution to the President of the United States, the Secretary of the United States Department of Education, the President pro tempore of the United States Senate, the Speaker of the United States House of Representatives, each member of the Kansas legislative delegation and the Chairperson of the Kansas State Board of Education.