

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:31 A.M. on March 19, 2007, in Room 123-S of the Capitol.

All members were present except:

Terry Bruce arrived, 9:34 A.M.
Barbara Allen arrived, 9:37 A.M.
Phil Journey arrived, 9:49 A.M.
Derek Schmidt arrived, 9:33 A.M.

Committee staff present:

Athena Anadaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Nobuko Folmsbee, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:

Rod Richardson, Attorney, Johnson County
Larry McAulay, Director of Legal Services, Johnson County Legal Department
Delores Furtado
Jerome Gorman, Wyandotte County District Attorney
Robert Hecht, Shawnee County District Attorney

Others attending:

See attached list.

Approval of Minutes

Senator Goodwin moved, Senator Donovan seconded, to approve the committee minutes of February 5, 2007, and February 6, 2007. Motion carried.

The Chairman opened the hearing on **SB 374--County and district attorneys; compliance with county commission policies, when required.**

Rod Richardson appeared in support, providing background on the formation of the Johnson County Charter of Government and adoption of the Home Rule Charter. Since implementation in 2000, the provisions of the Charter have been followed consistently with the exception of the current District Attorney. This has resulted in employment policies and procedures inconsistent with established county policies subjecting the county to litigation, therefore, making this bill necessary. Enactment of the bill will assure the citizens of Johnson County that previously adopted provisions for the successful governing and managing of the County are not subject to being declared optional (Attachment 1).

Larry McAulay spoke in support indicating enactment of **SB 374** would codify the historical administrative policies and procedures Johnson County used over the last twenty years. This bill will ensure taxpayers that county resources are used properly including the office of the District Attorney (Attachment 2).

Delores Furtado appeared as a proponent indicating that the bill affirms the intent of the Charter approved by the voters of Johnson County in 2000. The Johnson County Government provides the administrative systems necessary to the operation of the District Attorney's Office including computer systems and support, state and federal reporting requirements, payroll, retirement and benefits management. Ms. Furtado stated that it is unrealistic and unfair to expect the County to provide and administer systems for the District Attorney without expecting the District Attorney to comply with necessary policies and procedures that ensure the systems are run legally and effectively (Attachment 3).

Jerome Gorman spoke in opposition stating this bill is an attempt by a county's legislative body to control a state official and, as drafted, is unlikely to withstand constitutional scrutiny. One potential problem is that not all District Attorney offices are included in the bill. Another potential problem is judicial interpretation could require **SB 374** to apply to Shawnee County. It appears that any county commission that disapproves of its District Attorney's activities would only need to designate the office as an "urban area" and to gain

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:31 A.M. on March 19, 2007, in Room 123-S of the Capitol.

control of a State office. Mr. Gorman noted that local governments have the power to limit the appropriations of the District Attorney's office through budget approval and stressed independent prosecutors should remain independent in order to exercise the judgement and discretion required for their job (Attachment 4).

Charles Branson spoke in opposition, relating the same concerns as Mr. Gorman (No written testimony).

Robert Hecht appeared in opposition, reiterating the issues presented by Mr. Gorman. Mr. Hecht stated concern that **SB 374** violates separation of power. District Attorneys are legally and ethically responsible for the acts of commission and omission of their employees, lawyers, investigators and support staff and can be sanctioned for failure to make proper discovery or disclosure, for improper public comment, and for ill motive in pursuing litigation. District Attorneys must be able to confidently have trust and reliability that their staff shares the same legal, prosecutorial and professional philosophy and dedication as the District Attorney. All elected officials must have the right to obtain and/or retain staff without intrusion from county commissioners or others who do not have responsibility for the office or its conduct or performance (Attachment 5).

Written testimony in support of **SB 374** was submitted by:

Annabeth Surbaugh, Chairman, Johnson County Board of County Commissioners (Attachment 6)

Written testimony in opposition of **SB 374** was submitted by:

Nola Tedesco Foulston, District Attorney, 18th Judicial District of Kansas (Attachment 7)

Phil Kline, District Attorney, 10th Judicial District of Kansas (Attachment 8)

There being no further conferees, the hearing on **SB 374** was closed.

The meeting adjourned at 10:31 A.M. The next scheduled meeting is March 20, 2006.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-19-07

NAME	REPRESENTING
Bill Bredy	Capitol Strategies
Jeff Boltzberg	KSA
Helen Pedigo	KSC
Brenda Harmon	KSC
Steve Kenedy	KCDAA
Richard Sweeney	Kenney & Assoc
Willa DeCastro	Am Adoptions
Dallas Bauer	SB
Lane Wans	JA
Kit Wolf	LGR
Bob Keller	JCSO
W. M. Keane	Federal Land
Larry McAulay	Johnson County
Dolores Fustado	Johnson County
Rod Richardson	Johnson Co Charter Commission
Robert Hecht	District Attorney, 3 rd Judicial District
Jerome Gorman	District Attorney, 29 th District
Charles Branson	District Attorney, 7 th District

TO: Kansas Senate Judiciary Committee

DATE: March 19, 2007

STATEMENT SUPPORTING SENATE BILL NO. 374

Offered by:

Rod L. Richardson—Member Johnson County Charter Commission
19910 Padbury Lane
Spring Hill, Kansas 66085
(913) 752-5501

STATEMENT

Mr. Chairman and Members of the Committee:

My name is Rod L. Richardson. I reside in Spring Hill, Kansas at 19910 Padbury Lane. I appear before you to offer this statement in support of Senate Bill No. 374. I do so as a member of the Johnson County Charter Commission.

The adoption of Senate Bill No. 374 is necessary to successfully implement one of the most important provisions of Johnson County's new Charter of Government, that is, the provision requiring compliance with policies and procedures of the Board of County Commissioners by the District Attorney as a "county official" in the manner described in Sections f(1)(2)(3)(4) of the proposed Bill.

The Johnson County Charter Commission was formed in 1999 under K.S.A. 19-2684 as amended. The Commission convened May 13, 1999. I had the privilege of serving on that Commission as a member appointed by the Board of County Commissioners. The Commission's charge was to study the structure of Johnson County Government and to make recommendations for improvements.

In May 2000 the Charter Commission submitted its report and proposed Home Rule Charter for Johnson County with two alternative sections. On November 7, 2000, the voters of Johnson County approved and adopted the new Charter along with the two alternative provisions.

Senate Judiciary

3-19-07
Attachment 1

Specifically, adopted Charter Section 5.05(E) states:

“E. District Attorney: The District Attorney shall continue to be an elected position. The offices of the elected County Sheriff and District Attorney shall comply with the administrative policies adopted by the Commission to the extent not inconsistent with law.”

Since the implementation of the new Johnson County Charter of Government, the provisions of Charter Section 5.05(E) have been consistently and faithfully followed with the exception of the current administration of the present Johnson County District Attorney. The current District Attorney has refused compliance. The result of this refusal has subjected his employees to employment policies and procedures inconsistent with established County policies. The District Attorney’s refusal compliance has further subjected both the County and the District Attorney’s employees to litigation.

As a member of the Johnson County Charter Commission, I want this Committee to recognize that the Charter Commission’s adoption of Charter Section 5.05(E) and its compliance provisions was considered by the Commission to be critical to the implementation of the provisions of the Charter which were intended to provide meaningful authority to the Board of County Commissioners and the County Manager necessary for their adoption and implementation of consistent policies and procedures of government; policies and procedures necessary to the efficient management of County Government. The Charter Commission’s inclusion of Section 5.05(E) in the proposed Charter and that Charter’s subsequent adoption by the citizens of Johnson County must be recognized as binding unless specifically prohibited by law.

Senate Bill 374 has been made necessary to assure the citizens of Johnson County who approved the Charter, as well as the Board of County Commissioners who govern under it, that the adopted provisions for the successful governing and managing of the County are not subject to being declared “optional” by those to whom they apply, in this case, the Johnson County District Attorney’s Office.

As a member of the Johnson County Charter Commission this statement is respectfully submitted in support of the adoption of Senate Bill No. 374.

Rod L. Richardson



JOHNSON COUNTY LEGAL DEPARTMENT

F. LAWRENCE MCAULAY, JR.
DIRECTOR OF LEGAL SERVICES
(913) 715-1901
LARRY.MCAULAY@JOCOGOV.ORG

**TESTIMONY REGARDING SB 374
SENATE JUDICIARY COMMITTEE
MARCH 19, 2007
F. LAWRENCE MCAULAY, JR.,
DIRECTOR OF LEGAL SERVICES**

Good morning Chairman and Committee members. My name is Larry McAulay. I am the Director of Legal Services for Johnson County. I appear here today on behalf of the Board of County Commissioners of Johnson County to testify on Senate Bill 374. The Board has expressly approved and does support passage of SB 374, and I have a letter from the Board Chairman, who could not be here today, to present to the committee. I do appreciate the opportunity to appear before the committee, and I offer the following testimony.

Senate Bill 374, as drafted, is legislation intended to clarify that the Office of the District Attorney is required to comply with the administrative policies and procedures adopted by the Board of County Commissioners, when the County has a voter approved Home Rule Charter. This legislation is not a political action. It is not directed at a particular person or situation. Rather, it is an attempt to codify that which has been in operation in Johnson County for more than 20 years and that which the voters of Johnson County believed they enacted in 2000 as a part of the County's Home Rule Charter. Included with my testimony is a copy of the Charter, and the provisions applicable to the District Attorney are contained in Section 5.05 E.

Our Board believes that adoption of clarifying legislation during this legislative session is imperative. It is not in the best interests of the residents of Johnson County to leave the Charter and its requirement that the District Attorney comply with Board policies in uncertainty. Without the requirement, there is no effective means to assure the taxpayers that county resources are being used properly by the District Attorney. There are no other statutory requirements, whether for auditing, competitive purchasing, or the like, that apply to the District Attorney. Additionally, the current statutes that do apply to the District Attorney are, frankly, outdated for the modern realities of administering a government office, and they do not make clear how the necessary administrative services are to be provided. It is not prudent for either the County or the District Attorney, now heading into budget planning for next year, to be left with confusion on this important issue when this legislature can resolve that confusion.

Currently, the Johnson County Government does provide the administrative systems and performs the administrative services necessary for the Johnson County District Attorney's Office. Those systems are comprehensive and complex. They include the computerized systems that manage calendars, email, and document processing. They include human resource management that provides the federal and state reporting requirements, payroll, retirement, and benefits. They include purchasing and financial practices. It is unrealistic and unfair to expect the County to provide and administer those systems for the District Attorney without expecting the District Attorney to comply with the necessary policies and procedures that ensure that the systems are run legally and effectively.

Moreover, in our current legal environment, it is a disservice to the public and very unwise to operate a government office without professional standards and practices for all aspects of office administration, from simple recordkeeping of hours worked to responding to claims of discrimination. It is simply not practical for the District Attorney to possess the expertise necessary for the adoption and administration of his own administrative systems and procedures. The District Attorney must comply with some set of professional standards and practices, whether he can develop them himself or whether they are adopted and administered by the State or the County. We do not believe that it is prudent nor practical for the District Attorney to provide and administer his own systems, and clearly, it is not a prudent use of public resources for the District Attorney to duplicate administrative systems and services that are readily available and established by the County Government. Likewise, we do not believe that it is practical for the State to provide the administrative systems or services to the District Attorney since there are so many different situations across the state. We would suggest that the County is the most appropriate source for the administrative services, but only if the District Attorney is required to comply with the policies and procedures adopted by the County in the same manner as the county officers.

We do understand that the legislature, in the 1970's, did consider but declined to include the Office of the District Attorney within the group of elected officials that were required to comply with County administrative policies. We believe that the concerns felt then have now been alleviated by the passage of time and clearer reflection on the issues. First, to the extent that there were legitimate issues that professional legal ethics might be violated by compliance with some County policy, those concerns should be fully put to rest. There are literally hundreds of municipalities and state agencies which have legal staffs that are subject to municipal or agency policies. Many of those have prosecutorial responsibilities. However, we are not aware of a single professional ethics issue that has been raised as a result of compliance with a policy or practice.

To the extent that there are concerns that compliance with County policies would somehow restrict or negatively affect the ability of the District Attorney to perform his statutory duties, we would suggest that those concerns are also unfounded. All of the other local elected officials, as well as some "state designated" appointed officials, such as the County Appraiser and Election Commissioner, are required to abide by the administrative procedures of the County Government. Those officials are able to perform their duties. Moreover, in Johnson County, for the past 20 years or more, the District Attorney has complied with all of the administrative policies and procedures adopted by the Board of County Commissioners without problems, and we would assert with a great amount of success. The provisions of Senate Bill 374 do not apply to the prosecutorial functions of the District Attorney and will not affect the ability of the District Attorney to perform those functions.

In closing, the Board of County Commissioners of Johnson County requests that the committee act favorably on Senate Bill 374 and urge its passage by the legislature. Senate Bill 374 will clarify current state law, will ensure that the Office of District Attorney operates according to professional standards and practices in a cost effective manner, will enable the Board of County Commissioners to assure the county taxpayers that the budgeted funds provided to the District Attorney are being properly used, and will assure to the voters of Johnson County that the integrity of the Home Rule Charter they approved will be maintained.

Thank you for your consideration. I will be happy to answer your questions or supply you with additional information.

F. Lawrence McAulay, Jr.
Director of Legal Services
Johnson County Legal Department

What is the Charter?

The Johnson County Charter Commission was formed in 1999 under Kansas Statutes Annotated (KSA) 19-2684, as amended. The Commission was convened on May 13, 1999 to study the structure of Johnson County Government and to make recommendations for improvements. In May 2000, the Charter Commission submitted its report and proposed Home Rule Charter for Johnson County with two alternative sections. On November 7, 2000, the voters of Johnson County approved and adopted the new charter along with the two alternative provisions.

Article I - [Powers of the County](#)

Article II - [Board of County Commissioners](#)

Article III - [Method of Election of the County Commissioners](#)

Article IV - [County Manager](#)

Article V - [Administrative Departments and Organizations](#)

Article VI - [General Provisions](#)

Article VII - [Transition Provisions](#)

*ADOPTED BY THE VOTERS
OF JOHNSON COUNTY, KANSAS
NOVEMBER 7, 2000*

Preamble

We, the people of Johnson County, Kansas, in order to avail ourselves of the benefits and responsibilities of home rule powers, to create a County Government to serve our present and future needs, and to permit the people of this County to make changes in our own government, do, under God, adopt this Home Rule Charter and any Alternative Sections or Articles as determined by the electorate.

ARTICLE I. POWERS OF THE COUNTY

Section 1.01. POWERS OF THE COUNTY. Johnson County is a body corporate and politic, and as such, shall have all powers possible for a county to have under the Constitution and laws of the state of Kansas as fully and completely as though they were specifically enumerated in this Charter, and all other powers as provided for in this Charter. Such powers shall include all rights and powers of local self-government not inconsistent with the Constitution and laws of the state of Kansas.

Section 1.02. EXERCISE OF POWERS. All powers of the County shall be executed as provided by this Charter, or if the Charter makes no provision, as provided by statute or otherwise as provided by resolution of the Board of County Commissioners, hereinafter referred to as the "Commission."

Section 1.03. CONSTRUCTION. The powers of the County under this Charter shall be construed liberally in favor of the County, and the specific mention of particular powers shall not be construed as limiting in any way the general powers stated in this Article.

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ARTICLE II. BOARD OF COUNTY COMMISSIONERS

Section 2.01. COMPOSITION. The Commission shall be a governing body of "citizen legislators" composed of seven members. Six of the districts shall each have one Commissioner elected from

its respective district. The seventh Commissioner shall be elected at-large and shall serve as the Commission's Chair.

Section 2.02. TERMS OF OFFICE. The Commissioners currently holding office shall remain in their current staggered terms for election to four-year terms in November 2002 and 2004 respectively. The Sixth District Commissioner shall be elected to a two-year term in November 2002 and a four-year term in November 2004. The Seventh District Commissioner shall be elected to a four-year term in November 2002 and shall serve as Chair of the Commission immediately upon taking office. Beginning in November 2004, three Commissioners shall be elected to four-year terms, and in November 2006, four Commissioners shall be elected to four-year terms.

Section 2.03. QUALIFICATIONS. Members of the Commission shall be qualified electors of the County. Members shall reside in the district from which they are elected. Any Commissioner who changes residence from the district from which elected shall be disqualified to represent that district, and the office shall be vacant. The Commission shall be judge of the qualifications of its members.

Section 2.04. COMMISSION DISTRICTS. There shall be seven County Commission districts. Six of the districts shall be as compact and equal in population as possible. The seventh district shall be the County at-large and shall include the County population as a whole. The districts shall be subject to alteration by resolution of the Commission at least once every three years.

Section 2.05. COMPENSATION. The Commission shall continue to determine the salary and benefits of its members by resolution. The Chair shall receive additional compensation no less than 25 percent of the base compensation of Commissioners.

Section 2.06. DUTIES OF THE CHAIR. The Chair shall:

- Be considered a member of the Commission and vote as provided by law;
- Have all rights and privileges of any other Commission member, except as provided by law or by the Charter;
- Provide leadership in the communication and interpretation of policy to the public;
- Lead the Commission in developing its long-range plans and policies, establishing annual priorities, and planning for economic growth and stability of Johnson County government;
- Officiate and preside at all meetings and events;
- Call special meetings of the Commission as deemed necessary and in such manner as required by law;
- Attend, or designate a representative of the Commission to attend, all meetings, conferences, and negotiations relating to policy matters involving other units of government and legislative bodies;
- Receive reports of the County Manager;
- Prepare, at least annually, a written message to the Commission and the citizens detailing such information concerning the economic, physical, and social conditions and needs of Johnson County government; and
- Sign, if authorized by the Commission, all contracts and other documents of Johnson County government.

- The Chair shall have, in addition, all other powers granted by the Charter, the Commission, and applicable state law.

Section 2.07. PROHIBITIONS. No Commission member shall directly interfere with the conduct of any agency or any department, or any part thereof, including the appointment or removal of employees, except at the express direction of the Commission or as otherwise provided by this Charter. No former Commission member shall hold any compensated appointive office or County employment until one year after leaving office.

Section 2.08. INITIAL COMMISSIONER DISTRICTS. Prior to April 1, 2002, the Commission, under its current procedures, as prescribed by law, shall re-district in a manner to create the Sixth District. The Seventh District will not require any reapportionment of population and revision of district boundaries since the Seventh District Commissioner represents the County as a whole.

Section 2.09. MEETINGS OF THE COMMISSION. Meetings of the Commission shall be conducted as provided by law. The Commission shall hold its meetings at such times and places as will allow the general public the opportunity to attend and participate in such meetings.

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ARTICLE III. METHOD OF ELECTION OF COUNTY COMMISSIONERS

Section 3.01. COMMISSIONERS TO BE ELECTED ON A NON-PARTISAN BASIS. Elections of the members of the Commission and, if authorized, any elected Chair of the Commission shall be non-partisan. Elections for members of the Commission and, if authorized, any elected Chair of the Commission, shall be conducted in the manner provided by law for elections of State and County officials to the extent not in conflict with this Charter.

Section 3.02. QUALIFICATIONS OF THE COMMISSIONERS. The laws pertaining to the qualifications of the members and Chair of the Commission shall apply to the extent such laws are not in conflict with this Charter.

Section 3.03. VACANCIES. Should a vacancy occur on the Commission, the Board of County Commissioners shall, within ninety (90) days of the occurrence of such vacancy, appoint a replacement to serve until the end of the term to which he or she is appointed or until the next regular county election, whichever is sooner. If a regular county election is held prior to the end of the unexpired term, then an election shall be held for an individual to fill the remaining portion of said unexpired term.

Section 3.04. PRIMARY ELECTIONS.

A. If there are more than two (2) qualified candidates for one (1) commissioner position in any commissioner district, including any authorized at-large district, the county election officer shall call, and there shall be held, a primary election in each such commissioner district. The names of the two (2) candidates receiving the greatest number of votes for any commissioner or chair position at the primary election shall appear on the ballots in the general election.

B. If a commissioner is to be elected to fill an unexpired term, the rules in this section shall be modified consistent with the provisions of this subsection. If there are more than two (2) candidates for such unexpired term, the county election officer shall call and there shall be held, a primary election. The names of the two (2) candidates for such unexpired term receiving the greatest number of votes shall appear on the ballots in the general election for such position.

C. No ballot in a primary county election shall have either names or write-in blanks for any commissioner position unless more than two (2) candidates have filed for such position.

D. If a primary is required under this Section, it shall be held on the first Tuesday of August in even-numbered years for the nomination of all candidates to be voted for at the next following general election.

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ARTICLE IV. COUNTY MANAGER

Section 4.01. APPOINTMENT. The Commission shall appoint, based on education and experience in public administration, a professional County Manager who shall be the chief administrative officer of the County. The County Manager shall be appointed by December 31, 2001. The County Manager shall maintain residency within Johnson County and shall not engage in any other business or occupation while serving as County Manager. The Commission shall establish the salary of the County Manager.

Section 4.02. ABSENCE OF COUNTY MANAGER. The Commission may designate a qualified administrative officer of the County to assume the duties and authority of the County Manager during periods of absence and disability.

Section 4.03. POWERS AND DUTIES. The County Manager shall be the chief administrative officer of Johnson County government and shall be responsible to the Commission for administration of all Johnson County government affairs. The County Manager shall:

- Be directly responsible for the daily administrative functions of Johnson County government;
- Organize the administration, direct and supervise the organizational structure of all offices, the appointive officers and employees of Johnson County government, except as otherwise provided by law or as provided in this Charter;
- Have the responsibility to execute the policies of the Commission through the functional divisions and departments of administration;
- After appropriate consultation with the Commission, prepare and submit a recommended annual budget, including all revenue sources, to the Commission for final adoption, and administer the budget after its effective date;
- Report to, confer with, assist and advise the Chair and make recommendations to the Commission on all matters concerning the welfare of Johnson County government;
- Ensure that all ordinances, resolutions, codes, regulations, rules, policies, directions and actions of the Commission are faithfully enforced, administered, and executed;
- Attend, or provide appropriate staff to attend, and participate as necessary and advisable in all official Commission meetings, including regular, special, and executive session meetings and other official proceedings for the conduct of County business, except any meeting in which the continued employment of the County Manager is the business under consideration;
- Assist the Chair and the Commission in the preparation of meeting agendas, resolutions, rules, regulations, policies, and all such other matters as may be requested by the Commission;
- Submit to the Commission and make available to the public periodic annual reports of the financial administrative affairs of Johnson County government and

keep the Commission advised of the financial conditions and needs of Johnson County government; and

- Prepare and submit to the Commission, annually before May 1st, recommendations for a capital improvement and financing program for Johnson County.

The County Manager shall, in addition to the powers and duties listed above, assume all powers and duties conferred upon the County Administrator. The County Manager shall also have the powers and duties otherwise conferred upon the position by law, this Charter, actions of the Commission, or those inherent in the administration of Johnson County government.

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ARTICLE V. ADMINISTRATIVE DEPARTMENTS AND ORGANIZATION

Section 5.01. GENERAL PROVISIONS. The activities of the County shall be distributed among such departments and divisions thereof as are established or as may be established by reorganization of the County administration or as provided in this Article. Each department and division thereof shall have those duties and responsibilities provided by the Commission or the County Manager.

Section 5.02. DEPARTMENT DIRECTORS.

A. The director of each department shall be the principal officer of the department and shall be responsible for its operations. The County Manager shall appoint, suspend, or dismiss all non-elected department directors and division heads, except as provided by law or this Charter. The County Manager may authorize any appointive County administrative officer to appoint suspend or remove subordinates in that officer's department or division. All appointment and dismissal authority of the County Manager and his or her subordinates shall be subject to provisions of law and personnel rules adopted by the Commission. B. The positions of Chief Counsel and Internal Auditor shall remain under the authority, direction and supervision of the Commission.

Section 5.03. REORGANIZATION OF COUNTY GOVERNMENT ADMINISTRATION. The Commission may by resolution alter the administrative organization of County government including the creation, abolishment, or merger of departments and the transfer of responsibilities among departments. The County Manager may recommend to the Commission, in writing, changes in the administrative organization of the County, and the Commission shall act upon such recommendations within 90 days following its presentation. Such action shall be in the form of a resolution approving, disapproving, or approving in amended form the recommended administrative changes. Prior to action on a resolution that creates, abolishes, or merges departments, or causes the transfer of responsibilities among departments, the Commission shall provide proper notice, including publication in the official County newspaper(s) and a public hearing. Where required by law, any change in the administrative organization of the county shall be subject to a vote of the electorate of the County.

Section 5.04. GOVERNING BOARDS. The members of the governing boards of the Johnson County Library System, the Johnson County Parks and Recreation District, the Johnson County Mental Health Center, Johnson County Developmental Supports and the Johnson County Airport Commission shall be appointed by the Commission for definite terms. Each board shall be obligated and given authority to make and determine all policy matters in fulfilling its mission statement. Each board shall be responsible for selecting its Executive Director from a candidate pool that meets qualifications and experience levels as from time to time are determined by County personnel guidelines.

The policy decisions once made by each board shall be administered by its Executive Director and in accordance with the general administration policies of Johnson County government in matters relating to personnel, legislation, insurance/risk management, purchasing, budgeting and

budget making, accounting, auditing and finance. The respective policies shall be carried out in cooperation with the County Manager. Compliance by all governing boards shall be in effect by December 31, 2001.

Section 5.05. ELECTED COUNTY OFFICIALS. Provisions for the following elected County officials shall be as follows:

A. County Clerk: The position of County Clerk shall be appointed, not elected, and the functions and operations of the office of County Clerk shall be performed under the administrative authority of the County Manager. The statutory duties of the County Clerk shall be performed by or, as necessary, consolidated under the authority of and as delegated and assigned by the County Manager. Compliance with this provision shall occur when the County Clerk elected in November 2000 leaves office.

B. Register of Deeds: The position of the Register of Deeds shall be appointed, not elected, and the functions and operations of the office of the Register of Deeds shall be performed under the administrative authority of the County Manager. The statutory duties of the Register of Deeds shall be performed by the County Clerk, or, as necessary, consolidated under the authority of and as delegated and assigned by the County Manager. Compliance with this provision shall occur when the Register of Deeds elected in November 2000 leaves office.

C. County Treasurer: The position of the County Treasurer shall be appointed, not elected, and the functions and operations of the office of the County Treasurer shall be performed under the administrative authority of the County Manager. The statutory duties of the County Treasurer shall be performed by or, as necessary, consolidated under the authority of and as delegated and assigned by the County Manager. Compliance with this provision shall occur when the County Treasurer elected in November 2000 leaves office.

D. County Sheriff: The County Sheriff shall continue to be an elected position, subject to changes or amendments as provided or allowed by law.

E. District Attorney: The District Attorney shall continue to be an elected position. The offices of the elected County Sheriff and District Attorney shall comply with the administrative policies adopted by the Commission to the extent not inconsistent with law.

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ARTICLE VI. GENERAL PROVISIONS

Section 6.01. CHARTER AMENDMENT. A. The Commission, upon a four-fifths (4/5) vote of its full membership, may, unless otherwise prohibited by law, propose amendments to this Charter subject to a referendum of the electors of Johnson County. Such referendum shall be held at the next regularly scheduled election at which all qualified electors of the County are eligible to vote and which follows by at least 60 days passage of the amendment resolution.

B. The Charter Commission referenced in Section 6.03 of this Article may propose amendments to the Charter and such amendments will be acted upon pursuant to Section 6.04 of this Charter.

Section 6.02. EFFECT OF THE CHARTER. This Charter shall be liberally construed in aid of its declared purpose. If any article, section, subsection, sentence, clause or provision of this Charter or the application thereof shall be held invalid for any reason, the remainder of the Charter and of any resolutions or regulations made thereunder shall remain in full force and effect.

Section 6.03. CHARTER REVIEW COMMISSION.

A. A seven member standing Johnson County Charter Review Commission shall be appointed by

the Board of County Commissioners from the 1999 Charter Commission and shall meet at least annually for five years after the effective date of the Charter.

Section 6.04. FUTURE CHARTER COMMISSION.

A. A Charter Commission, composed and appointed as provided by statute, shall be created within thirty 30 days of a date which follows by 10 years the effective date of this Charter, and at least once every 10 years thereafter.

B. Each Charter Commission shall meet in an organization meeting within 30 days following appointment of its members. Each such Charter Commission shall determine and elect its own officers. All members shall serve without compensation except for necessary expenses authorized by the Board of County Commissioners. Each Charter Commission shall meet as frequently as its membership deems necessary. Minutes of each meeting shall be reported in an official journal of the Charter Commission. At least one meeting of each Charter Commission shall be a public hearing.

C. Each Charter Commission is empowered to conduct comprehensive studies of any or all phases of County government operations, including a review of the existing County Charter and major resolutions of the Commission as they affect the operation of Johnson County government. On or before a date, which follows by one year the organization meeting of each Charter Commission, a report of the Charter Commission's findings shall be presented to the Board of County Commissioners. Such report shall include recommendations of the Charter Commission and such other information deemed important. Recommendations of the Charter Commission may include suggested changes in the administration of the County government, programs, and activities. It may also include proposed amendments to the Charter. All recommendations of a Charter Commission shall be adopted by a majority vote of its membership. Each Charter Commission shall terminate on the date that follows by 30 days the submission of its report.

D. The Board of County Commissioners shall consider all suggested changes, as allowed by law, of the Charter Commission. It shall submit all proposed Charter amendments to the electorate. Such election shall be held at the next regularly scheduled election at which all qualified electors of the County are eligible to vote and which follows by at least 60 days the submission of the Charter Commission report.

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ARTICLE VII. TRANSITION PROVISIONS

Section 7.01. CHARTER REFERENDUM. In accordance with law, a referendum on adoption of this Charter shall be held at the November 2000 general election. The majority of those electors voting on the issue shall be necessary for adoption of the Charter.

Section 7.02 QUESTIONS TO BE SUBMITTED TO THE ELECTORATE. The questions to be decided by the electorate of Johnson County are, subject to appropriate phrasing by the Board of County Commissioners and the Election Commissioner, as follows:

A. Shall the proposed Charter for Johnson County, Kansas, as submitted on May 13, 2000 by the Johnson County Charter Commission to the Commission of Johnson County, Kansas, be adopted?

B. If the proposed Charter for Johnson County, Kansas, is adopted, shall Alternative Article II to the Charter, increasing the membership of the Johnson County Board of Commissioners to seven members, to include one additional district Commissioner and one Commissioner elected at-large who shall serve as Chair of the Commission, be adopted?

C. If the proposed Charter for Johnson County, Kansas, is adopted, shall Alternative Article III to the Charter, providing for the non-partisan election of Commissioners, be adopted?

Section 7.03. EFFECTIVE DATE. The Charter shall become effective the second Thursday of January, 2001, and all powers and duties provided in the Charter shall become effective.

Section 7.04. INITIAL COUNTY MANAGER. The Commission shall initiate the necessary procedures to employ a County Manager, as provided in Article III of this Charter. Pending the selection of the County Manager, the Commission may appoint an acting Manager.

Section 7.05. OFFICES AND OFFICERS PRIOR TO THIS CHARTER. Unless otherwise provided by this Charter, all offices, officials, governing boards, commissions, agencies, and advisory boards of Johnson County government shall continue to exist on the effective date of this Charter and all powers, duties, and functions thereof shall continue pursuant to their current status and operations.

Section 7.06. EMPLOYEES' CONTINUATION. On the effective date of this Charter all employees of Johnson County government prior to this Charter shall continue without change in benefits or compensation from that in effect prior to the Charter's effective date.

Section 7.07. CONTINUATION FOR EXISTING REGULATIONS, CONTRACTS, LEVIES, OBLIGATIONS, AND OTHER OFFICIAL CONDUCT. All proceedings, actions, regulations, resolutions, contracts, levies, obligations, and other official conduct of the County government in process preceding adoption of this Charter shall be and remain effective unless or until repealed or modified by official action of the Board of County Commissioners or unless such items are contrary to the provisions of this Charter.

**Dolores Furtado
10104 Hemlock Drive
Overland Park, KS 66212**

March 19, 2007

Chairman Vratil and members of the Judiciary Committee:

Good Morning. I am Dolores Furtado, a resident of Johnson County and a former County Commissioner. I am here to express my support for SB 347.

In 2000, while I was co-President of the League of Women Voters of Johnson County. League members extensively reviewed the proposed Charter as part of an official League study. We supported the proposed changes and then I, along with others, campaigned for passage of the Charter. The voters approved the Charter in November 2000.

Article 5 section 5.05 subsection e of the charter states:" the offices of the elected County Sheriff and District Attorney shall comply with the administrative policies adopted by the Commission to the extent not inconsistent with law". This statement reflects the intent to make the adopted policies and procedures applicable to all departments including those headed by elected officials.

In November, 2002 I was elected to the Board of County Commissions. During my 4 years of service, several of the changes mandated by the Charter were implemented. It was understood that the District Attorney would follow the administrative policies. Throughout my tenure, the District Attorney did so and to my knowledge, there were no problems with following policies affecting employees, purchasing, financial management as well as for the annual budget deliberations.

I support Senate bill 347 because this legislation affirms the intent of the charter approved by the voters in 2000 to have the District Attorney comply with administrative policies adopted by the Board of County Commissioners. I urge this committee to pass this bill.

Thank you.

Senate Judiciary

3-19-07

Attachment 3



Office of The
DISTRICT ATTORNEY

JEROME A. GORMAN

Twenty-Ninth Judicial District of Kansas
Wyandotte County Criminal Justice Complex
710 N. 7th Street - Kansas City, Kansas 66101-3051

Consumer/Check
913-573-2980
Fax 913-573-8151

Criminal
913-573-2851
Fax 913-573-2948

Juvenile
913-573-2973
Fax 913-573-2860

March 19, 2007

Senator John Vratil, Chairman
Senate Judiciary Committee
Kansas State Capitol Building
Topeka, Kansas 66603

RE: SB 374

Dear Senator Vratil:

Presenting testimony jointly before you this morning are the following state officers: District Attorney Charles Branson, Douglas County; District Attorney Nola Foulston, Sedgwick County; District Attorney Jerome A. Gorman, Wyandotte County and District Attorney Robert Hecht, Shawnee County. The apparent purpose behind SB 374 is to address an issue that has arisen in Johnson County, Kansas as a result of the recent Attorney General – District Attorney job switch between Phill Kline and Paul Morrison.

United we offer this testimony in opposition to SB 374. Our testimony lies in two regards. The first issue is that we believe that SB 374 is an attempt by a county legislative body for control of a state official vested with performing executive branch duties. The second issue is that the construction of SB 374 itself is flawed and unlikely to withstand constitutional or judicial scrutiny.

CONTROL OF A STATE OFFICER BY A COUNTY COMMISSION

The recent and well publicized occurrences in Johnson County, Kansas are the obvious driving force behind this legislation. In 1972 the Kansas Legislature created the position in four judicial districts: 3, 10, 18 and 29. The legislation specifically stated that in no event would the district attorney be deemed an officer of the county, but instead an executive officer of the judicial district.

Senate Judiciary

3-19-07

Attachment 4

It is obvious that the purpose behind the district attorney legislation was to create professional full time prosecutors in the largest districts in the state. Career prosecutors are now responsible for their staff and all of the legal, professional and ethical obligations of the criminal justice system within their district. SB 374 will erode that independence.

K.S.A. 22a-106 presently gives county commissions the power of the purse strings over a district attorney by mandating that a district attorney must stay within the limits of appropriations allowed by the county commission. Strict adherence to any county commission established personnel policy, pay plan or purchasing or financial policy allows the legislative branch greater control over an independent prosecutor than state and federal constitutions and state law envisioned. SB 374 will violate the separation of powers clause of the United States Constitution.

We acknowledge that the current situation in Johnson County may be distasteful to many. However, Kansas is an employment at will state. Prosecutors in district attorneys offices are not subject to employment contracts or union rules. Numerous federal and state appellate decisions support the fact that a district attorney has the authority to hire and fire personnel and should be able to effectively and independently operate the prosecutor's office. Discriminatory or political practices in hiring and firing in employment at will states are prohibited under those appellate decisions.

Many times the dismissal of assistant prosecutors by a new district attorney is necessary to carry out the functions of his/her office in their vision as the electors of that county mandated. Other district attorneys have already utilized this process of retaining or not retaining assistant prosecutors during administration changes in recent years. Administration changes in Shawnee, Douglas and Sedgwick Counties occurred with minimal personnel changes and little or no fanfare. Other administration changes in Wyandotte, Johnson, Douglas and Shawnee Counties have seen essentially no personnel changes. This process is critical to the elected district attorney to assemble the make-up of staff under their administration.

In short, the proposed legislation is aimed solely at the present situation in Johnson County. The legislation is intended to cure a local issue rooted in politics and personal issues. This very same legislation could prevent a successor to the Johnson County office, or any other office, from reversing this very situation.

Any statewide legislation designed to address a local political situation through greater control of an independent state officer is not a good idea. This legislation is ill conceived.

APPLICATION TO ALL DISTRICT ATTORNEYS

This legislation is said to apply only to Johnson County. However, several issues must be pointed out. First of all, the legislation attempts to amend K.S.A. 22a-106 by recognizing that there are four district attorney offices and that the legislation only applies to any of those four counties that are designated “urban areas” pursuant to K.S.A. 19-2680. Under K.S.A. 19-2680, referencing K.S.A. 19-2654, Johnson County is designated to be an “urban area”. This enabling legislation makes it easier for any of the three remaining county commissions that disapproves of an action by their local district attorney to have that office added as an “urban area” and thus subject to all the issues as earlier addressed.

Secondly, SB 374 only recognizes the four district attorney offices that were originally created by K.S.A. 22a-106. There are actually six such offices in Kansas. K.S.A. 22a-108 added Douglas County in 1980 and K.S.A. 22a-109 added Reno County in 2000 as district attorney offices. Each of those statutes references K.S.A. 22a-106, making the statute applicable to all six district attorney offices. The failure of SB 374 to recognize the existence of Douglas County and Reno County may cause a judicial determination that the new statute applies to all six district attorney offices, some combination of the six, or none of the offices at all. This unintended result would certainly cause unnecessary litigation at the trial and appellate levels. This litigation would lead to an unnecessary use of manpower and tax dollars.

Thirdly, SB 374 completely ignores the fact that that K.S.A. 12-354 has defined Shawnee County as an “urban area”. Surely, judicial interpretation would decide that SB 374 would apply to Shawnee County as well.

SB 374 is poorly written and is very likely to cause unintended consequences. Those unintended consequences will most likely lead to unnecessary, expensive and time consuming litigation.

CONCLUSION

SB 374 is unnecessary. Local government should be left to work out their own political issues. All local governments have the power to limit the appropriations of their district attorneys through budget approval. Independent prosecutors should be allowed to remain completely independent in order to exercise the judgment and discretion required for their job.

The below signed district attorneys urge this committee to vote against SB 374.

Sincerely yours,

CHARLES BRANSON
Douglas County

JEROME A. GORMAN
Wyandotte County

NOLA FOULSTON
Sedgwick County

ROBERT HECHT
Shawnee County

LAW OFFICES OF
DISTRICT ATTORNEY
Third Judicial District
Shawnee Co. Courthouse, 200 SE 7th Street
Second Floor, Suite 214
TOPEKA, KANSAS 66603

ROBERT D. HECHT
District Attorney

TELEPHONE (785) 233-8200 Ext. 4330
FAX (785) 291-4909
www.shawneecountyda.org

To: Kansas Senate Judiciary Committee
From: Robert D. Hecht, District Attorney
Date: March 19, 2007
SUBJECT: **TESTIMONY IN OPPOSITION TO SENATE BILL 374**
AN ACT concerning county and district attorneys;
requiring compliance with policies adopted by board of
county commissioners; amending K.S.A. 22a106 and
repealing the existing section.

Good morning Mr. Senator Vratil, Chairperson; and Members of the Senate Judiciary Committee. I am Robert Hecht, District Attorney for the Third Judicial District, Shawnee County, Kansas. I was first elected to this office in November, 2000. I appreciate the opportunity to appear before this Committee in regards to Senate Bill 374.

I served in the Shawnee County Office of County Attorney from 1961 to January, 1969 when I went into private law practice with the firm of Scott, Quinlan & Hecht. Former Senator Jack A. Quinlan was one of the founding partners as was now Chief Justice Kay McFarland.

I was first admitted to the bar in February, 1958 and am admitted in all of the courts of Kansas, the United States District Court of Kansas, the United States Court of Appeals, Tenth Circuit, the United States Supreme Court and have tried cases from the province of Ontario, Canada throughout New England to West Virginia, North Carolina, Colorado and California, as well as Kansas. I offer the same, not as self-promotion, but merely reflective of my experience and professional background as you consider my perspective as to Senate Bill 374.

The bill before you in Section 1, paragraph (f) in K.S.A. 22a-106 is addressed to district attorney offices in judicial district (3) [Shawnee County]; (10) [Johnson County]; (18) [Sedgwick County] and (29) [Wyandotte County]; if they have adopted a home rule charter for county government pursuant to K.S.A. 19-2680, et seq.

The bill, amending K.S.A. 22a-106, as proposed, would subject those four (4) District Attorney offices to county policies and procedures and require the District Attorney to, for all administrative practices comply with:

1. Personnel policies and procedures established by the board of county commissioners for all employees other than the elected officials;
2. Any pay plan established by the board of county commissioners for all county employees;
3. The budget for the financing of the district attorney's office as approved by the board of county commissioners; and
4. The purchasing and financial policies established by the board of county commissioners applicable to expenditures and acquisitions made for the operation of the office.

If the commission adopts a home rule charter so providing.

First, let's address (3) and (4) above pertaining to budget and expenditures.

The County presently funds district attorney offices pursuant to K.S.A. 22a-106. The budget sets the total amount the district attorney's office can spend that fiscal year. The office is also, of course, subject to the Kansas cash basis and budget laws. Hence, other than how said budget is distributed for the various expenditures and necessities of the office, the county commission presently sets the limit by setting the budget.

As to expenditures, surely it is not considered good public policy that district attorneys should be controlled in how they expend that budget by an elected person who has no knowledge of the functioning of the office, the professional responsibilities and ethical restrictions, that those professional responsibilities may necessarily be directed at such officials families, personal and professional friends and political associates and supporters who could then express their

displeasure by limiting, restricting or refusing necessary expenditures.

The District Attorney's office of the Third Judicial District has exercised its professional responsibilities in regard to high ranking state administrators, political party officials, elected city and county officers, district court and municipal court judges and others who political figures might have preferred was otherwise.

Does this proposal not give commissioners a premise to assume they could reject, modify and otherwise influence the expenditures so as to seek to influence the district attorney's exercise of professional responsibilities and obligations?

Now, as to the inherent legal and policy weakness of the proposal.

First, there are six, not four, District Attorney offices. The drafter of the bill apparently failed to recognize there are district attorney offices in Douglas County and Reno County, Judicial Districts 7 and 27.

It may be suggested that since the bill refers to K.S.A. 19-2680 which provides that any county designated as "urban area" by K.S.A. 19-2654, such county may, by charter, alter the government, its elected offices and make otherwise far reaching changes in the form, functioning and administration of local government that the proposal is limited in scope.

K.S.A. 19-2654, referred to above, designated Johnson County as such "urban area" as referred to in Section 17 of Article 2 of the Kansas Constitution. Hence one might suggest Senate Bill No. 374 is limited in scope and effect to Johnson County.

Is it?

K.S.A. 12-354, adopted in 2005, designated Shawnee County as an "urban area" as contemplated by Section 17 of Article 2 of the Kansas Constitution, yet it contains: ". . . for the purpose of granting to such county and urban area powers of local government and consolidation of local government" language not found in K.S.A. 19-2654.

Is Shawnee County's "urban area" powers limited to "local government" and "consolidation"? I suggest it is and such issue would be litigated in the event it sought to exercise such responsibilities or authorities as contemplated in Senate Bill No. 374.

Our state constitution requires all laws of a general nature to have a uniform operation throughout the state (Section 17, Article 2) except "urban areas" which may be given "such powers of local government and consolidation of local government as the legislature may deem proper".

Recognizing an essential need, the legislature in 1972 created the office of District Attorney in Judicial Districts 3, 10, 18 and 29, recognizing a need for professional, career prosecutors who devote full time to such responsibilities. In so doing, the legislature, in the creating statute, K.S.A. 22a-101 provided:

"Said district attorney is hereby declared to be an executive officer of the judicial district in which he is elected, with said office constituting a separate entity within said district for administrative purposes, and in no event shall said district attorney be deemed an officer of any county. . . ."

It is generally recognized that District Attorneys and their agents are state officers and employees (Attorney General Opinion 87-13).

It is patently obvious that District Attorneys are not county officers or employees who county commissions can then cause to be subject to county personnel and/or administrative policies and procedures, particularly when they are declared to "constit[ute] a separate entity within said district for administrative purposes and in no event shall said district attorney be deemed an officer of any county. . . ."

Article 2, Section 17, has been interpreted to permit some classification, provided the classification is not arbitrary. (*State ex rel. Steven v. Smith*, 242 Kan. at p. 381)

As long ago as 1903 in *Rambo v. Larrabee*, 67 Kan. 634, our Supreme Court has stated:

"It is entirely competent for the legislature to adapt its laws general in their nature to general classifications, either individuals, surroundings, or conditions, but such classification must always be a natural one, not an arbitrary or fictitious one. If the nature of the law is general, that is, generic, its operation must be as general throughout the state as are the genera." (Emphasis supplied)

With six district attorneys, from Hutchinson to Wichita, to Topeka, to Lawrence to Kansas City, to Olathe, it can hardly be

said this bill meets its obligation for ". . . its operations must be as general throughout the state as are the genera."

The United States Supreme Court in *Watson v. Memphis*, 373 U.S. 526, 10 L.Ed.2d 529, 83 S.Ct. 1314 (1963) made clear an act cannot lawfully rest entirely on financial or economic considerations and such cannot provide a rational basis for an otherwise unconstitutional disparate treatment which was acknowledged by our Supreme Court in *State ex rel. Stephan v. Smith, supra*.

In *State ex rel. v. Consumers Warehouse Market*, our Supreme Court stated:

"Concededly a state has broad discretion in classification in the exercise of its powers of regulation, and the constitution of the United States does not require that things which are different in fact are to be treated in law as though they were the same, but discrimination in a state regulatory statute must be based on differences that are reasonably related to the purposes of the statute, and that the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. Distinctions cannot be justified if the discrimination has no reasonable relation to the difference. (185 Kan. at 370 and numerous appellate court decisions therein cited) (emphasis supplied)

In *Gustafson v. McPherson County*, 88 Kan. 335, decided many years ago but referred to with approval in *Consumer Warehouse Market, supra*, it was stated:

"Interpreted by its title, the law is one of general nature covering all counties in a specified class. It does not, however, have a uniform operation upon all the counties of the class throughout the state. . . ." (p. 371)

and

". . . No difference in circumstances or other valid reason existed for difference in regulation. No obstacle existed to the framing of an applicable general law of uniform operations upon all the members of the group alike. Instead of enacting such a law the legislature understood to dispense special privileges to some of them. In so doing it stepped outside its constitutional province as a law making body and the product of its act lacks the force and quality of a statute. (see 185 Kan. at p. 371, *supra*)

The bill is obviously directed at the action of one appointed to fill a vacancy in the District Attorney office of Judicial District Ten when an incumbent succeeded to higher office. The appointee declined to retain certain long term and respected assistant district attorneys, as well as some support staff, and in their places engaged others. Perhaps it was not accomplished as sensitively as it might have been, but such does not warrant special legislation.

This bill, is, notwithstanding the political or personal, or philosophical motivations or beliefs, bad public policy and will notwithstand legal or constitutional scrutiny because it is discriminatory and an unlawful classification not reasonably related to its purposes and a violation of separation of powers and an attempt to subject state officers to county control.

It is inapplicable to all district attorney offices.

It is inapplicable to all district attorney offices located in designated "urban areas".

It purports to make major changes in the authority of an elected officer during the term of the office holder.

As a general rule, an elected office may not have its authority, responsibility or obligations substantially modified during the term of the office holder for such would create an office different from that for which the office holder was elected or appointed.

The bill contains no rationalization for its discrimination.

More importantly, the bill violates many precepts of separation of power where it purports to grant to a county authority to intrude into the operation, management and administration of an executive officer of a judicial district clearly not a county officer or employee.

Neither does this bill recognize or appreciate that District Attorneys are legally and ethically responsible for the acts of commission and omission of their employees, lawyers, investigators and support staff and can be sanctioned for failure to make proper discovery or disclosure, for improper public comment, and for ill motive in pursuing litigation.

District Attorneys must be able to confidently have trust and reliability that the staff shares the same legal, prosecutorial and professional philosophy and dedication as the District Attorney.

It has long been the law, as pronounced some thirty years ago, that a District Attorney may not terminate or adversely impact an assistant district attorney or support staff's employment for political reasons or motivations and if they so do they are liable for compensatory and punitive damages and attorney fees and expenses in federal court for violation of recognized constitutional rights of association and speech.

If the incident that prompts this bill was politically motivated those who were damaged have a remedy.

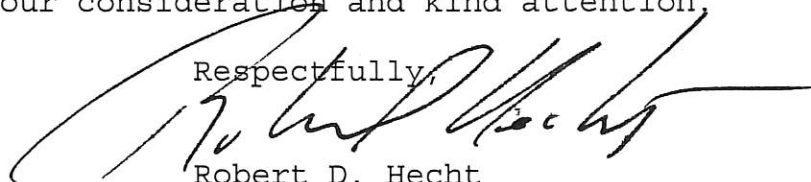
All elected office holders, and particularly County and District Attorneys, as well as Attorney Generals must have the discretion to obtain and/or retain staff without intrusion from county commissioners or others without responsibility for the office or its conduct or performance.

If the concept of the bill is considered good public policy then why is it that it applies naught to all District Attorneys, all elected county officials, staff of all courts, all elected state officers and even the members of this committee and the legislature as a whole.

Do not adopt special legislation directed at a single instance, from differing philosophical and/or political perspective or out of political animus. It will be perceived as personal, vindictive and bad public policy and should be rejected.

Thank you for your consideration and kind attention.

Respectfully,



Robert D. Hecht
District Attorney
Third Judicial District
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Suite 214
200 S.E. 7th Street
Topeka, Kansas 66603
(785) 233-8200, ext. 4330



JOHNSON COUNTY, KANSAS

BOARD OF COUNTY COMMISSIONERS

Testimony in support of
Senate Bill 374

Presented to the
Senate Committee on the Judiciary

by
Annabeth Surbaugh
Chairman of the Board of County Commissioners
Johnson County, Kansas

March 19, 2007

Chairman and Members of the Senate Judiciary Committee, I am Annabeth Surbaugh, Chairman of the Board of County Commissioners of Johnson County. Due to prior commitments, I am not able to appear in person to present testimony on Senate Bill 374, but I appreciate the opportunity to present this written statement on behalf of the Board of County Commissioners in support of that important legislation.

Senate Bill 374, as drafted, makes clear that the District Attorney and his office are required to follow the administrative policies and procedures adopted by the Board of County Commissioners that relate to personnel matters, pay plans and benefits, purchasing, finance, and budget. While we respect the fact that the District Attorney is an elected official and performs his prosecutorial functions as a state official, that office is essentially funded from county taxpayer dollars, and the County Government provides essentially all support services. In 2007, for example, the County's budget will provide \$5,935,405.00 to fund the operations of the District Attorney with its staff of 91.5 full-time equivalent employees. In addition, the County will provide services, including space and administrative support, valued at \$908,168.00 for the District Attorney. Those are substantial resources which we have provided over the years to best serve our residents, as well as the State, and to help enable that office to develop into one of the best and most respected District Attorney offices in the country.

Those resources have been provided with the basic understanding that the District Attorney would be subject to and follow the administrative policies and procedures adopted by the Board of County Commissioners. For the past twenty years or more, that has been the case, and the District Attorney's office has followed County policies without any major problem or hindrance to his statutory and prosecutorial functions. That compliance has allowed us to ensure that taxpayer dollars were being properly used and administered, and, in fact, that compliance has provided substantial benefits to the District Attorney and his staff in developing a pay plan for that office, in providing benefits for the employees, and in providing state-of-the-art technology systems.

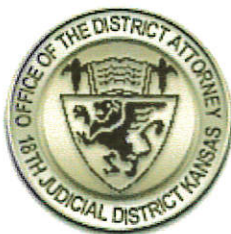
Our residents also consider this an important issue. In 1999, the Board of County Commissioners established, pursuant to state law, a Charter Commission which studied and deliberated for over a year on how to best structure the County Government. As a part of its considerations, the Charter Commission expressly determined that the Office of the District Attorney should be subject to and follow the administrative policies approved by the Board of County Commissioners. Specific language on that point was included in the Home Rule Charter, and the voters of Johnson County approved the Home Rule Charter as proposed.

This legislation fulfills the intent of the voters of Johnson County. This legislation serves the interests of the taxpayers and enables the Board of County Commissioners to better assure that funds for the District Attorney are properly and appropriately used. Finally, this legislation is consistent with the requirements for other elected officials in administering their offices. For at least twenty years, compliance with County policies has not hindered the prosecutorial functions of the office and has aided in its success.

We ask for your support and that you favorably act on and urge passage of SB 374.

Again, the Board, and I, as Chairman, thank you for considering this action.

* * * * *



Nola Tedesco Foulston
Office of the District Attorney
Eighteenth Judicial District of Kansas

Testimony before the State of Kansas
Senate Judiciary Committee
March 19, 2007

Senate Bill No. 374

An Act concerning certain county and district attorneys amending K.S.A. 22a-106

Chairman Vratil:

Thank you for the opportunity to address the Senate Judiciary Committee on a bill now pending seeking to amend the long-standing statutory authority of the District Attorneys of the State of Kansas.

History of the Statute

In the year 1855, the legislature of the territory of Kansas provided for the election of a district attorney for each district organized for judicial purposes. In 1861 when Kansas became a state, once again, the district attorney held it place as the chief law enforcement officer for the various judicial districts. Upon its admission to statehood, and in the subsequent reorganization of state government, the Office of the Attorney General was created to have jurisdiction only certain defined crimes or in certain other defined circumstances, however, the duties and responsibilities of the District Attorney remained separate from county attorneys and the district attorneys were deemed to be the chief law enforcement officers for judicial districts where they prosecuted criminal offenses. It remains this way today.

In 1972, the Kansas Legislature created a new statutory framework to institute the system of administration by *district attorneys* in what were then considered the most populous urban areas of our state: the third (3rd) Judicial District of **Shawnee County**, the twenty-ninth district (29th) of **Wyandotte County**, the tenth judicial district (10th) of **Johnson County** and the eighteenth (18) judicial district of **Sedgwick County**, Kansas.

The 1972 legislation clearly described the duties and responsibilities of the recreated District Attorneys [because the office of the District Attorneys had been legislatively empowered long before Kansas statehood] and the parameters that would follow the statutory structure of administration as follows:

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Attachment 7

Said district attorney they are declared to be an executive officer of the judicial district in which elected, with said office constituting a separate entity within said district for administrative purposes.

*The enabling legislation for the District Attorney Act provides in particularity, that in no event shall said district attorney be deemed an officer of any county
Kansas Statutes Annotated 22a-101(1972)*

In the years following, two additional counties became joined as judicial districts administered under the auspices of the District Attorney system. [Note: While it probably would have been more efficient to amend K.S.A. 22a-101 to include the newly formed districts, the legislature chose to add two separate statutes setting forth identical language as the original enabling act – KSA 22a-108 and 22a-109.]

In 1978, **Douglas County** was added to the original four judicial districts to provide for administration by a District Attorney. See Kansas Statutes Annotated 22a- 108.

In 1999, **Reno County** was established as the twenty-seventh (27th) judicial district to be administered by a District Attorney. See Kansas Statutes Annotated 22a-109.

Now, each of the six named judicial districts including Wyandotte, Shawnee, Johnson Sedgwick, Douglas and Reno are administered under the provisions of the applicable statutory code. In addition to provisions that set forth the executive nature of the district attorneys position, and the fact that they are separate entities within the judicial district, the statutes make it clear that the district attorney is a separate state elected official who has no legal relationship with the county where they reside and may **not become an officer of the county for any purpose**. The District Attorney has been held to be the chief law enforcement official for the judicial district that she serves.

Financing the Office of the District Attorney

Kansas Statutes Annotated 22a-106 is the enabling statute for the financing of District Attorneys as a separate entity from county government. This statute relies upon the county to appropriate amounts for the operation of the office, but gives the District Attorney the power to administer their office in the allocation of funding for their purposes, for the hiring of personnel and for the necessary expenditures that may be incurred by the office of the District Attorney. While the funding source for the office of the District Attorney may be the county within the judicial district where this state office resides, **the county is nevertheless prohibited from exercising power over the district attorney who remains solely in control of the administration of his or her office**. It is this statute that Senate Bill 347 improperly seeks to amend. The relevant statute reads as follows:

:

22a-106. (a) Within the limits of appropriations therefore, **the district attorney shall appoint** such assistant district attorneys, deputy district attorneys and other stenographic, investigative and clerical **hire as may be necessary** to carry out the functions of the district attorney's office in such judicial district, and **he shall determine the annual compensation** of each assistant district attorney and other persons appointed pursuant to this subsection. The

county commissioners shall determine and allow such reasonable sums from funds of the county for the compensation of assistants, deputies and other stenographic, investigative and clerical hire and for other expenses of such office as may be necessary to carry out the function of such office. **History:** L. 1972, ch. 71, § 6; L. 1973, ch. 146, § 2; April 18.

Notwithstanding that only four judicial districts are set forth in this proposed amended statute, the amendments to the act made in 1978 and 1999 adding Reno and Douglas county, also make it incumbent upon the board of county commissioners to follow these statutory prerogatives as to their funding; and mandate that they not interfere with the employment of personal staff of the District Attorney, and assure that this state elected official, while financed by the county, is provided suitable space as may be required.

Errors in the Conception of Senate Bill 347

Of note concerning Senate Bill 347, there are conspicuous errors in its formation and proposed application. The bill, as drafted, seeks to make the District Attorney a “county attorney” purely for funding and administrative matters under the financing statute. However, under the preamble statute, clearly, **District Attorneys are not county officials** and cannot be presumed to be one by simply waving a wand over a portion of the financial statute to make them changelings in one amendment to the financial statutory scheme. You can’t be the District Attorney for half the statute, and a county attorney for another portion of the statute. It is genetically impossible.

The impetus to change this statute is perplexing. It appears to have been fostered by a judicial district that is unhappy with the authority granted to the District Attorney, and therefore seeks to bring his administration under the county umbrella under an “urban area” theory. Their position in formulating this proposed amendment to the District Attorney statute is misguided.

As a District Attorney in one of the six judicial districts, and with my colleagues, we take no sides in the issues facing Johnson County. We have all long enjoyed good relations with our respective county governments, and work together for the betterment of our communities as fiscally responsible state elected officers.

Our state legislature has been true to its responsibilities to deal with issues of state-wide concern, and not to enact statutes that have a such a singular and pointedly special interest purpose as that proposed by the proponents of Senate Bill 347. Saying that the amendment of this statute will not affect the other five jurisdictions with statutorily empowered district attorneys does not make this proposal any more legitimate or palatable. There are also errors in the proposed statute. [Note: The drafter of this statute inadvertently failed to recognize two important issues. One, Shawnee County is also designated an “urban area” by Kansas Statute. That was neglected to be researched. Also, there are six jurisdictions total and in the drafting of the proposal, Reno and Douglas county were not added probably because the drafter did not recognize their inclusion by virtue of their independent statutes KSA 22a-108 and 109]. If, as it has been said, that this senate bill will not impact the other five districts, this presumption is in error.

The important roles played by District Attorneys in their respective jurisdictions, mandate that they alone control the administration of their office. The ties that bind the commissioners to the elected state official are financial ones. The District Attorney has the legal, ethical and statutory

responsibility to handle the matters that are entrusted to him. If he fails in that respect, it is for the electorate to make the changes necessary to secure an appropriate law enforcement official. It is not for the county to change the law to fit one aberration only to find that it has not been necessary in the past, and more than likely will not be necessary with any future elected official under this statute.

The Special Responsibilities of the District Attorney As Employer of Personal Staff

It appears that Johnson County wishes to exert more administrative control over the office of the District Attorney than the Kansas Legislature has seen fit to vest in them. By law, the District Attorney is has the plenary power to hire and to fire employees who do not meet the elected's requirements for membership in his personal staff.

The administrative power over the office that is held by the District Attorney is for legitimate reasons. **Kansas law has long supported the right to employment at will.** Kansas law also recognizes that a District Attorney is exempt from allegations of discrimination under Title VII – 42 US 2000e. For purposes of the anti-discrimination in employment statute, the term “employee” means an individual employed by an employer. However, the term employer does not include any person elected to public office in any State or political subdivision or a member of such elected's personal staff. The State of Kansas follows this law. See **Crumpacker v. State of Kansas Department of Human Resources**, United States Court of Appeals for the 10th Circuit: 474 F 3rd 747; 2007 January 10, 2007 holding that Title VII outlines four classes of persons who are exempt from its protection: (1) elected officials (2) persons chosen by an elected official to be on such official's personal staff (3) appointees on the policy making legal and (4) persons serving as an immediate adviser to the elected official with respect to the constitutional exercise of powers of the official's office. *42 USC §2000e (f)*. In the case of **Lococo v. Mark Barger et al, 958 F. Supp, 290 [1997]** The United States District Court for the Eastern District of Kentucky applied the same test as set forth in the Kansas Crumpacker case to a staff employee of a prosecutor's office who was terminated from employment in that government job. Ms. Lococo was an assistant county attorney. She was terminated and asserted wrongful discharge. In denying this assistant district attorney the right to sue for wrongful discharge under 42 USC 2000, the court stated:

“Title VII does not define personal staff. However, the Fifth Circuit, when faced with this same issue, put forth six factors Which Courts have found significant in determining whether a Complainant falls within the “personal staff” exception to Title VII's Definition of “employee. [cites omitted].

- (1) Whether the elected official has plenary power of appointment and removal
- (2) whether the person in the position at issue is personally Accountable to only that elected official
- (3) whether the person in the position at issue represents the Elected official in the eyes of the public

- (4) whether the elected official exercises a considerable Amount of control over the position
- (5) the level of the position within the organization's chain of Command and
- (6) the actual intimacy of the working relationship between The elected official and the person filling the position."

"Having reviewed each of the {sic} six factors, the Court is persuaded that the personal staff exception removes Lococo as an assistant County attorney from the definition of employee. First, since by statute, the county attorney appoints and removes assistants, the county attorney has plenary power of appointment and removal. Second, it appears that an assistant county attorney is accountable only to the county attorney. Third, it is clear that an assistant county attorney would generally represent the county attorney in the eyes of the public. Fourth, the assistant county attorney is under the direction and control of the county...Fifth, an assistant county attorney is just below the county attorney in the chain of command. And finally, the county attorney and an assistant county attorney have a close working relationship. Thus having determined that Lococo falls within the personal staff exemption to the definition of employee, the Title VII claim must be dismissed."

See also **Ramirez v. San Mateo County District Attorneys Office**, 638 F 2d 509, 511-513 (9th Cir. 1981). "A similar distinctiveness characterizes the position of deputy district attorney in San Mateo County. Unlike most other county workers, deputy district attorneys serve at the pleasure of their superior, the district attorney, who has plenary power of appointment and removal. **Also unlike others employed by the county, deputies are not subject to the normal protections of the county civil service system.**"

"This characterization of the deputy's position in county law tells us much about the working relationship the county envisions between district attorney and deputy. The exclusive powers of selection and retention indicate that deputies perform to the district attorney's personal satisfaction rather than to the more generalized standards applied to other county workers by the civil service system. **Such a level of personal accountability is consistent with the highly sensitive and confidential nature of the work which deputies perform as well as with the considerable powers of the deputy to represent the district attorney in legal proceedings and in the eyes of the public.** See Wall v. Coleman, supra, 393 F. Supp. at 830-31. **We conclude that when a job includes this level of personal accountability to one elected official, it is precisely the sort of job Congress envisioned to be within the "personal staff" of that official and thus exempt from Title VII.**"

It is unfortunate that proponents of Senate Bill 347 chose to attempt local problem solving by putting this inappropriate bill before the legislature. This committee has more important work to do than to single out one jurisdiction that is having difficulties with an elected official whose term appears to be of short duration.

The District Attorney statute should remain unchanged. There is a legitimate need for separation of powers. The prosecution of criminal offenses is the **responsibility** of the public prosecutor who ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. It is important to the public, as well as to

individuals suspected or accused of crimes, that these discretionary functions of the prosecutor be exercised with the highest degree of integrity and impartiality, and with the appearance of the same. State v. Cope, 30 Kan Ap 2d 893, 50 P.3rd, 2002.

Likewise, the District Attorney is not in the same position as other “employers”, both under Title VII and in the nature of the work performed by his assistants. As set forth in **Wall, Supra** and **Ramirez, supra**, the responsibilities of an assistant District Attorney are solely accountable to the elected official. Their work is confidential and sensitive. They are not general employees, but employees with specialized skills and statutory requirements not akin to most other employees in government work. They are required to be members of the Bar of the State of Kansas, and they are also subject to ethical responsibilities that are governed and monitored by the District Attorney. This entirely different class of personal staff members requires the singular attention of the elected official who is charged with monitoring their conduct, their licensing, their continuing legal education and other confidential employee requirements that do not lend themselves to supervision and authorization by other county administrators neither responsible nor proficient in these additional specialized and unique employment matters.

I ask that the Senate Judiciary Committee view this bill in light of the law presented by this testimony. I will certainly make myself available for further testimony or discussion of the merits and issues surrounding Senate Bill 347 if called upon by the Committee or its Chair.

Respectfully Submitted

Nola Tedesco Foulston

District Attorney Nola Tedesco Foulston
18th Judicial District of Kansas

OFFICE OF DISTRICT ATTORNEY
PHILL KLINE, DISTRICT ATTORNEY

March 16, 2007

The Honorable Senator John Vratil
Chairman, Senate Judiciary Committee
Attn: Committee Secretary Karen Clowers
Room 281-E
Capitol Building
Topeka, Kansas 66612

Via Overnight Mail

Re: Senate Bill No. 374

Dear Mr. Chairman and Members of the Committee:

Current Kansas statute combines with case law to provide the appropriate mix of oversight and independence for those independently elected offices with law enforcement responsibilities within our state's counties and judicial districts.

Kansas District Attorneys, Sheriffs and County Attorneys maintain independence under statute and case law in hiring, firing, promoting and setting of salaries of deputies and assistants. This independence is critical due to the unique ethical and legal obligations incumbent on the offices. Furthermore, these agencies are often called to investigate allegations of criminal activities of county officials and employees. The legislature has wisely recognized that allowing supervisory control of law enforcement officials by those whom those officials may be called to investigate creates an inherent conflict and an invitation to improper influence.

Furthermore, the practice of law imposes additional unique legal and ethical obligations on prosecutors that are not present with other county officials. These obligations are not contemplated in the employment policies of numerous Kansas counties.

I realize that some may disagree with my decisions as the District Attorney of the 10th Judicial District; however, the expression of their discontent can be expressed at the ballot in two years. Disagreement with the results of a special election should not compel change to longstanding Kansas policy that properly reflects and protects the responsibilities of the independently elected office of District Attorney.

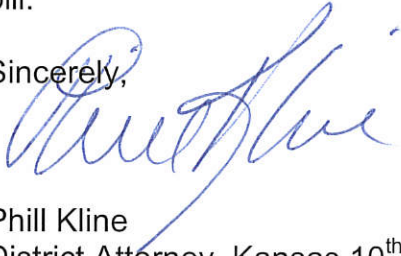
Senate Judiciary

3-19-07

Attachment 8

I join my colleagues District Attorneys Robert Hecht and Nola Foulston in opposing this bill.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phill Kline". The signature is fluid and cursive, with a large initial "P" and "K".

Phill Kline
District Attorney, Kansas 10th Judicial District

Cc: Members of the Committee (25 copies provided as requested).

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