Approved: March 25, 2008
Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Arlen Siegfreid at 1:30 P.M. on February 21, 2008, in Room 313-S of the Capitol.

All members were present:

Committee staff present:
Dennis Hodgins, Kansas Legislative Research Department
Mike Heim, Revisor of Statutes Office
Jason Long, Revisor of Statutes Office
Jeannie Dillon, Committee Assistant

Conferees: Jason Long
Mike Heim
Representative Lance Kinzer
Alan Cobb
Lt. Colonel William Richards
Justice Fred Six
Dick Hite
Professor Robert Casad
David Rebein
Jim Robinson

The Chair opened the meeting and asked for bill introductions. Hearing no bill introduction requests, Chairman Siegfreid opened the hearings on:

HB 2799 - Court of appeals judges appointed by governor, subject to senate confirmation; creating a court of appeals nominating commission to nominate three qualified persons; governor appoints any qualified persons and

HCR 5031 - Governor appoints supreme court justices, senate confirms; nominating commission membership amended; commission nominates three employees; governor appoints any qualified person.

A briefing on **HCR 5031** was given by Mike Heim, Revisor of Statutes. The bill has two basic objectives. It provides for an appointment by the governor, subject to consent of the senate and secondly, it provides for a different appointing authority for the Supreme Court nominating commission.

Jason Long, Revisor of Statutes, briefed the Committee on **HB 2799**. Mr. Long explained that the bill was similar to the **HCR 5031** with one major difference. **HB 2799** refers to the appointment to the court of appeals which is the appellate court, immediately below the Supreme Court in our state. The bill would essentially create a court of appeals nominating commission which would be separate and apart from the Supreme Court Nominating Commission. The commission would be appointed in a manner similar to the resolution; 3 members appointed by the speaker of the House, 3 members by the president of the Senate and 3 members by the governor. After answering questions asked by the Committee, Mr. Long was thanked by the Chair.

Lance Kinzer spoke as a proponent of the bills. He related that no other state in the country allows its bar to control the majority of supreme court nominees and he thinks that this is a problem. That is why he is suggesting restructuring to make some accountability to the system. He opined that it is wrong to give too much power to any one entity. In closing, Representative Kinzer said that we have a system that allows a very narrow group of people with a very narrow point of view to control the process.
(Attachment 1)

Americans for Prosperity was represented by Alan Cobb. Mr. Cobb said that Kansas is the only state that allows lawyers to dominate the process. He stated that it is true that our judiciary must be independent of the shifting political sands but that judicial independence applies to the judges, not to their selectors.
(Attachment 2)

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on February 21, 2008, in Room 313-S of the Capitol.

The Chairman invited Colonel William Richards, Topeka Branch of the NAACP, to the podium. Colonel Richards testified as a proponent to the **HCR 5031** and **HR 2799.** He urged the Committee to pass **HCR 5031.** He stated that the concurrent resolution provides more accountability, transparency, and democratic oversight than currently exists for the Kansas electorate. He opined that it will terminate the current charade of appointments by the Governor appearing to be no more that a "rubber stamp" operation. He concluded by say that it is recommended that the process for considering and nominating persons to the Kansas Supreme Court include compliance with the Title V11 Civil Rights Act of 1964, as well as the Americans with Disabilities Act and the Kansas Act Against Discrimination. (Attachment 3 & 4)

Justice Fred Six, Kansas Supreme Court Justice (retired), spoke as an opponent to **HCR 5031.** In his testimony, Justice Six commented on the following points:

- The triple play of 1957
- Kansans desire a Supreme Court that is independent and accountable.
- **HCR 5031** will discourage Judges and lawyers in Kansas from becoming nominees.
- Potential for damaging the working relationship between executive branch and legislative branch.
- Track record of decisions based on the law, the facts and the record from the trial court
- The Kansas current merit selection system is currently being used by surrounding sister states.
- The Kansas merit selection system, adopted by the voters in 1958, is a judicial vehicle that has be used over the past 49 years.
- Kansas requirements that a Supreme Court Justice retire at age 70.
- The cost factor, fiscal impact and additional expense.
- **HCR 5031** does not support the independence of the Judiciary.

(Attachment 5)

Dick Hite representing the Supreme Court Nominating Commission, addressed the Committee as an opponent to the proposal. He stated that he would like to concur with all of Judge Six's comments regarding **HCR 5031.** He addressed the role of the lawyers on the commission and the criticism directed to the commission. The Commission's interviews of applicants for appellate judges positions are not secret in the sense implied by its critics. When a vacancy occurs in one of the appellate courts, the Commission interviews as many as 35 to 40 individuals. Only three are nominated to fill the vacancy. He suggested that Kansans continue to want independent appellate judges and that there is no need for change. (Attachment 6)

The Chair recognized Robert Casad, professor of law emeritus of the University of Kansas. Mr. Casad said that the fact that someone disagrees with a court's decision is certainly no argument for changing the system of judicial selection. He stated that the proponents do not want a politically unbiased judiciary; they want one that is politically biased in a way that they approve. (Attachment 7)

The Chair recognized David Rebein, an attorney from Dodge City, who appeared as an opponent to the bills. He asked the Committee to consider a number of points on why the current system is working. He compared the federal system to the current Kansas system we have now and explained why our state system is a more superior system. (Attachment 8)

Jim Robinson, Kansas Association of Defense Counsel, appeared in opposition to both the concurrent resolution and the bill. He shared many the reasons articulated by others. He contended that the resolution and the bill that the Committee has before them is an effort to tilt the "playing field" so that the legislature knows in advance how the "calls" are going to be made. He stated that the system works very well and we should not be changing it now. (Attachment 9)

The Committee members were allowed to ask questions of the conferees.

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on February 21, 2008, in Room 313-S of the Capitol.

Written testimony was submitted by Ronald Cass (Attachment 10) and Stephen Ware (Attachment 11) who were proponents of **HB 2799** and **HCR 5031.**

Written testimony was submitted by Kellyanne Conway, CEO of Polling Company, Inc. (Attachment 12) who is neutral to **HB 2799** and **HCR 5031**.

Written testimony was submitted by Janis McMillen, League of Women Voters of Kansas, (Attachment 13) and Callie Denton Hartle, Kansas Association of Justice, (Attachment 14) who are opponents of **HB 2799** and **HCR 5031**.

The hearing was closed on **HB 2799** and **HCR 5031.**

The meeting was adjourned. The next meeting will be on February 25, 2008, at 1:30 in room 313 S.

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STATE OF KANSAS
HOUSE OF REPRESENTATIVES

TOPEKA

LANCE KINZER
REPRESENTATIVE, 14TH DISTRICT

COMMITTEE ASSIGNMENTS
TAXATION
JUDICIARY
FEDERAL AND STATE AFFAIRS

TESTIMONY REGARDING HCR 5031 & HB 2799

The current system of selecting Court of Appeals & Supreme Court Justices gives too much power to the state bar. Under current law a nine member commission, five of whom are attorneys selected by other attorneys, submit a list of three nominees to the Governor. The Governor is then required to appoint one of those three nominees. Kansas is the only state in the nation that allows lawyers to control the selection of the majority of a state judicial nominating commission.

HCR 5031 & HB 2799 would implement the following reforms:

- Change the make up of the nominating commission to allow three appointments each by the Governor, the President of the Senate and the Speaker of the House. One of each appointing authorities appointees would be required to be an attorney in good standing in Kansas.
- The new nominating commission would still present three names to the Governor who would be free to either select one of those nominees or to make a selection of her own.
- The person selected by the Governor would then be subject to confirmation by the Senate.

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

In November of 2007 Professor Stephen Ware of the University of Kansas School of Law published a white paper titled "Selection to the Kansas Supreme Court" in which he noted, "The bar has an unusually high degree of control over the selection of supreme court justices in Kansas. None of the other forty nine states gives the bar as much control." Summarizing his findings Professor Ware noted, "In short, senate confirmation is a reform worthy of serious consideration."

I hope that this Committee will agree with Professor Ware and give HCR 5031 & HB 2799 your serious consideration.

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Attachment 1

AFP AMERICANS FOR PROSPERITY
KANSAS

February 20, 2008

Support of House Concurrent Resolution No. 5031 and House Bill No. 2799

Mr. Chairman and members of the committee,

I am Alan Cobb, representing the more than 13,000 Kansas citizens who are members of AFP and who want more say in one-third of our government. I am also an attorney, licensed to practice in Kansas.

Controversy surrounding the way judges are selected is nothing new. In fact, the colonists listed as one of their grievances against George III in the Declaration of Independence the way the Crown unilaterally and without input from the Colonies selected and controlled colonial judges.

We are currently experiencing in Kansas a crisis of confidence among the people in their government's ability to provide equal justice under the law. According to a recent poll, 63% of Kansas voters support changing the nominating commission to have much more public and legislative input and less from the state's lawyers.

Kansas is a unique state in many, many positive ways. Being the only state with the bar controlling the process for the selection of appellate court judges and justices is not one of them.

Politics Are Part of the Process

Please let's not pretend politics and campaigning are not parts of this process. They are, as you can see from the attached campaign letter sent to me by a candidate for the Commission. The politics may be more subtle than those present in a campaign for the legislature or the Governor, but they are present nonetheless.

There may or may not be politics involved in the actions of the Nominations Commission, but we don't know since their deliberations are secret.

Let's substitute the politics of the many for the politics of the elite few.

The Fallacy of the Application of the Triple Play

Many members of the Kansas bar scream about how we need the "merit system" to prevent another "Triple Play." The sentiments are completely and absolutely irrelevant to the proposals at hand.

The triple-play occurred because the Governor could unilaterally select a Supreme Court justice replacement, without any check from the legislature or "merit" commission. No one is suggesting we go back to that system.

A primary factor contributing to lagging public confidence in the basic fairness of our judiciary is the growing sense that judicial selection in Kansas is controlled by an elite group of societal managers who, while purporting to be objective and neutral, in fact exercise

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Attachment 2

our government. Kansans, with our basic faith in our democratic institutions of government, are generally quite accepting of the judicial rulings handed down by our courts, even when they are adverse, so long as the system does not violate our fundamental common sense of fair play. The recent political acrimony over certain important judicial decisions in Kansas does not stem, as some have suggested, from an unwillingness or inability to be gracious in political defeat, but rather from an impression that the playing field is no longer level. Thus, one of the most important reforms this government can enact to restore public confidence in our judiciary is to adopt House Concurrent Resolution No. 5031 and House Bill No. 2799 which would return the selection of Kansas appellate judges to the democratic branches of government.

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

While it is naïve to think that our judicial selection process can ever be devoid of politics, it is not unrealistic to expect that insofar as political considerations impact the selection of the judiciary, those considerations be *of the people* through their democratically selected representatives. This is consistent with the sacred principle of "one man one vote" which forms the very foundation of our democratic institutions of government. The method of judicial selection currently in place, simply put, is not consistent with this most fundamental rule. The system proposed by HCR 5033 and HB 2770 of gubernatorial appointment with Senate consent, while avoiding the undue political influence peddling which can plague a system of direct election of judges, avoids the equally damning problem of control by an unaccountable societal elite. The founders of our country knew this, and their choice of this selection method of appointment with consent has served our country and the federal judiciary well for centuries.

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

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PE E
NAACP, TOPEKA BRANCH
P.O. BOX 1451
TOPEKA, KANSAS 66601

BRANCH SLOGAN: *"Come Together As One and Get The Job Done"*

February 21, 2008

Testimony:
Kansas House Federal and State Affairs Committee by:
LtC(ret.) William E. Richards, Sr., Lobbyist for for the Topeka Branch, National Association for the Advancement of Colored People(NAACP).

Mr. Chairman, Members of the Committee:

It is a pleasure to be here this afternoon!

The Topeka Branch, of the NAACP, urges your affirmative vote and support for the passage of House Concurrent Resolution No. 5031, a Proposition to amend Section 5 of Article 3 of the Kansas Constitution, relating to the selection of Justices of the Supreme Court.

House Concurrent Resolution No. 5031 provides more accountability, transparency, and democratic oversight, than currently exists for the Kansas Electorate! It will terminate the current charade of appointments by the Governor appearing to be no more than a "rubber stamp" operation, and, the Kansas Senate is completely eliminated from this highly important process of reviewing and approving the selection of Supreme Court Justices!

In a Democracy, the will of the Kansas Electorate is represented by an elected Governor and Senate legislators, not by an extra-legal Supreme Court Nominating Commission that is practically accountable to no one!

Your attention is invited to Attorney General Opinions: 93-69, dated May 17,1993 and 97-29, wherein the Kansas AG states: The Supreme Court nominating commission is not subject to title 7 of the civil rights act of 1964, as amended,but is subject to theAmericans with disabilities act and the Kansas act against discrimination. Title V11 of the Civil Rights Act of 1964, is Federal Law that states- "It shall be an unlawful employment practice...to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin." It is rather obvious that these AG Opinions are too broad and should have been more specific! The State of Kansas is under Federal jurisdiction, by what authority could the AG abolish compliance with all aspects of anti-discrimination under Title V11, without Federal approval?

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Attachment 3

In view of the above, and the historical FACT that no Kansas Citizen of African American extraction, regardless of how highly qualified legally and otherwise, is being submitted as a nominee for possible appointment as a Supreme Court Justice, by the Kansas Supreme Court Nominating Commission! It is recommended that, the process for considering and nominating persons to be Kansas Supreme Court Justices include compliance with Title V11 Civil Rights Act of 1964, as well as, the Americans with Disabilities Act and, the Kansas Act Against Discrimination1 Knowing, to some degree, that theprocess has been designed to be, also, color-blind, would be greatly appreciated.

Vote favorably for HCR 5031!!

William E. Richards, Sr.

State of Kansas
Office of the Attorney General
301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

March 27, 1997

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ATTORNEY GENERAL OPINION NO. 97-_29_

Carol G. Green, Clerk
Kansas Supreme Court
Kansas Judicial Center, 3rd Floor
Topeka, Kansas 66612

Re: Labor and Industries--Kansas Acts Against Discrimination--Unlawful Employment Practices; Legality of Questions Posed to Applicants for Appellate Court Positions

Synopsis: The Supreme Court Nominating Commission is subject to the Kansas Acts Against Discrimination, the Kansas Age Discrimination in Employment Act and the Americans With Disabilities Act. A question regarding the age of the judicial applicant is appropriate in order to ensure that a judicial candidate is legally qualified to apply, however, the question should be narrowly tailored to avoid the appearance of age discrimination. A question regarding the candidate's marital status and family situation is inappropriate in the absence of a legally justifiable basis for the inquiry. A question which requests the religious affiliation of the candidate violates the First Amendment to the United States Constitution, Section 7 of the Kansas Bill of Rights and the Kansas Acts Against Discrimination. Finally, the mental health related questions, although appropriate under Title II of the Americans With Disabilities Act because they are reasonably related to job performance and are subject to reasonable time limitations, are not permissible under Title I of the ADA and the Kansas Act Against Discrimination. Cited herein: K.S.A. 20-120; 20-124; 20-125; 20-132; 20-133; 20-137; 20-138; 20-2608; 20-3002; 20-3004; 20-3007; 44-1009; 44-111; 44-1112; 44-1113; 29 U.S.C § 621; 42 U.S.C. §§ 2000e, 12111, 12112; Kan Const., Art. 3, §§ 5, 7; Kan. Const., Bill of Rights, Sec. 7: U.S. Const., Art. VI and Amendment I.

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Attachment 4

* *

Dear Ms. Green:

You request an opinion on behalf of the Chairman of the Supreme Court Nominating Commission (Commission) concerning the propriety of certain questions that appear on the application form for appellate court candidates. The questions address the age, marital/family status, religious affiliation and health of the applicant. We review each question in light of the Kansas Acts Against Discrimination (KAAD), the Kansas Age Discrimination in Employment Act (KADEA) and the Americans With Disabilities Act (ADA).

"1. Given minimum age qualifications and a mandatory retirement age, may the Commission ask on its nomination form the date of birth and age of potential nominees?"

The Kansas Age Discrimination in Employment Act (KADEA), K.S.A. 44-1111 *et seq.*, prohibits employment practices based upon age which "limit, deprive or tend to deprive any person of employment opportunities or otherwise adversely affect the person's status as an applicant for employment." K.S.A. 44-1113. One of these prohibited employment practices is for an "employer", because of the applicant's age, "to bar . . . the person from employment." K.S.A. 44-1113(a)(1). As used in this Act, the term "employer" includes the State of Kansas. K.S.A. 44-1112(d). [The KADEA generally parallels the federal Age Discrimination in Employment Act (ADEA) at 29 U.S.C. 621 *et seq.*, however, the ADEA does not apply to state court judges and nominees for those positions because the federal law definition of "employee" exempts appointees on policy making levels. ***Gregory v. Ashcroft***, 501 U.S. 452, 115 L.Ed.2d 410, 111 S.Ct. 239 (1991).]

The Commission is established by the Kansas Constitution and its purpose is to nominate and submit to the Governor the names of persons for appointment to the Kansas Supreme Court and the Kansas Court of Appeals. Kan. Const., Art. 3, § 5(d), K.S.A. 20-133, 20-3004. The Commission is comprised of attorneys and non-attorneys who serve fixed terms and who are compensated for their services and reimbursed for expenses from the state treasury. K.S.A. 20-120, 20-124, 20-125, 20-137, 20-138. When a vacancy in the appellate courts occurs, it is the practice of the Clerk of the Appellate Courts to send written notice to all Kansas attorneys informing them of the vacancy and inviting applications to be submitted to the Commission. The Commission interviews the applicants and submits three names to the Governor who then makes a selection. K.S.A. 20-132, 20-3007. [The three nominees are subject to a Kansas Bureau of Investigation background check and, as part of that investigation, are required to complete an information form which requests some of the same information found on the Commission's application (*i.e.* date of birth, names and age of children). We address in this opinion only the propriety of the information requested by the Commission.]

While the Commission does not itself employ the candidate, it plays an integral part in the process by which appellate court judges are employed. ***State ex rel. Stephan v. Adam***,

243 Kan. 619 (1988). Title VII of the Civil Rights Act of 1964 and the Kansas Acts Against Discrimination prohibit the same employment practices that the KADEA prohibits except Title VII and its state counterpart protect job applicants from discrimination based upon race, color, religion, sex and national origin. Federal court decisions concerning Title VII are persuasive authority in KAAD and KADEA cases. ***Woods v. Midwest Conveyor Co.***, 231 Kan. 763 (1982), ***Kansas State University v. Kansas Comm'n on Civil Rights***, 14 Kan. App.2d 428 (1990); ***Davis v. Wesley Retirement Communities, Inc.*** 913 F. Supp. 1437, 1443 (D.Ks. 1995). The Title VII cases that address the issue of who the employer is in a situation where the entity in question does not actually employ the person but plays a decisive role in the employment process supports our conclusion that the Commission is an agent for the State of Kansas and must abide by the KADEA because it is the gatekeeper to appellate court employment. *See* ***Scott v. City of Topeka Police and Firefighter Civil Service Commission***, 739 F.Supp. 1434 (D.Kan. 1990) (city of Topeka liable under Title VII for discriminatory acts of its civil service commission which failed to certify a woman as a candidate for a firefighter position); ***Rivas v. State Board for Community Colleges***, 517 F. Supp. 467 (D. Colorado 1981) (state council with authority to confirm teaching appointments at community colleges was sufficiently involved with the employment process for Title VII purposes). In ***Livingston v. Ewing***, 601 F.Supp. 1110 (10th Cir. 1979) the state museum adopted a policy prohibiting non-Indians from selling merchandise on museum grounds. Title VII exempts from its prohibition against racial discrimination any employment practice that grants preferential treatment to Indians. Plaintiff/non-Indians argued that the exemption did not apply because there was no employment relationship between the museum and the Indian sellers. The Court concluded that an employment practice is not restricted to a master-servant situation. *See also* ***Sibley Memorial Hospital v. Wilson***, 488 F.Supp. 1338 (D.C. 1973) [cited in ***Livingston***] (Title VII applies to those who control access to employment and who deny access by reference to invidious criteria); ***Puntolilo v. New Hamsphire Racing Commission***, 375 F.Supp. 1089 (D. New Hampshire 1974) [cited in ***Livingston***] (State Racing Commission liable under Title VII to harness race driver because it controlled access to employment by virtue of its powers to assign stall space at racing parks).

Having determined that the Commission is subject to the KADEA, we review the question at issue. 29 C.F.R. § 1625.5 provides, as follows:

> "A request on the part of the employer for information such as 'date of birth' or 'state age' on an application form is not in itself a violation of the ADEA but it will be closely scrutinized to assure that the request is for a permissible purpose and not for the purpose of discriminating against applicants on the basis of their age."

By law, appellate court judges must be at least 30 years old and must retire at age 70. Kan. Const., Art. 3, § 7; K.S.A. 20-3002, 20-2608. While it is appropriate for the Commission to ascertain whether an applicant is at least 30 and not over the age of 70, the wording of the present question invites scrutiny on the basis that the inquiry is much

broader than it has to be in order for the Commission to accomplish the lawful objective of finding an age-qualified candidate. It can do so by narrowing its inquiry to ask whether the applicant is between the ages of 30 and 70 thereby avoiding the appearance of discriminating against an applicant on the basis of age.

"2. May the Commission ask on the nomination form whether the potential nominee is married, the spouse's name, the number of children, and the children's names and ages?"

In Attorney General Opinion No. 93-69, Attorney General Stephan concluded that the Commission as an agent for the State of Kansas is subject to the Kansas Acts Against Discrimination which prohibit discrimination against a job applicant on the basis of sex. General Stephan also concluded that the Commission is not subject to Title VII because an applicant for a vacancy on the Kansas appellate courts is not an "employee" for purposes of Title VII because of the federal exemption for appointees on a policy making level. However, federal decisions construing Title VII are persuasive authority in construing KAAD cases because the statutory schemes are analogous. ***Miller v. Brungardt***, 916 F.Supp. 1096 (D.Kan. 1996). In ***Mabry v. State Board of Community Colleges***, 813 F.2d 311 (10th Cir. 1987) the Court concluded that any marital or family status distinction violates Title VII only if its impact is to discriminate on the basis of sex. For example, an employer's rule that forbids employment of women who are married but not men who are married is discrimination based upon sex. 29 C.F.R. § 1604.04(a).

Our concern lies with the relevance of this information to the Commission's mission of selecting the most qualified candidates for the appellate bench. Is a married candidate better qualified to review a decision of a lower court than an unmarried candidate? Is a married man more qualified to affirm a murder conviction than a single or married woman with minor children? While the question concerning marital and family status is posed to all applicants, we believe that requesting this information increases the potential for liability under an Equal Protection challenge or an employment discrimination/disparate impact theory. A disgruntled applicant could allege that this seemingly neutral question creates "an artificial, arbitrary and unnecessary barrier to employment" because it has a significant disparate impact on a protected group. ***Murphy v. Derwinski***, 990 F.2d. 540 (10th Cir. 1993). If a plaintiff can establish that impact, the burden would shift to the Commission to rebut with evidence of a business justification for the question. ***Ortega v. Safeway Stores, Inc.*** 943 F.2d 1230,1243 (10th Cir. 1991). If faced with an Equal Protection challenge, a court would have to discern whether there is a rational basis for the Commission distinguishing between married and single applicants or between applicants with minor children and applicants with no minor children.

The Commission has not provided us with a reason why this information is necessary in securing the best qualified candidates and, therefore, we urge the Commission to reexamine whether the information sought is justified in light of the potential for liability and

the perception it creates among the applicants. If there is no non-discriminatory reason for asking these questions, they should be stricken.

"3. May the Commission ask on the nomination form the religious affiliation of a potential nominee?"

A question propounded by the Commission that inquires into one's religious affiliation implies that one's religious beliefs or lack of religious beliefs is relevant to serving on the appellate bench. Such implication is odious to the concept of separation of church and state. Both the Kansas and United States Constitutions forbid religious tests as a qualification for holding public office. Kan. Const., Bill of Rights, sec. 7; U.S. Const., Art. VI. Religion is a private matter for the individual and the state cannot force a person to profess a belief or disbelief in any religion nor may the government inquire into the religious beliefs and motivations of officeholders. ***Lemon v. Kurtzman***, 403 U.S. 602, 29 L.Ed 2d 745, 91 S. Ct. 2105 (1971); ***Torcaso v. Watkins***, 367 U.S. 488, 6 L.E. 982, 81 S.Ct. 1680 (1961); ***McDaniel v. Paty***, [concurring opinion by Brennan and Marshall], 435 U.S. 618, 55 L.E.2d 593, 98 S.Ct. 1322 (1978). In ***Torcaso***, ***supra***, the United States Supreme Court invalidated on First Amendment grounds a state constitutional provision that required a public officeholder to declare belief in the existence of God. The Court condemned the "discredited policy of probing religious beliefs by test oaths or limiting public office to persons who have a belief in some particular kind of religious concept." The Commission's inquiry gives the impression that there may be some religious affiliations that are more compatible or incompatible with serving on the appellate court - a notion that is prohibited by the First Amendment to the United States Constitution and section 7 of the Kansas Bill of Rights. Furthermore, the KAAD prohibits discrimination against a job applicant on the basis of religion. K.S.A. 44-1009. This section mirrors the Title VII prohibition. 41 U.S.C. § 2000e-2(a). K.A.R. 21-30-17(e) prohibits "any [pre-employment] inquiry into organization memberships, the name or character of which could indicate the . . . religion . . . of the applicant." The Kansas Human Rights Commission proscribes indirect queries into one's religious affiliations. Based on these authorities, it is our opinion that the Commission may not directly or indirectly inquire into a judicial applicant's religious affiliation.

"4. May the Commission ask on the nomination form a series of health-related questions. Specifically:

"(a) Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder? If 'yes,' explain.

"(b) Do you currently have *any* condition or impairment (including, *but not limited to*, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability

to serve as a judge of the appellate courts in a competent and professional manner? If 'yes,' explain.

"(c) Have you been treated for alcohol or drug abuse in the past five years? If 'yes,' please describe the treatment and explain how you have dealt with the condition."

Attorney General Opinion No. 93-69 concluded that the Commission is subject to Title I of the Americans with Disabilities Act (ADA) and to the KAAD, both of which prohibit discrimination against qualified individuals with disabilities in employment situations. Since the issuance of that opinion, one federal district court has reviewed similar mental health related questions propounded to judicial candidates by the Florida Judicial Nominating Commission. ***Doe v. The Judicial Nominating Commission for the 15th Judicial Circuit of Florida***, 906 F.Supp. 1534 (Fl. 1995).

In ***Doe*, supra**, the Court never addressed a Title I application; rather, the court reviewed Title II of the ADA, which prohibits a public entity from imposing eligibility criteria that screens out or tends to screen out disabled individuals from enjoying a program or activity offered by the public entity and concluded that the Florida Judicial Nominating Commission is a public entity subject to Title II. The Court then proceeded to evaluate six health-related questions, three of which addressed mental health and substance abuse.

28 C.F.R. § 35.130(b)(8) prohibits public entities from using eligibility criteria to screen out disabled individuals unless the criteria are necessary. Under the "necessity exception" public entities such as a judicial nominating commission may utilize eligibility criteria that screen out disabled individuals "if the criteria are necessary to insure the safe operation of the program or if the individual poses a direct threat to the health and safety of others." The Florida Judicial Nominating Commission argued successfully that questions relating to the mental health of a judicial applicant are justified by the necessity exception.

> "Judges in our society are vested with extraordinary power. Decisions of life and death, liberty or imprisonment, custody of children, and a host of weighty issues constitute the daily diet of those who serve on the bench. It is absolutely imperative that applicants for these positions be thoroughly vetted to assure their physical and mental fitness. The Florida Constitution places a large part of this responsibility in the hands of the nominating commission. As the gatekeepers of the appointive route to the bench, the Commission's task is to invite the best to apply, to scrutinize the applicants, and then to nominate only the most qualified for the Governor's consideration. Protecting the public is a paramount goal and, therefore, the Court agrees with the Judicial Nominating Commission's contention that the necessity exception is applicable to the judicial selection process."

The Court concluded that Title II of the ADA does not prevent inquiry into the area of diagnosis and treatment for severe mental illness. However, the Court then had to address the issue of whether the mental health related questions were over-inclusive because they required disclosure of information about past treatment or counseling that had no bearing on the applicant's present ability to perform the job.

> "All of these cases reinforce the principle that, under the ADA, the forced disclosure of information relating to disabilities without a necessary basis for the information is a form of discrimination because it screens out, or tends to screen out the disabled by imposing disproportionate burdens on them. . . . Therefore, where the inquiry has no reasonable relationship to job performance, but imposes a burden on individuals with disabilities by requiring them to make public disclosure of irrelevant present, past or perceived disabilities, the inquiry violates the ADA."

Citing case law from other jurisdictions that considered mental health related questions propounded to candidates for bar admission the Court concluded that wide-open inquiries into "any form of mental illness" or "any form of emotional disorders or disturbances" were over-inclusive and violated Title II of the ADA. ***Clark v. Virginia Board of Bar Examiners***, 880 F.Supp. 430 (E.D. Va. 1995). The Court also concluded that inquiry into treatment for substance abuse is justifiable provided the inquiry is restricted to narrow time parameters.

Applying the ***Doe*** analysis to the questions at issue, it is our opinion that the Commission's questions pass muster under Title II because they are reasonably related to job performance and are subject to reasonable time limitations. Questions similar to questions (a) and (b) have been upheld in other jurisdictions when challenged by bar applicants and the National Conference of Bar Examiners has approved such questions for use on bar admission forms. *See* ***Clark***, ***supra***, footnote 22, 18; ***Applicants v. Texas State Board of Bar Examiners***, 1994 W.L. 776693 (W.D. Texas 1994) and Memorandum from the National Conference of Bar Examiners (February 24, 1995).

However, under a Title I analysis, the questions constitute impermissible pre-employment medical inquiries and the Commission may subject itself to liability under Title I as well as the KAAD. 42 U.S.C. § 12112(a) prohibits a "covered entity" from discriminating against a qualified individual with a disability because of the disability in regard to job application procedures. "Covered entity" is defined as an "employer." 42 U.S.C. § 12111(2). "Employer" includes a "person" and the definition of "person" is the same as Title VII's definition which includes state government or a governmental agency. 42 U.S.C. § 12111(7); 42 U.S.C. § 2000e. While the Commission does not actually employ the applicant, Attorney General Opinion No. 93-69 concluded that, under Title VII case law which interprets "employer" to include entities that play an integral part of the employment process, the Commission is an agent for the state and is subject to both the ADA and the KAAD. We have found no cases issued subsequent to Attorney General Opinion No. 93-69 that would change that conclusion.

Both the ADA and the KAAD restrict an employer's ability to make inquiry of job applicants in an effort to discover disabilities or perceived disabilities on the basis that such information has been traditionally used to exclude applicants with disabilities before their ability to perform the job was evaluated. In short, an employer may not ask disability-related questions until it makes a conditional job offer to the applicant. 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13(a); U.S. Equal Employment Opportunity Commission ADA Enforcement Guidance: *Pre-employment Disability-Related Questions and Medical Examinations* (December, 1995) [EEOC Guidance Manual]; K.A.R. 21-34-2, 21-34-3. After making a conditional job offer, an employer may make medical inquiries and may condition a job offer on the results of such inquiry if all employees in the same job category are subjected to such an inquiry regardless of disability. 29 C.F.R. § 1630.14(b), K.A.R. 21-34-4. If the employer rejects the applicant after asking a disability related question, the focus will then shift to whether the rejection was based on the results of that question. EEOC Guidance Manual, Appendix III, pg. 529. If the question screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is job related and consistent with business necessity. 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10, 1630.14(b)(3); EEOC Guidance Manual, Appendix III, pg. 529

At the pre-offer stage, which is the point at which the Commission participates, it may not ask questions that are likely to elicit information about a disability. EEOC Guidance Manual, Appendix III, pg. 530. Moreover, the Commission may not list a number of potentially disabling impairments and ask the applicant to indicate any of the impairments that he or she may have. 29 C.F.R. Appendix to Part 1630 - Interpretive Guidance on Title I. All three questions at issue inquire into possible impairments and, therefore, they are impermissible under Title I of the ADA. [The EEOC Guidance Manual specifically prohibits questions relating to treatment for drug or alcohol abuse.]

We realize that the area of disability law is evolving and that much remains to be litigated in the employment arena including whether entities such as the Commission are covered by Title I. However, at this point it is our opinion that while the questions at issue here are sufficiently narrow to withstand Title II scrutiny they are not permissible under Title I.

Summarizing our opinion, the Supreme Court Nominating Commission is subject to the Kansas Acts Against Discrimination, the Kansas Age Discrimination in Employment Act and the Americans With Disabilities Act. Question number 1 regarding the age of the judicial applicant invites scrutiny on the basis that the inquiry is broader than it has to be in order to ensure that a judicial candidate is legally qualified to apply. Question number 2 regarding the candidate's marital status and family situation is inappropriate in the absence of a legally justifiable basis for the inquiry. Question number 3 which requests the religious affiliation of the candidate violates the First Amendment to the United States Constitution, section 7 of the Kansas Bill of Rights and the Kansas Acts Against Discrimination. Finally, the mental health related questions, although appropriate under Title II of the Americans With Disabilities Act because they are reasonably related to job

performance and are subject to reasonable time limitations, are not permissible under Title I of the ADA and the Kansas Act Against Discrimination.

Very truly yours,

CARLA J. STOVALL
Attorney General of Kansas

Mary Feighny
Assistant Attorney General

CJS:JLM:MF:jm

The U.S. Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964

EDITOR'S NOTE: The following is the text of Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) amends several sections of Title VII. These amendments appear in boldface type. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973. Cross references to Title VII as enacted appear in italics following each section heading. Editor's notes also appear in italics.

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term ``person'' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, jointstock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 *[bankruptcy]*, or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the

United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 *[of the United States Code]*), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26 *[the Internal Revenue Code of 1954]*, except that during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, persons having fewer than twentyfive employees (and their agents) shall not be considered employers.

(c) The term ``employment agency'' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term ``labor organization'' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twentyfive or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. **With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.**

(g) The term ``commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ``industry affecting commerce'' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ``affecting commerce'' within the meaning of the LaborManagement Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term ``State'' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term ``religion'' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms ``because of sex'' or ``on the basis of sex'' include, but are not limited to, because of or on the basis of pregnancy, childbirth,

or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employmentrelated purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term ``complaining party'' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term ``demonstrates'' means meets the burdens of production and persuasion.

(n) The term ``respondent'' means an employer, employment agency, labor organization, joint labormanagement committee controlling apprenticeship or other training or retraining program, including an onthejob training program, or Federal entity subject to section 2000e-16 of this title .

EXEMPTION

SEC. 2000e-1. *[Section 702]*

(a) This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining (including onthejob training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) (1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or

2000e-3 of this title *[section 703 or 704]* engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title *[sections 703 and 704]* shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment

any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase ``unlawful employment practice'' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labormanagement committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communistaction or Communistfront organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 *[50 U.S.C. 781 et seq.]*.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to

hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 *[section 6(d) of the Fair Labor Standards Act of 1938, as amended]*.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labormanagement committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or

employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ``alternative employment practice''.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act *[21 U.S.C. 801 et seq.]* or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color,

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religion, sex, or national origin.

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) (1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of

members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. *[Section 704]*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labormanagement committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. *[Section 705]*

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of title 5 *[United States Code]* governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges *[hearing examiners]*, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 *[United States Code]*, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges *[hearing examiners]* shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5 *[United States Code]*.

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title *[sections 706 and 707]*. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken *[the names, salaries, and duties of all individuals in its employ]* and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) The Commission shall have power-

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title *[section 706]* by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) **(1)** The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in

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the performance of such educational and promotional activities.

(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of title 5 *[section 9 of the Act of August 2, 1939, as amended (the Hatch Act)]*, notwithstanding any exemption contained in such section.

(j) (1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. *[Section 706]*

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title *[section 703 or 704]*.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labormanagement committee (hereinafter referred to as the ``respondent'') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the

Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixtyday period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that

such sixtyday period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) **(1)** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action

under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 *[of the United States Code]*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) **(1)** If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title *[section 704(a)]*.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title *[section 703(m)]* and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title *[section 703(m)]*; and

(ii) shall not award damages or issue an order requiring any

admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) The provisions of chapter 6 of title 29 *[the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)]* shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28 *[United States Code]*.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee **(including expert fees)** as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. *[Section 707]*

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a threejudge court shall be immediately furnished by such clerk to the

chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5 *[United States Code]*, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be

conducted in accordance with the procedures set forth in section 2000e-5 of this title *[section 706]*.

EFFECT ON STATE LAWS

SEC. 2000e-7. *[Section 708]*

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 2000e-8. *[Section 709]*

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title *[section 706]*, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are

being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labormanagement committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labormanagement committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labormanagement committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make

public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 2000e-9. *[Section 710]*

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 *[section 11 of the National Labor Relations Act]* shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. *[Section 711]*

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. *[Section 712]*

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 2000e-12. *[Section 713]*

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5 *[the Administrative Procedure Act]*.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or

on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 2000e-13. *[Section 714]*

The provisions of sections 111 and 1114, title 18 *[United States Code]*, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18 *[United States Code]*, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 2000e-14. *[Section 715]*

[There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission *[Council]* shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 *[July 1]* of each year, the Equal Employment Opportunity Commission *[Council]* shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 2000e-15. *[Section 716]*

[(a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c)] The President shall, as soon as feasible after July 2, 1964 *[the enactment of this title]*, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive agencies *[other than the General Accounting Office]* as defined in section 105 of title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[Civil Service Commission]* shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission *[Civil Service Commission]* shall be exercised by the Librarian of Congress.

(c) Within **90 days** of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission *[Civil Service Commission]* upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission *[Civil Service Commission]* on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title *[section 706]*, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title *[section 706(f) through (k)]*, as applicable, shall govern civil actions brought hereunder, **and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.**

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 2000e-17. *[Section 718]*

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of title 5 *[United States Code]*, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within fortyfive days thereafter the Office of Federal Contract Compliance has disapproved such plan.

This page was last modified on January 15, 1997.


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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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May 17, 1993

ATTORNEY GENERAL OPINION NO. 93- 69

Carol Green
Clerk, Kansas Supreme Court
Kansas Judicial Center
3rd Floor
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Judicial--Supreme Court Nominating Commission; Applicability of Title 7 of the Civil Rights of 1964, As Amended, the Americans With Disabilities Act, and the Kansas Acts Against Discrimination

Synopsis: The Supreme Court nominating commission is not subject to title 7 of the civil rights act of 1964, as amended, but is subject to the Americans with disabilities act and the Kansas act against discrimination. Cited herein: K.S.A. 20-124; 20-125; 20-132; 20-137; 20-138; 20-3004; 20-3007; K.S.A. 1992 Supp. 44-1002; 44-1006; 44-1009; Kan. Const., art. 3, § 5; 29 U.S.C.S. § 630; 42 U.S.C.S. § 2000e; 42 U.S.C.S. § 2000e-2; 42 U.S.C.S. §§ 12101, 12111, 12112.

* * *

Dear Ms. Green:

You request an opinion on behalf of the chairman of the Supreme Court nominating commission concerning whether the commission is subject to title 7 of the civil rights act of 1964, as amended by the equal employment opportunity act of 1972 (42 U.S.C.S. §§ 2000e et seq.) (title 7), the Americans with disabilities act (42 U.S.C.S. 12,101 et seq.) (ADA) and

the Kansas act against discrimination (K.S.A. 1992 Supp. 44-1001 et seq.) (KAAD). In addition, you request our opinion concerning the legality of certain screening practices.

TITLE 7

The Supreme Court nominating commission is established by the Kansas constitution and its purpose is to nominate and submit to the governor the names of persons for appointment to the Supreme Court and the Court of Appeals. Kan. Const., art. 3, § 5(d) and K.S.A. 20-3004. The commission is comprised of attorneys and one non-attorney who serve fixed terms and who are compensated for their services and reimbursed for expenses from the state treasury. K.S.A. 20-124, 20-125, 20-137, 20-138.

When a vacancy in the appellate courts occurs, it is the practice of the clerk to send written notice to all Kansas attorneys informing them of the vacancy and inviting applications to be submitted to the commission. The commission interviews all of the applicants and submits three names to the governor who then makes a selection. K.S.A. 20-132 and 20-3007.

42 U.S.C.S. § 2000e-2 states, in relevant part, as follows:

> "It shall be an unlawful employment practice for an employer -
>
> "(1) to . . . refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex or national origin; or
>
> "(2) to limit, segregate, or classify . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individuals race, color, religion, sex, or national origin."

"Employer" includes governments, governmental agencies, and their agents. 42 U.S.C.S. § 2000e(a) and (b). An applicant for employment is an "employee" for purposes of title 7 unless an exemption applies. Starrett v. Wadley, 876 F.2d 808, 821, note 18, (10th Cir. 1989). In Stillians v. State of Iowa, 843 F.Supp. 276 (8th Cir. 1988), an employee of the Iowa arts council sought the position of director, a position created by

statute which provided that vacancies be filled by nomination from the council and appointment by the governor. The employee was not selected and sued the state under the age discrimination in employment act (ADEA) for failing to promote her. The court dismissed her claim relying on the definition of "employee" which exempts from the definition an "appointee on the policy making level." 29 U.S.C.S. § 630(f). The court concluded that since the plaintiff was applying for a position on the policy making level she did not fall within the definition of "employee" for purposes of the ADEA. Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982) is a title 7 case where the court concluded that since the definition of "employee" and the exemptions are identical to those used in the ADEA, a job applicant who was not seeking an appointment on a policy making level was covered under title 7. Finally, in the United States Supreme Court case of Gregory v. Ashcroft , 501 U.S. ___, 115 L.Ed.2d 410, 111 S.Ct. 239 (1991) the court affirmed the 8th circuit's determination that a judge is an "appointee on the policy making level" for purposes of the ADEA.

> "We stated in Stillians that the purpose of the policy making level exception was to give state governors broad discretion to fill policy making positions without fear of being sued by disappointed office seekers. The governor of Missouri must have the freedom to appoint as judges the persons he feels are best qualified without fear of subjecting himself to age discrimination claims." Gregory, 898 F.Supp.2d 598, 604 (8th Cir. 1990).

Therefore, it is our opinion that an applicant for a vacancy on the Kansas appellate courts is not an "employee" for purposes of title 7 and would not be afforded coverage under the act because of the exemption for appointees on a policy making level.

AMERICANS WITH DISABILITIES ACT

The ADA utilizes the term "covered entity" and prohibits such entity from engaging in discrimination by limiting, segregating or classifying a job applicant who is a qualified individual with a disability in a way that adversely affects the applicant's job opportunities. 42 U.S.C.S. § 12112(a) and (b)(1). A covered entity discriminates by using qualification standards or other selection criteria that screen out or tend

to screen out an individual with a disability unless the selection criteria is shown to be job related for the position and is consistent with business necessity. An "employer" is included in the definition of a "covered entity". 42 U.S.C.S. § 12111(2).

The definition of employer is the same as title 7's definition which includes governments, governmental agencies and their agents. 42 U.S.C.S. § 12111(5), 42 U.S.C.S. § 2000e(b), 42 U.S.C.S. §12111(7), 42 U.S.C.S. § 2000e(a). "Employee" is simply defined as an "individual employed by an employer," and there is no exemption for appointees on a policy making level. 42 U.S.C.S. § 12111(4). Both title 7 and the ADA contain the same language prohibiting discrimination which includes "limiting, segregating, or classifying a job applicant" in such a manner that it adversely affects an applicant's job opportunities. 42 U.S.C.S. § 12112(b)(1) and 42 U.S.C.S. § 2000e-2(a)(2).

In the absence of any case law construing the ADA provisions at issue here, and in light of the similarity between the ADA and title 7, we rely on title 7 case law to determine whether the ADA applies to the commission.

Title 7 is liberally construed in order to effectuate its policies and this liberal construction is also bestowed on the definition of "employer". Owens v. Rush, 636 F.2d 283 (10th Cir. 1980). In Owens, an employee of the sheriff's department sued the sheriff under title 7 and the district court concluded that the sheriff was not an employer because he lacked the requisite 15 or more employees. The 10th circuit court of appeals reversed and concluded that the sheriff was an agent of the county and, under title 7, it was immaterial that he lacked the requisite number of employees because the county did have the requisite number, and consequently, the sheriff could be sued because he was the county's agent. It is our opinion that the commission is an agent of the state and that while the commission does not have the authority to employ the applicant, it does serve as a screening device by selecting only three candidates, one of whom is then chosen by the governor. Under title 7 case law, an "employer" may be any person who significantly affects access of any individual to employment opportunities regardless of whether that person can be described as an "employer" as that term has generally been defined at common law. Livingston v. Ewing, 601 F.2d 1110, 1114 (10th Cir. 1979), citing Sibley Memorial Hospital v. Wilson, 488 F.Supp. 1338 (D.C. 1973) and Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D. New

Hampshire 1974). Also see Doe on behalf of Doe v. St. Joseph Hospital 788 F.2d 411 (7th Cir. 1986), Spirt v. Teachers Insurance and Annuity Assoc., 691 F.2d 1054, 1063 (2nd Cir. 1982), Gomez v. Alexian Brothers Hospital, 698 F.2d 1019, 1021 (9th Cir. 1983), Christopher v. Stouder Memorial Hospital, 936 F.2d 870 (6th Cir. 1991).

In Sibley Memorial Hospital v. Wilson, supra, a male private duty nurse sued the hospital under title 7 alleging that the hospital had discriminated against him because it refused to refer him to patients requesting a private duty nurse whenever the patient was female. Evidently, a hospital patient who required the services of a private duty nurse would ask the hospital to communicate that need to the nurse's registry. The patient's request was telephoned to the official registry which matched the request with the name of the nurse who had indicated his or her availability. The nurse would then report directly to the patient for possible employment. The plaintiff found himself in the position of always being rejected by the nurses operating the registry when the patient was female. The court concluded that title 7 applied to those who control access to employment and who deny access by reference to invidious criteria. In Puntolillo v. New Hampshire Racing Commission, the plaintiff was a driver-trainer of harness horses who filed a title 7 claim against the state racing commission and the trotting and breeding association which was responsible for conducting harness racing at certain parks. The court concluded that even though drivers are employed directly by the horse owner, it was the racing commission and the trotting and breeding association which controlled and assigned stall space at the parks which was a prerequisite for employment by a horse owner. Therefore, title 7 would apply even though the relationship between the plaintiff and the racing commission did not involve the normal incidents of a typical employment relationship. Citing Sibley, the court found that the state defendants were "employers" and would potentially be liable because they controlled access to the plaintiff's job market.

Following the reasoning in these cases, it is our opinion that the commission is a "covered entity" and, therefore is subject to the ADA because it significantly controls access to positions on the Kansas appellate courts.

KANSAS ACTS AGAINST DISCRIMINATION

The KAAD uses the language of title 7 and the ADA to prohibit employers from using unlawful employment practices which include the following:

(1) Refusal to hire or employ a person on the basis of his or her race, religion, color, sex, disability, national origin or ancestry. K.S.A. 1992 Supp. 44-1009(a)(1) and 42 U.S.C.S. § 2000e-2(a)(1).

(2) Segregating or classifying a job applicant because of a disability. K.S.A. 1992 Supp. 44-1009(a)(8)(A) and 42 U.S.C.S. § 12112(b)(1).

(3) Using qualification standards, employment tests or selection criteria that screen out or tend to screen out an individual with a disability. K.S.A. 1992 Supp. 44-1009(a)(8)(G) and 42 U.S.C.S. § 12112(b)(6). "Employer" includes the state of Kansas, K.S.A. 1992 Supp. 44-1002(b).

While title 7 cases are not controlling in KAAD actions, they are persuasive when one considers the comparability of the provisions of both. Woods v. Midwest Conveyor Company, 231 Kan. 763 (1982), Best v. State Farm Mutual Auto Insurance Company, 953 F.2d 1477, 1480 (10th Cir. 1991). In the absence of any case law to the contrary and taking into consideration that K.S.A. 1992 Supp. 44-1006 mandates a liberal construction of the KAAD to accomplish its purposes, it is our opinion that the reasoning in Sibley Memorial Hospital (which has been adopted in the 10th Circuit) is applicable here and, therefore, the commission is an "employer" and subject to the KAAD.

LEGALITY OF SCREENING PRACTICES

Because the commission is subject to the ADA and the KAAD you request our opinion concerning certain screening procedures. Specifically, you request whether the commission may do the following:

"(1) Request (but not require) that a recent photograph accompany the nomination form?"

Our research found no cases concerning photographs and it is our opinion that the issue is how the photograph is used. Obviously, if it is used to screen out individuals based upon their race or sex, the use of the photograph would violate the KAAD. However, if the photograph is utilized for nondiscriminatory purposes then we see no legal impediment to

requesting that an applicant provide one. Absent an explanation of why the commission requires a photograph, we cannot render an opinion concerning the propriety of doing so.

"(2) Ask on the nomination form whether the potential nominee is married, the spouse's name, the number of children, and the children's names and ages?"

Martial status is not protected under title 7 and, in our opinion, the KAAD, because it does not fall within the classifications listed in either act. Cooper v. Delta Airline, 274 F.Supp. 781 (E.D. La. 1967). However, while the question itself may not be legally repugnant, the issue is how the commission treats the information that is gained from the response. For example, if the commission uses the information to discriminate against women with preschool children while not applying the same standard to male applicants, that action may violate the KAAD's prohibition against sex discrimination. Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969), reversed for other reasons, 400 U.S. 542, 27 L.Ed.2d 613, 91 S.Ct. 496 (1971). Again, absent an explanation of why the commission seeks this information, we cannot render a specific opinion on the propriety of doing so.

In short, the commission may ask the question as long as it does not use the information to discriminate against the applicant.

"3. Ask on the nomination form a series of health-related questions. Specifically:

"(a) Your vision (with glasses if you use them).

"(b) Any limitations on your hearing (with an aid, if you use one).

"(c) A description of any treatment for alcohol or substance abuse or an emotional illness within the past five years.

"(d) Please state the date of your last physical examination and give your doctor's name and address and whether or not you would consent to having the Commission review that report.

"(e) Please describe the reason for admission to any hospital (exclusive of emergency rooms visits) within the past five years."

42 U.S.C.S. § 12112(d)(1) provides that discrimination includes medical examinations and inquiries. 42 U.S.C.S. § 12112(d)(4) prohibits preemployment medical examinations and medical inquiries concerning whether the employee has a disability and, if so, the nature and the severity of the disability unless the inquiry is job related and consistent with business necessity. An employer may make preemployment inquiries into the ability of the applicant to perform job related functions. 42 U.S.C.S. § 12112(d)(2)(B).

In the absence of case law, we rely upon the United States equal employment opportunity commission's technical assistance Manual which prohibits any medical inquiry during the preemployment stages. E.E.O.C. Technical Assistance Manual, January 1992, section 5.5(a). The manual contains a list of prohibited queries and questions (c) and (e) are flatly prohibited. The remaining questions are also prohibited because they constitute medical inquiries. It is our opinion that until there is case law which construes these provisions, it would be advisable for the commission to avoid these questions.

SUMMARY

It is our opinion that the commission is not subject to title 7 of the civil rights act of 1964, as amended, but is subject to the ADA and the KAAD. Furthermore, while the screening procedures relating to the photograph and the domestic situation of an applicant are not legally repugnant, if the information gained is used to discriminate on the basis of classifications listed at K.S.A. 1992 Supp. 44-1009(a)(1), the commission may be liable. Finally, it is our opinion that the medical inquiries are prohibited under the ADA and the KAAD unless the inquiry is job related..

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Mary Feighny

Mary Feighny
Assistant Attorney General

RTS:JLM:MF:jm

4-44

KANSAS RESTAURANT & HOSPITALITY ASSOCIATION

Testimony Re: HB 2921
House Federal and State Affairs Committee
Presented by Don Sayler
On behalf of
Kansas Restaurant & Hospitality Association
February 26, 2008

Mr. Chairman, Members of the Committee:

My name is Don Sayler, and I am the President & CEO for the Kansas Restaurant & Hospitality Association (KRHA). The Kansas Restaurant & Hospitality Association is the leading business association for restaurants, hotels, motels, country clubs and allied business in Kansas. Along with the KRHA Educational Foundation, the association works to represent, educate and promote the rapidly growing industry of hospitality in Kansas.

The restaurant and lodging industry relies heavily on immigrant workers. We do not promote or condone the presence or employment of undocumented or illegal aliens in Kansas or the United States.

We believe that immigration is an issue that should be enforced at the federal level. Federal law already contains severe penalties for those who knowingly hire illegal aliens. Those provisions should be enforced in lieu of the creation of additional laws which must be enforced by state and local government. As such, Kansas businesses should not be penalized for following current federal immigration laws nor should they be mandated to enforce federal immigration laws. Businesses should not be forced out of business due to sanctions or the revocation of their business license for unknowingly employing workers that prove to be undocumented or illegal.

If new or additional legislation is to be enacted regarding immigration, KRHA supports HB 2921 so that businesses are not unduly penalized. HB 2921 reiterates and clarifies federal provisions and states that no action will be taken against an employer that has complied with the stated provision by having completed I-9 forms.

Thank you very much for permitting us to submit written testimony in support of HB 2921.

Donald G. Sayler

4-45

KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION 3500 N ROCK RD BUILDING 1300 WICHITA, KANSAS 67226
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WRITTEN TESTIMONY TO THE
HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
IN SUPPORT OF HOUSE BILL 2921

By Dan Morgan
The Builders' Association and Kansas City Chapter, AGC
February 25, 2008

Mister Chairman and members of the House Federal and State Affairs Committee, my name is Dan Morgan. I am director of governmental affairs for the Builders' Association and the Kansas City Chapter of Associated General Contractors of America. The Builders' Association and KC Chapter, AGC represent more than 1,100 general contractors, subcontractors and suppliers engaged in the commercial and industrial building construction industry. Half of our members are located in the Kansas City area and are either domiciled in Kansas or perform work in the state. I appreciate the opportunity to offer this written testimony in support of House Bill 2921.

We are members of a coalition of Kansas business organizations that represent a very large number and a very wide variety of employers across the state. We certainly recognize the many problems that have been caused by failed federal policies on illegal immigration, especially in certain areas of our nation. As the number of illegal aliens in this country has grown, the resources and political will to address these problems have not kept up. Faced with significant local issues caused by large influxes of illegal aliens, some states have adopted tough new illegal immigration laws of their own. Elements of those tough new laws are contained in other bills before this committee. As a coalition, we have reviewed other states' laws and other Kansas bills that place the burden of enforcing our nation's immigration laws on employers. We have found those measures to have unintended consequences and to contain significant potential liabilities for innocent employers. Instead, as a coalition, we have joined in support of House Bill 2921 which focuses on employment eligibility verification requirements and establishes new and increased state penalties on those who are causing the problems.

Immigration is a federal matter and employers should comply with federal laws that already include significant penalties. We believe that any new state law should assist in and enhance the enforcement of existing federal law rather than add another layer of state-imposed sanctions on employers. Because of the problems associated with the Basic Pilot/E-Verify program, HB 2921 does not mandate participation in that program. Those who elect to utilize this federal employment authorization program in good faith, however, should be granted a "safe harbor" against any action relating to the employment of an illegal alien as provided in the bill. The vast majority of employers who would never knowingly employ an illegal alien should not be at risk of losing their business licenses because they are found to have "constructive knowledge" of an employee's unauthorized status. Nor should they be put at risk of defending associated discrimination lawsuits. Finally, no contractor should be responsible for his or her subcontractors' or independent contractors' actions or record-keeping requirements in this regard and HB 2921 imposes no such responsibility.

We submit that it is in the state's best interests to address instances of illegal immigration in the state in a reasoned and unemotional manner as set forth in HB 2921. We urge your support of this bill and will gladly make ourselves available for any questions that you may have of the commercial building construction industry in this regard. Thank you for your consideration of our position on this very important issue.

4-46

KANSAS LIVESTOCK ASSOCIATION

Since 1894

February 25, 2008

House of Representatives
Federal and State Affairs Committee
Representative Arlen Siegfreid, Chair

Written Testimony of Kansas Livestock Association
Presented by Allie Devine

Support for HB 2921

The Kansas Livestock Association is a trade association with over 5,000 members throughout Kansas. KLA members are employers, taxpayers, and business owners who are directly impacted by the issues surrounding immigration bills pending before the legislature.

KLA strongly supports passage of HB 2921 the employment verification act. HB 2921 codifies federal law requiring all Kansas employers to verify employment eligibility of employees.

In our research we have noted that several states have litigation pending resulting from passage of proposals similar to HB 2680 and HB 2836. We believe that HB 2921 is the only bill that will not draw a federal preemption challenge.

We support the increased crimes outlined in HB 2921 as tools for targeting illegal and inhumane treatment of immigrants.

KLA is proud to be a member of the Kansas Business Coalition and offer our support for the positions of the coalition.

Thank you for your time and consideration to this important issue.

4-47

6031 SW 37th Street • Topeka, KS 66614-5129 • (785) 273-5115 • Fax (785) 273-3399 • E-mail: kla@kla.org • www.kla.org

Legislative Testimony

achieve more

HB2921

February 25, 2008

Testimony before the Kansas House Federal and State Affairs Committee
By Amy Blankenbiller, President and CEO

Thank Mr. Chairman and members of the committee for this opportunity to testify. My name is Amy Blankenbiller, and I am the President and CEO of the Kansas Chamber.

I'm here today representing a coalition of 36 different state and local business organizations that exist to make Kansas communities thrive, and make Kansas businesses strong. You can find the list in the back of my written testimony.

We organized at the beginning of the 2008 Legislative Session to provide a solution to the immigration debate without harming Kansas businesses and the Kansas economy as other proposed immigration legislation would unfortunately do.

While we do not condone the hiring of illegal immigrants, we also strongly oppose legislation that will place Kansas business licenses in jeopardy, mandates the voluntary federal program e-verify and holds contractors responsible for the hiring practices of sub-contractors.

The issue of illegal immigration can only be solved at the federal level. HB2921 however addresses an area where Kansas can be effective – fraudulent identification for the purpose of employment.

This proposal increases the penalties from a severity level 8 non-person felony to a severity level 5 non-person felony for identity fraud, identity theft and the manufacturing, reproduction and selling of false identification if the identity in question is used for employment purposes.

HB2921 also reinforces federal immigration guidelines of correctly completing the I-9 form at hiring by putting this guide into state law.

Finally, HB2921 creates a new penalty to combat the exploitation of illegal aliens. Subjecting known illegal aliens to working conditions violating the minimum wage and maximum hours law will result in a severity level 8 non-person felony under our bill.

Thank you again for your attention to our support of real immigration reform. We look forward to working with you to combat illegal

THE KANSAS CHAMBER

835 SW Topeka Blvd. **Topeka, KS** 66612 785.357.6321

4-48

Kansas Business Coalition Members

Associated Builders and Contractors – Heart of America Chapter
Associated General Contractors – Kansas City Chapter
Associated General Contractors of Kansas
Builders' Association
Dodge City Chamber of Commerce
Garden City Area of Commerce
Greater Topeka Chamber of Commerce
Home Builders Association of Greater Kansas City
Kansas Agribusiness Retailers Association
Kansas Association of Realtors
Kansas Building Industry Association
Kansas Chamber
Kansas City Kansas Chamber of Commerce
Kansas Contractors Association
Kansas Cooperative Council
Kansas Dairy Association
Kansas Farm Bureau
Kansas Grain and Feed Association
Kansas Licensed Beverage Association
Kansas Livestock Association
Kansas Manufactured Housing Association
Kansas Pork Association
Kansas Restaurant and Hospitality Association
Kansas Society for Human Resource Management
Kansas Soybean Commission
Leawood Chamber of Commerce
Lenexa Chamber of Commerce
Liberal Chamber of Commerce
National Federation of Independent Businesses – Kansas
Northeast Johnson County Chamber of Commerce
Ottawa Chamber of Commerce
Overland Park Chamber of Commerce
Southwestern Association
Travel Industry Association of Kansas
Wichita Area Chamber of Commerce
Wichita Independent Business Association

Kansas Chamber, with headquarters in Topeka, is the leading statewide pro-business advocacy group moving Kansas towards becoming the best state in America to live and work. The Chamber represents small, medium and large employers all across Kansas.

GREATER TOPEKA CHAMBER

GO TOPEKA

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Written Testimony – HB 2921
House Federal & State Affairs Committee
February 25/26, 2008
By: Christy Caldwell, Vice President Government Relations
Greater Topeka Chamber of Commerce
ccaldwell@topekachamber.org

Chairman Siegfreid and members of the committee:

The Greater Topeka Chamber of Commerce would like to express its support for HB 2921, the Kansas Employment Verification Act. This bill is a constructive action the Kansas Legislature can take to address an issue that must receive further federal attention to effectively address immigration challenges throughout our country.

HB 2921 offers options to employers to verify resident status of new hires. The use of the I-9 federal system, the Social Security Verification Service, and the E-Verify system are tools employers can use to check potential employee's status; one method is required by our federal government and if not followed there are severe federal consequences for violations. The federal government should be held accountable to enforce laws they created. Now is not the time to divert state resources to new verification mandates and penalties that would warrant state and local governments to monitor and replicate enforcement. Kansas employers should not be penalized by multi levels of government when they are expected to invest capital in the state, create jobs for Kansans, and contribute to the general benefit of the state through their state and local taxes and produce a quality product or service for their customers. Becoming immigration enforcers is not what they should be expected to do.

HB 2921 enhances the penalties for identity theft and fraud and for manufacturing and selling false identification. This is where our state should be concentrating its efforts; eliminating these criminal acts so employers can feel confident in their I-9 practices without fear of discriminating against honest citizens. Additionally, this bill creates a new penalty for the exploitation of an illegal alien; we agree unscrupulous persons who exploit undocumented individuals who travel to this country to find work and are expected to work for illegally low wages and callous working conditions should feel the impact of the law.

We believe the Kansas Legislature understands that most Kansas employers are vigorously working within the law to have legal workers in their businesses. Utilizing a broad brush to create new state regulations and laws that increase the regulatory load of honest Kansas businesses throughout this great state does not reflect this state's values. We believe HB 2921 will help in dealing with issues of illegal workers while at the same time embracing employers who work daily to be good citizens, good employers, and good community partners. We urge you to pass HB 2921 and express to our federal leaders the importance of addressing immigration issues for the entire nation and not stand by while laws are create piecemeal across the nation.

HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

Hearing on HCR 5031
February 21, 2008, 1:30 PM
Hearing Room 313-S

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

1. **Judicial Experience:** One year, Kansas Court of Appeals, 1987-88; Fourteen years, Kansas Supreme Court, retiring 2003.
2. **Education:** BA, History, University of Kansas, 1951; JD, University of Kansas 1956; LLM, Masters in the Judicial Process, University of Virginia, 1990.
3. **Military:** United States Marine Corps, 1951-1953; Korean War Service, 1952-1953.
4. **Professional:** Private practice of law, 1956-1987; Assistant Attorney General, Kansas, 1957-1958. An attorney member of the Commission on Judicial Qualifications from the Commission's creation in 1974 until appointment to Kansas Court of Appeals in 1987. Two terms as Chair. Member, Kansas Commission on Judicial Performance, 2006 – (Commission created by the Legislature in 2006 House Substitute for SB 337, K.S.A. 20-3201, *et seq.*)

COMMENTS IN OPPOSITION TO HCR 5031

1. The Birth of Kansas Merit Selection -- The Triple Play of 1957 -- Politics, The Supreme Court, and Governor Fred Hall's "Why Not Me?" 51 Years Ago.

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

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

The Constitutional Amendment authorizing the judicial selection system we now have banished politics from its seat on the 50-yard line of the judicial playing field.

UNDER HCR 5031, NOT A SINGLE MEMBER OF THE NOMINATING COMMISSION WOULD BE INDEPENDENT OF THE POLITICAL PROCESS.

House Fed and State Committee
Februruary 21, 2008

Attachment 5

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

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

3. **HCR 5031 Will Discourage Judges and Lawyers in Kansas from Becoming Nominees for Consideration as Members of the Supreme Court.**

Under HCR 5031, if a majority of the Kansas Senate declines to consent to the Governor's Supreme Court appointment, failure to consent has the potential of damaging that person's professional reputation. Also, such failure to consent will discourage other persons from submitting their names for a future vacancy. The result will be fewer judicial applicants.

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

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

4. **HCR 5031 Has the Potential For Damaging the Working Relationship Between the Executive Branch and the Legislative Branch.**

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

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

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

During my time on the Court, I served with colleagues appointed by Governors Bennett, Hayden, Carlin, Finney, and Graves. My observation is that, at all times, each justice approached the task at hand earnestly. The black robe worn by each justice spoke for an independent Third Branch of Government, the Judiciary, free from political ebbs and flows. We came to the Court with past party affiliations appointed by both Republican and Democrat governors. We served on the Court as judges, not as

Republicans or Democrats. Kansas has a recent history of electing governors from both parties. Grafting a requirement of Senate consent to an ongoing working system of judicial selection and restructuring the nominating commission has the potential of politicizing the selection process.

6. The Kansas Current Merit Selection System Is In "Good Mid-West Company."

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

7. The Kansas Merit Selection System, Adopted by the Voters at the November Election in 1958, is a Judicial Vehicle that Has Been "Road Tested" Over the Past 49 Years.
HCR 5031 Appears to Be a New Judicial Vehicle Designed, in Part, from the Federal Model, But Without the Federal "Drive-Shaft:" Life Tenure for Supreme Court Justices

Fifteen states appear to have the Kansas system, *i.e.,* gubernatorial appointment of Supreme Court Justices from judicial nominating commissions. Of the States like Kansas that use merit selection with periodic retention elections to select and retain their Supreme Court justices, only one state (Utah) also requires senate confirmation. Utah Supreme Court Justices serve ten-year terms, rather than the six-year terms served by Kansas Justices.

At least eight other states use judicial nominating commissions to select justices or judges at some level. My information comes from: (a) the American Judicature Society's website, Current Methods of Judicial Selection, http://www.ajs.org/js/, (Attachment No. 1), and (b) Table 4, Selection of Appellate Court Judges, *State Court Organization 2004*, U.S. Department of Justice, Bureau of Justice Statistics, Office of Justice Programs (Attachment No. 2). A summary of the *State Court Organization* table by grouping based on the method of selection is also attached (Attachment No. 3). In two states that have gubernatorial appointment of Supreme Court Justices, Delaware and Maryland, the governors have established a nominating commission by executive order to help with the selection process.

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

The Federal judicial appointment system, unlike Kansas, has no nominating commission to screen and recommend, no six-year term, and no retention election at the end of the term. The President of the United States can appoint anyone he or she wishes to the U.S. Supreme Court. Article III, Section 1 of the United States Constitution authorizes Federal judges to "hold office during good behavior." Removal is by impeachment.

Article II, Section 2 of the United States Constitution (Powers of the President) requires a presidential judicial appointment to be made "with the advice and consent" of the Senate.

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

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

9. Will the Senate Be in Session? It's a Long, Long Time From April to December. The Cost Factor – Fiscal Impact--Additional Expense for the State Imposed by HCR 5031

HCR 5031 requires the President of the Senate to convene the Senate for the sole purpose of voting on the appointment if the Senate is not in session or will not be in session within 30 days after the Senate receives the appointment (HCR 5031, page 2, Lines 9-13). How many days will the Senate be in special session? What will the Special Sessions cost the state?

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

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

10. The Following Justices, No Longer on the Court, Have Served on the Kansas Supreme Court. The Date After Each Name Represents the Date "Such Vacancy Occurred or Position Became Open" (HCR 5031, Page 1, Lines 42-43)

Justices Fontron (9-17-75), Fatzer and Kaul (9-16-77), Owsley (12-30-78), Fromme (10-25-82), Schroeder (1-11-87), Prager (8-31-88), Miller (9-2-90), Herd (1-11-93), Holmes (8-31-95), Larson (9-4-02), Lockett and Six (1-13-03), Abbott (6-6-03), Gernon (3-30-05), and Allegrucci (1-8-07).

A total of 16 justices have left office in the 32 years. Of the 16, only five (Schroeder, Herd, Lockett, Six, and Allegrucci) vacated a position on the bench at the end of their final six-year term, when the Legislature was in session.

Assuming HCR 5031 had been in place, it would appear that a special session of the Senate would have been required to hold confirmation hearings for 11 of those 16 justices. Three appear to be marginal, *i.e.,* they may have been subject to a confirmation hearing during a regular session of the Legislature but a special session could have been required, and only three would appear to have been subject to confirmation during a regular session.

HCR 5031 gives the Governor sixty days to make the appointment *"from date such vacancy occurred or position became open,"* (HCR 5031, page 1, lines 41-42). The Senate then has to vote on the appointment no later than thirty days after the appointment (HCR 5031, page 2, lines 8-9).

11. The Legislature Showed Wisdom in Drafting the Language Creating The Kansas Supreme Court Nominating Commission [KSCNC], as an Independent Constitutional Body.

Your predecessors showed wisdom by insulating the sitting Justices from involvement in the Supreme Court selection process. Missouri's experience in 2007-2008, involving controversy between the Nominating Commission (the Chief Justice is Chair of the Nominating Commission) and the Governor is Exhibit "A" supporting the wisdom of the KSCNC independent approach. If a similar controversy were to arise in Kansas, the Governor would be dealing with the Chair of an independent Constitutional entity. Thus, the Supreme Court would be free to continue its important business of deciding cases and not become bogged down in a public controversy with the Governor.

A majority of the Missouri Nominating Commission members are lawyers. (Mo. Const. of 1945, Article V, Section 25(a)-(d) (1976), Mo. Sup. Ct. R. 10.03 (provides for seven members: one Supreme Court justice chosen by members of the court, three lawyers elected by members of the bar, and three nonlawyers appointed by the governor.)

The current chair is Chief Justice Laura Denvir Stith. The independence of the KSCNC removes the opportunity for any claim of Supreme Court influence in the selection process to arise.

12. HCR 5031 Returns Supreme Court Selection to the "Pre 1958 Triple-Play" Political Arena. The Past is Prologue to the Future.
A Future Look at Kansas Supreme Court Appointments Under HCR 5031.

Over the past one-half century, Kansas has had five Republican Governors (Anderson, Avery, Bennett, Hayden, and Graves) and five Democratic Governors (G. Docking, R. Docking, Carlin, Finney, and Sebelius).

Only one Republican Governor, Bill Graves, has been re-elected to a second four-year term. (Governors Bennett and Hayden were defeated. John Anderson was re-elected to a second two-year term, William Avery was not.)

Every Democratic Governor who sought a second term, either two years (G. Docking) or four years (R.Docking, Carlin, and Sebelius) has been re-elected. Governor Finney did not seek re-election.

At the end of Governor Sebelius' second term, Democratic governors will have controlled the Governor's office 32 years, Republican governors 22 years.

Democratic Governors will have had the appointment power for Justices of the Supreme Court 60 percent of the time in the past 54 years.

In the history of merit selection in Kansas, it would appear that only two Governors have appointed a member to the Supreme Court from the opposite political party, when given a two party choice.

The Kansas Senate has always been controlled by Republicans. The HCR 5031 requirement of Senate confirmation is ripe for potential "deal making" and political posturing in filling a judicial vacancy.

Who with a "straight face" can deny this conclusion, particularly when the Governor and the majority party in the Senate are of different parties?

13. **HCR 5031 Does Not Support the Independence of the Judiciary. Why Restructure the Nominating Commission, Give the Governor General Authority to Appoint, Rejecting the Nominating Commission's Recommendations, thus Abolishing Merit Selection, and Impose the Senate Consent Requirement Now in 2008 After Nearly One-Half Century of Merit Selection for Supreme Court Justices?**

HCR 5031 is a Paper Solution Chasing a Non-Existing Problem. "You Don't Fix It If It Isn't Broken."

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

Since Justice John Fontron wrote his first published opinion as a merit selected Justice of the Kansas Supreme Court, the Court under merit selection has issued **8,617** published opinions. (These opinions appear in the *Kansas Reports* 192 Kan. through 285 Kan.)

The Kansas Court of Appeals, since its creation in 1977, has issued **3,466** published opinions (1 Kan. App. 2nd through 39 Kan. App. 2nd).

This represents a total of **12,083** published merit selection opinions. Both courts have written hundreds of unpublished opinions as well.

Marsh and *Montoy*, two published opinions, vs. 12,081 other published opinions, and HCR 5031 and its earlier counterparts surface in 2005, 2006, and 2007 to abolish a nationally recognized judicial reform, merit selection, after almost one-half century of exemplary service to the citizens of Kansas.

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

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

Respectfully Submitted,
Fred N. Six

Judicial Selection in the States

Appellate and General Jurisdiction Courts

"Initial Selection, Retention, and Term Length"

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

1. In a retention election judges run unopposed on the basis of their record.
2. In November 2000, Arkansas voters passed an amendment to the Arkansas constitution shifting judicial elections to a nonpartisan system.
3. The California constitution provides that local electors may choose gubernatorial appointments instead of nonpartisan election to select superior court judges. To date, no counties have chosen gubernatorial appointments.
4. If the election is uncontested, the incumbent's name does not appear on the ballot.

Revised January 2004

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Attachment 1

State and Court	APPOINTIVE SYSTEMS: Merit Selection through Nominating Commission	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
COLORADO						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (8 year term)
District Court	X				2	Retention election (6 year term)
CONNECTICUT						
Supreme Court	X				8	Commission reviews incumbent's performance on noncompetitive basis; governor renominates and legislature confirms
Appellate Court	X				8	Same
Superior Court	X				8	Same
DELAWARE[5]						
Supreme Court	X				12	See Footnote 6
Court of Chancery	X				12	See Footnote 6
Superior Court	X				12	See Footnote 6
DISTRICT OF COLUMBIA						
Court of Appeals	X				15	Reappointment by judicial tenure commission[7]
Superior Court	X				15	Reappointment by judicial tenure commission[7]
FLORIDA						
Supreme Court	X				1	Retention election (6 year term)
District Court of Appeal	X				1	Retention election (6 year term)
Circuit Court			X		6	Re-election for additional terms
GEORGIA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
HAWAII						
Supreme Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Intermediate Court of Appeals	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Circuit Court and Family Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)

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

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

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

5-8

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

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

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

5-9

State and Court	APPOINTIVE SYSTEMS: Merit Selection through Nominating Commission	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
MAINE						
Supreme Judicial Court		X(G)			7	Reappointment by governor, subject to legislative confirmation
Superior Court		X(G)			7	Reappointment by governor, subject to legislative confirmation
MARYLAND[10]						
Court of Appeals	X				See fn 11	Retention election (10 year term)
Court of Special Appeals	X				See fn 11	Retention election (10 year term)
Circuit Court	X				See fn 11	Nonpartisan election (15 year term)[12]
MASSACHUSETTS[13]						
Supreme Judicial Court	X				to age 70	
Appeals Court	X				to age 70	
Trial Court of Mass.	X				to age 70	
MICHIGAN						
Supreme Court				X[14]	8	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
MINNESOTA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
MISSISSIPPI						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Chancery Court			X		4	Re-election for additional terms
Circuit Court			X		4	Re-election for additional terms
MISSOURI						
Supreme Court	X				1	Retention election (12 year term)
Court of Appeals	X				1	Retention election (12 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Jackson, Clay, Platte, Saint Louis Counties)	X				1	Retention election (6 year term)
MONTANA						
Supreme Court			X		8	Re-election; unopposed judges run for retention
District Court			X		6	Re-election; unopposed judges run for retention
NEBRASKA						
Supreme Court	X				3	Retention election (6 year term)
Court of Appeals	X				3	Retention election (6 year term)
District Court	X				3	Retention election (6 year term)

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

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

12. May be challenged by other candidates.

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

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

State and Court	APPOINTIVE SYSTEMS: Merit Selection through Nominating Commission	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
NEVADA						
Supreme Court			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
NEW HAMPSHIRE[15]						
Supreme Court		X(G)[16]			to age 70	
Superior Court		X(G)[16]			to age 70	
NEW JERSEY						
Supreme Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Appellate Division of Superior Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Superior Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
NEW MEXICO						
Supreme Court	X				until next general election	See Footnote17
Court of Appeals	X				until next general election	See Footnote17
District Court	X				until next general election	See Footnote17
NEW YORK						
Court of Appeals	X				14	See Footnote18
Appellate Division of the Supreme Court	X				5	Commission reviews and recommends for or against reappointment by governor
Supreme Court				X	14	Re-election for additional terms
County Court				X	10	Re-election for additional terms
NORTH CAROLINA						
Supreme Court			X[19]		8	Re-election for additional terms
Court of Appeals			X[19]		8	Re-election for additional terms
Superior Court			X		8	Re-election for additional terms
NORTH DAKOTA						
Supreme Court			X		10	Re-election for additional terms
District Court			X		6	Re-election for additional terms

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

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

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

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

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

5-11

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

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

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

5-12

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

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

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

State Court Organization 2004

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

Attachment 2 5-15

Table 4. Selection of Appellate Court Judges

Legend: SC=Court of last resort; IA=Intermediate appellate court; N/S=Not stated; ~=Not applicable

	Appellate judges				Chief justice/judge	
	Method of selection		Method of retention	Geographic basis for selection	Method of appointment	Term (years)
	Unexpired term	Full term				
Alabama						
SC Supreme Court	GU	PE	PE	SW	NP	6
IA Court of Civil Appeals	GU	PE	PE	SW	CS	ID
IA Court of Criminal Appeals	GU	PE	PE	SW	SN	ID
Alaska						
SC Supreme Court	GN	GN	RE[1]	SW	CS	3
IA Court of Appeals	GN	GN	RE[1]	SW	SCJ	2
Arizona						
SC Supreme Court	GN	GN	RE	SW	CS	5
IA Court of Appeals	GN	GN	RE	DS	CS	1
Arkansas						
SC Supreme Court	GU	NP	NP	SW	NP	8
IA Court of Appeals	GU	NP	NP	DS	SCJ	4
California						
SC Supreme Court	GU	GU	RE	SW	GU	12
IA Courts of Appeal	GU	GU	RE	DS	GU	12
Colorado						
SC Supreme Court	GN	GN	RE	SW	CS	ID
IA Court of Appeals	GN	GN	RE	SW	SCJ	AP
Connecticut						
SC Supreme Court	GNL	GNL	GNL	SW	GNL	8
IA Appellate Court	GNL	GNL	GNL	SW	SCJ	ID
Delaware						
SC Supreme Court	GNL	GNL	GNL	SW	GU	12
District of Columbia						
SC Court of Appeals	[2]	[2]	[2]	SW[3]	JN	4
Florida						
SC Supreme Court	GN	GN	RE	DS and SW[4]	CS	2
IA District Courts of Appeal	GN	GN	RE	DS	CS	2
Georgia						
SC Supreme Court	GN	NP	NP	SW	CS	2
IA Court of Appeals	GN	NP	NP	SW	SN	2
Hawaii						
SC Supreme Court	GNL	GNL	JN	SW	GNL	10
IA Intermediate Court of Appeals	GNL	GNL	JN	SW	GNL	10
Idaho						
SC Supreme Court	GN	NP	NP	SW	CS	4
IA Court of Appeals	GN	NP	NP	SW	SCJ	2
Illinois						
SC Supreme Court	CS	PE	RE	DS	CS	3
IA Appellate Court	SC	PE	RE	DS	CS	1
Indiana						
SC Supreme Court	GN	GN	RE	SW	JN	5
IA Court of Appeals	GN	GN	RE	DS	CS	3
IA Tax Court	GN	GN	RE	SW	~	~
Iowa						
SC Supreme Court	GN	GN	RE	SW	CS	8[5]
IA Court of Appeals	GN	GN	RE	SW	CS	2
Kansas						
SC Supreme Court	GN	GN	RE	SW	SN	ID
IA Court of Appeals	GN	GN	RE	SW	SC	ID
Kentucky						
SC Supreme Court	GN	NP	NP	DS	CS	4
IA Court of Appeals	GN	NP	NP	DS	CS	4
Louisiana						
SC Supreme Court	CS[6]	PE[7]	PE[7]	DS	SN	DU
IA Courts of Appeal	SC[6]	PE[7]	PE[7]	DS	SN	DU

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Table 4. Selection of Appellate Court Judges

Legend: SC=Court of last resort; IA=Intermediate appellate court; N/S=Not stated; ~=Not applicable

	Appellate judges				Chief justice/judge	
	Method of selection		Method of retention	Geographic basis for selection	Method of appointment	Term (years)
	Unexpired term	Full term				
Maine						
SC Supreme Judicial Court	GL	GL	GL	SW	GU	7
Maryland						
SC Court of Appeals	GNL	GNL	RE	DS	GU	ID
IA Court of Special Appeals	GNL	GNL	RE	DS	GU	ID
Massachusetts						
SC Supreme Judicial Court	~[8]	GNE[9]	~[10]	SW	GE[11]	To age 70
IA Appeals Court	~[8]	GNE[9]	~[10]	SW	GE[11]	To age 70
Michigan						
SC Supreme Court	GU	NP[12]	NP[12]	SW	CS	2
IA Court of Appeals	GU	NP[12]	NP[12]	DS	SC	2
Minnesota						
SC Supreme Court	GU	NP	NP	SW	GU	6
IA Court of Appeals	GU	NP	NP	SW	GU	3
Mississippi						
SC Supreme Court	GU	NP	NP	DS	SN	DU
IA Court of Appeals	GU	NP	NP	DS	SCJ	4
Missouri						
SC Supreme Court	GN	GN	RE	SW	CS	2
IA Court of Appeals	GN	GN	RE	DS	CS	2[13]
Montana						
SC Supreme Court	GNL	NP	NP[14]	SW	NP	8
Nebraska						
SC Supreme Court	GN	GN	RE	SW and DS[15]	GN	DU
IA Court of Appeals	GN	GN	RE	DS	CS[16]	2
Nevada						
SC Supreme Court	GN	NP	NP	SW	Rotation	2[17]
New Hampshire						
SC Supreme Court	GE	GE	~[18]	SW	SN	5
New Jersey						
SC Supreme Court	GL	GL	GL	SW	GL	DU
IA Superior Court, Appellate Div.	GL	GL[19]	GL[19]	SW	SCJ	AP
New Mexico						
SC Supreme Court	GN	PE	RE	SW	CS	2
IA Court of Appeals	GN	PE	RE	SW	CS	2
New York						
SC Court of Appeals	GNL	GNL	GNL	SW	GN	14
IA Supreme Ct., Appellate Div.	GN	GN	GN	SW[20]	GN	DU
North Carolina						
SC Supreme Court	GU	NP	NP	SW	NP	8
IA Court of Appeals	GU	NP	NP	SW	SCJ	AP
North Dakota						
SC Supreme Court	GN[21]	NP	NP	SW	CS[22]	5[23]
Ohio						
SC Supreme Court	GU	PE[24]	PE[24]	SW	PE[24]	6
IA Courts of Appeals	GU	PE[24]	PE[24]	DS	CS[25]	Calendar year
Oklahoma						
SC Supreme Court	GN	GN	RE	DS	CS	DU
SC Court of Criminal Appeals	GN	GN	RE	DS	CS	5
IA Court of Civil Appeals	GN	GN	RE	DS	CS	5
Oregon						
SC Supreme Court	GU	NP	NP	SW	CS	6
IA Court of Appeals	GU	NP	NP	SW	SCJ	2

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Table 4. Selection of Appellate Court Judges

Legend: SC=Court of last resort; IA=Intermediate appellate court; N/S=Not stated; ~=Not applicable

	Appellate judges				Chief justice/judge	
	Method of selection		Method of retention	Geographic basis for selection	Method of appointment	Term (years)
	Unexpired term	Full term				
Pennsylvania						
SC Supreme Court	GL	PE	RE	SW	SN	DU
IA Superior Court	GL	PE	RE	SW	CS	5
IA Commonwealth Court	GL	PE	RE	SW	CS	5
Puerto Rico						
SC Supreme Court	GL	GL	~[26]	SW	GL	To age 70
IA Court of Appeals	GL	GL	GL	SW	SCJ	At pleasure
Rhode Island						
SC Supreme Court	GN	GN	~[27]	SW	GN	Life
South Carolina						
SC Supreme Court	LA	LA	LA	SW	LA	10
IA Court of Appeals	LA	LA	LA	SW	LA	6
South Dakota						
SC Supreme Court	GN	GN	RE	DS and SW[28]	CS	4
Tennessee						
SC Supreme Court	GN	GN	RE	SW	CS	4
IA Court of Appeals	GN	GN	RE	SW	CS	1 term
IA Court of Criminal Appeals	GN	GN	RE	SW	CS	1 term
Texas						
SC Supreme Court	GU	PE	PE	SW	PE	6
SC Court of Criminal Appeals	GU	PE	PE	SW	PE	6
IA Courts of Appeals	GU	PE	PE	DS	PE	6
Utah						
SC Supreme Court	GNL	GNL	RE	SW	CS	4
IA Court of Appeals	GNL	GNL	RE	SW	CS	2
Vermont						
SC Supreme Court	GNL	GNL	LA	SW	GNL	6
Virginia						
SC Supreme Court	GU[29]	LA	LA	SW	CS	4
IA Court of Appeals	GU[29]	LA	LA	SW	CS	4
Washington						
SC Supreme Court	GU	NP	NP	SW	CS	4
IA Courts of Appeals	GU	NP	NP	DS	CS[30]	2[31]
West Virginia						
SC Supreme Court of Appeals	GU[32]	PE	PE	SW	SN	1
Wisconsin						
SC Supreme Court	GN	NP	NP	SW	SN	Until declined
IA Court of Appeals	GN	NP	NP	DS	SC	3
Wyoming						
SC Supreme Court	GN	GN	RE	SW	CS	4

ABBREVIATIONS:

AP = At pleasure
CS = Court selection
DS = District
DU = Duration of service
GE = Gubernatorial appointment with approval of elected executive council
GL = Gubernatorial appointment with consent of the legislature
GN = Gubernatorial appointment from judicial nominating commission
GNE = Gubernatorial appointment from judicial nominating commission with approval of elected executive council
GNL = Gubernatorial appointment from judicial nominating commission with consent of the legislature
GU = Gubernatorial appointment
ID = Indefinite
JN = Judicial nominating commission appoints
LA = Legislative appointment
NP = Non-partisan election
PE = Partisan election
RE = Retention election
SC = Court of last resort appoints
SCJ = Chief justice/judge of the court of last resort appoints
SN = Seniority
SW = Statewide

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Table 4. Selection of Appellate Court Judges

FOOTNOTES:

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

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

Florida:
[4] Five justices are selected by region (based on the District Courts of Appeal) and two justices are selected statewide.

Iowa:
[5] The Chief Justice serves either eight years or the duration of his/her term.

Louisiana:
[6] The person selected by the Supreme Court is prohibited from running for that judgeship; an election is held within one year to serve the remainder of the term.
[7] Louisiana uses a blanket primary, in which all candidates appear with party labels on the primary ballot. The two top vote getters compete in the general election.

Massachusetts:
[8] There are no expired judicial terms. A judicial term expires upon the death, resignation, retirement, or removal of an incumbent.
[9] The Executive (Governor's) Council is made up of nine people elected by geographical area and presided over by the Lieutenant Governor.
[10] There is no retention process. Judges serve during good behavior to age 70.
[11] Chief Justice, in the appellate courts, is a separate judicial office from that of an Associate Judge. Chief Justices are appointed, until age 70, by the Governor with the advice and consent of the Executive (Governor's) Council.

Michigan:
[12] Candidates may be nominated by political parties and are elected on a nonpartisan ballot.

Missouri:
[13] Terms are two years in length in the Western and Southern districts; one year in length in the Eastern district.

Montana:
[14] If the justice/judge is unopposed, a retention election is held.

Nebraska:
[15] Chief Justices are selected statewide while Associate Justices are selected by district.

[16] The Chief Justice/Judge is selected by a majority vote of the Court of Appeals with ratification of the selection by the Supreme Court.

Nevada:
[17] The term may be split between eligible justices.

New Hampshire:
[18] There is no retention process. Judges serve during good behavior to age 70.

New Jersey:
[19] All Superior Court judges, including Appellate Division judges, are subject to gubernatorial reappointment and consent by the Senate after an initial seven-year term. Among all the judges, the Chief Justice designates the judges of the Appellate Division.

New York:
[20] The Presiding Judge of each Appellate Division must be a resident of the department.

North Dakota:
[21] The Governor may appoint from a list of names or call a special election at his discretion.
[22] Selection is done by the judges of both the Supreme and District courts.
[23] The term of the Chief Justice is five years or until the judge's term expires, whichever occurs first.

Ohio:
[24] Party affiliation is not included on the ballot in the general election, but candidates are chosen through partisan primary nominations.
[25] Selection is done by the judges of each district.

Puerto Rico:
[26] There is no retention process. Judges serve during good behavior to age 70.

Rhode Island:
[27] There is no retention process. Judges serve during good behavior for a life tenure.

South Dakota:
[28] Initial selection is by district, but retention selection is statewide.

Virginia:
[29] Gubernatorial appointment is for interim appointments.

Washington:
[30] The Chief Judge is chosen by the Division judges. The Presiding Chief Judge is chosen by court selection, but the position rotates among the three divisions.
[31] The term of the Presiding Chief Judge is one year.

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

Summary of Methods of Selection of State Supreme Courts

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

Gubernatorial appointment from judicial nominating commission: 15 states
In addition to Kansas, these 14 states include the neighboring states of Colorado, Iowa, Missouri, Nebraska, and Oklahoma. (The remaining nine are Alaska, Arizona, Florida, Indiana, New York, Rhode Island, South Dakota, Tennessee, and Wyoming.)

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

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

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

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

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

Legislative Election: 1 state: South Carolina

ATTACHMENT 3

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BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE
Hearing on HCR 5031
Thursday, February 21, 2008
Testimony of Richard C. Hite, Chair
Supreme Court Nominating Commission
316-265-7741

My name is Richard C. (Dick) Hite. I have practiced law in Wichita for more than 50 years. I appear today on behalf of the Supreme Court Nominating Commission. I have served as Chair of the Commission for almost seven years. During that time the Commission has submitted nominations to the Governor six times to fill positions on the Supreme Court and seven times to fill positions on the Kansas Court of Appeals. I have served with the Commission when all of the lay positions were filled by appointments by Governor Graves and when all of the lay positions were filled by appointments made by Governor Sebelius.

I concur with the comments in opposition to HCR 5031 of Justice Six. In particular I am deeply concerned that the proposed changes in the process for selection of appellate judges would greatly limit the number of qualified attorneys and district court judges who would submit their names for consideration. However, rather than repeating Justice Six's comments, I prefer to spend my limited time discussing two points on which critics of the present system seem to rely.

LAWYERS SUPPORT AN INDEPENDENT AND IMPARTIAL JUDICIARY AND REJECT SELECTION OF JUDGES BY ANY STANDARD OTHER THAN MERIT

Critics of the present system of selecting appellate judges, particularly Professor Ware, assert that it is subject to "bar control" implying that the bar is a special interest group seeking some special advantage. The organized bar, i.e. the Kansas Bar Association, has no role in the selection process. So the implication is that the elected lawyer members of the Commission have some conspiratorial or improper motive in selection of nominees. I have not heard or read any explanation of the basis for this theory. There is none. Nothing could be further from the truth.

A great majority of lawyers want appellate judges who possess the intelligence, temperament and independence contemplated by the founding fathers of this country and the Citizens of Kansas when they amended the Kansas Constitution in 1957. The lawyers who have been elected to the Commission come from different backgrounds but they have one thing in common. They know that lawyers represent clients. They know that lawyers want, and need to be able, to advise clients on the basis of the facts and the law. They know that lawyers want, and need to be able, to take their cases to the courts in

anticipation of getting a fair hearing and a fair result. From a pragmatic standpoint plaintiffs' lawyers don't want judges with a bias for the defense and vice-versa. Business lawyers don't want judges with a bias for unions and vice-versa. Lawyers do not want their cases decided by the luck of the draw on assignment to a panel of judges. It might be said that the interests of lawyers as a group are so diverse they could not agree on a bias.

In my experience with the Commission there has been no attempt by the lawyer members of the Commission to "control" the nomination process. There has been no instance in which the lawyer members supported their "slate" of applicants and the lay members supported their "slate." Without exception the lawyer and lay members of the Commission have worked together with mutual respect dedicated to identifying the most capable persons to nominate. Mere mention of political or other considerations not based on merit would be fatal to any candidate. While the Governor is free to consider political affiliation in her (or his) appointments the Commission strives solely to place the Governor in a position where she (or he) cannot make a mistake.

THE COMMISSION'S PROCEEDINGS ARE NOT "SECRET"

The Commission's interviews of applicants for appellate judges positions are not "secret" in the sense implied by its critics. Secrecy is defined as keeping or hiding something from view. Critics use terms like "secret meetings" to unfairly describe Commission proceedings. The Commission acts in accord with Kansas public policy established by the legislature. The legislature has balanced the public's right to know with consideration of an individual's right to privacy. Personnel records of non-elected officials, including letters of recommendation, medical records and confidential financial matters, are not subject to the Kansas Open Records Act. K.S.A. 45-215, et seq. Such matters are discussed in closed sessions by other public bodies. K.S.A. 75-4319.

When a vacancy occurs in one of the Kansas appellate courts the Commission interviews as many as 35 to 40 individuals. Only three are nominated to fill the vacancy. The legislature has recognized that "the best qualified nominees may be those whom it would be most difficult to persuade to serve." K.S.A. 20-133. The public policy concerning matters which can be discussed in a closed rather than an open session is vital in attracting qualified applicants for the appellate judiciary.

Criticism of the present system is sometimes based on a comparison with the federal method of selecting judges. This criticism ignores fundamental differences between the Kansas and federal processes. Federal judges are appointed for life. The only input that

the citizens have is through their elected representatives at Senate confirmation hearings. In Kansas the citizens themselves have the opportunity to make the final decision. The appellate judges are subject to retention elections at the next general election after their appointment and periodically thereafter during their service.

CONCLUSION

I respectfully suggest that Kansans continue to want independent appellate judges. An "independent" judge is a fair and impartial judge who decides cases on the facts and applicable law. The entire Commission is concerned that the changes proposed by HCR 5031 would result in attempts to apply pressure to and get commitments from nominees to decide cases on some other basis. Additionally, HCR 5031 would permit the Governor to ignore the recommendations of the Commission and appoint appellate judges on a purely political basis. The present system has worked well. There is no need for change.

Richard C. Hite

House Federal and State Affairs Committee
Thursday, February 21, 2008

Testimony in Opposition to HCR 5031

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I am Robert Casad, professor of law emeritus of the University of Kansas. I have been a Kansas resident all my life, born in Council Grove, educated in the public schools of Melvern, Atchison, and Wichita, and at the University of Kansas. Even when I was physically absent for extended periods in military service or attending law school at Michigan and Harvard I kept my Kansas residence. I did become a resident of Minnesota for a period of less than 2 years when I was practicing law there, but I returned to Kansas in 1959 to take a position as professor in the KU Law School.

I taught several different courses during the 37½ years before I retired, but the main focus of my teaching and research has been courts and litigation processes. My main courses were Civil Procedure and Federal Courts. I have written several books and many articles on aspects of civil procedure. I will mention two: I am co-author with the late Spencer Gard of a 3 volume treatise on Kansas Civil Procedure, called KANSAS CODE OF CIVIL PROCEDURE ANNOTATED, now in its 4th edition. I recently completed KANSAS CIVIL JURY INSTRUCTION HANDBOOK. So much of my career has been devoted to studying and teaching Kansas civil procedure. I have been a member of the Kansas bar for over 50 years and a member of the Kansas Judicial Council's Civil Code Advisory Committee for over 25 years.

All that study about courts and their processes has made it very clear to me that a good and effective court system depends heavily on insulating the judiciary from political manipulation and temporary political pressures to the greatest extent possible. We need judges that are intelligent and well versed in law and the legal

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Attachment 7

method, but who are also fair-minded, not driven by any partisan political concerns. Our existing system of judicial selection is particularly well suited to produce just such judges. Our system works very well. And that is why I appear here today as a concerned Kansan; I appear in support of our nonpartisan merit selection system. That means, of course, that I oppose the proposals to radically change that system; to replace it with a selection system driven by partisan politics.

Anyone who urges radical changes in basic institutions must bear a very heavy burden of proof on two points. First, they must show by solid evidence that the existing system is broken and irreparable. Second, they must show that the proposed changes would make the institution better rather than worse. The proponents of HRC 5031 and HB 2799 have not even attempted to provide evidence that our present system does not work well. Instead, they have sought to justify the radical changes they propose by three arguments:

1. They disagree with a few of the decisions of the Supreme Court.
2. They don't like the idea of lawyers being a majority of one on the nominating commissions.
3. They think we should follow the federal system in requiring legislative confirmation of all judicial appointments.

None of these arguments constitute evidence that our system does not work well, and even as abstract arguments, none is persuasive.

The fact that someone disagrees with a court's decision is certainly no argument for changing the system of judicial selection. In virtually every litigated case, one side or the other is going to disagree with the decision. One side will win and one will lose. That is just the nature of litigation. That, in fact, is a very strong reason why courts should be insulated insofar as possible from political influence on their decisions. Under our present system as it stands, the legislature has considerable power over the judiciary, even if it does not participate in the selection process. The courts are dependent on the legislature for their budgets. Only a couple of years ago the legislature used its power over the budget to cut off the Supreme Court's power to levy a surcharge on the fee for filing new cases. So this first argument does not support radical change in the selection process: to the contrary, it argues strongly for maintaining a non-partisan selection process that helps to keep a proper balance of power between the legislature and the judiciary.

The fact that lawyers comprise a majority of one on the nominating commission does not show any defect in the system. The lawyer and non-lawyer

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members of the commission do not vote in blocs, so lawyers do not "dominate" the selection process. We must remember that the candidates for judgeships must be lawyers. Fellow members of the bar are probably in the best position to evaluate whether a candidate has the requisite intelligence, legal learning, and fair-mindedness to be a judge. Even the proponents of these radical proposals recognize the need for lawyers among the nominating commission members. The proponents would, however, let politicians select the lawyers, not the members of the bar. Under the present system, the lawyer members of the commission are chosen through a non-political election. The political affiliation of the lawyer candidates for the commission is never disclosed.

The third argument – that selection for the federal judiciary entails Senate confirmation – does not in any way indicate that our non-partisan selection system is inadequate. When one talks about following the federal model, they should tell the whole story. What the proponents have not mentioned is that once candidates for federal judgeships have cleared the political hurdle of Senate confirmation, they receive tenure for life and their salaries cannot be reduced. The judges are then free forever from partisan political influence. These protections for judicial independence are established by Article III of the U.S. Constitution. Congress cannot change them. The federal model, then, entails not only legislative confirmation of judges, but also life tenure and irreducible salary. In his comments in 2006 before the House Judiciary Committee on a previous version of the proposals under consideration here, Professor Kobach suggested that federal judges are of higher quality than our state court judges, and he tried to link that with the highly political selection process for federal judges. However, if federal judges are of higher quality than state judges, the reason is surely the promise of life tenure and irreducible salary, not the selection process. I don't believe Kansans are ready to accept a life-tenured judiciary. I think we like the idea that our judges have to stand for a retention election every 6 years. Instead of life tenure and irreducible salary, we have tried to promote judicial independence by the non-partisan selection process. Our system works and has worked very well indeed.

Apart from the fact that the proponents have made no real attempt to show that our system is broken, the radical changes they propose would surely leave us worse off than we are today. Politicization would undermine the quality, fair-mindedness and independence of the judiciary. Candidates for judicial office under the proposed system would have to present their credentials to a 9 person commission. The commissioners would all be appointed by partisan politicians: no longer would there be any pretense of non-partisanship. Curiously, under the

proposed system, although all candidates for judgeships would have to go through the nominating commission, what the commissioners would recommend is essentially meaningless. The governor can appoint whomever he or she wants. Why anyone would want to be a commissioner under those circumstances is not clear. Who would expend the time and effort required to fairly evaluate the qualifications of the candidates when they know that their recommendations may well be ignored? It would seem that only persons with some political axe to grind would want to be a commissioner under the proposed system.

The whole point of the proposed radical change appears to be to subject the judiciary to stronger legislative control. That is certainly not the federal system. The proponents do not want a politically unbiased judiciary; they want one that is politically biased in a way that they approve. To adopt such a system would by a giant step backward to the great detriment of the people of Kansas.

THE HONORABLE ARLEN SIEGFRIED AND MEMBERS OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

Good afternoon Chairman Siegfried and Members of the House Federal and State Affairs Committee. My name is David Rebein and I am an attorney in Dodge City. I appear before you this afternoon on behalf of the Kansas Bar Association.

As you consider the proposals to change the manner in which appellate judges in Kansas are selected, please consider the following:

1. To be effective, the judiciary must be independent of and equal to the other branches of government. This is critical to our system of government. A strong and independent judiciary is a check and balance on the power of the Executive and the Legislative bodies. One branch should not try to tip the scales in its favor.

2. Kansas has a non-partisan (merit) based system of selection. It is a collaborative effort between lawyers and non lawyers based entirely upon the qualifications of each candidate. It would be a mistake to politicize this process or to inject partisanship politics into it.

3. The Kansas system may be unique but it has worked well. Kansas courts are fair, impartial and efficient. While one may disagree with an individual decision, the system itself has served the state well.

4. The current system gives each congressional district a lawyer member and a lay member of the Nominating Commission. This ensures that every part of the state is represented in the search for judicial nominees.

5. The Nominating Commission is designed to be non-partisan and operates that way. The idea is to give the Governor three excellent candidates without regard to partisan issues.

6. The Nominating Commission takes this job very seriously, thoroughly backgrounds each candidate and tries to give each candidate a fair hearing. In my experience, the inquiry is focused on four areas:

    - Integrity
    - Academic qualifications, with an emphasis on writing ability
    - Professional experience and achievements
    - Community involvement and contribution

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Attachment 8

7. The beauty of the current system is that literally anyone can put their name forward who feels they are qualified. An applicant doesn't have to be active politically; a friend of the Governor; a political donor; or even well known, so long as the applicant is of unquestioned integrity, has superior academic qualifications, has demonstrated professional excellence and is committed to the people of Kansas.

8. Before you change this system, you would do well to interview past nominees, interview past Governors and to look closely at the quality of the bench in Kansas.

9. Senate confirmation at the federal level has degenerated in recent years to division along party lines with judicial nominees turning themselves inside out to avoid answering controversial questions while Senators apply their own brand of litmus testing.

10. It has been suggested that attorneys 'control' the process. While it is true that there are five attorneys and four non attorneys on the commission, it was my personal experience that everyone contributed and participated. It was truly a non-partisan collaborative effort.

11. The current system allows an attorney from each congressional district, in collaboration with their non attorney member, to recruit the very best candidates from their congressional district and to see that the Kansas judges are representative of the Kansas people.

12. The current system has stood the test of time. It may not be popular now but an independent judiciary has at several critical stages in our nations and states history resolved controversial issues and allowed the state to move on and progress.

13. The Kansas system is completely different from the federal system in that judges are only appointed until the next retention election. The Kansas legislature recently passed legislation allowing for judicial evaluation. This is a very good measure. Now Kansas has a procedure whereby:

    - Appellate judges are picked based on merit
    - Performance is evaluated and results are published
    - Judges must stand for retention. In other words, Kansas has strengthened its already strong and independent judiciary.

Thank you for the opportunity to testify in this matter.

David J. Rebein
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TO: HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

FROM: F. JAMES ("JIM") ROBINSON, JR.
KANSAS ASSOCIATION OF DEFENSE COUNSEL

RE: HCR 5031

DATE: FEBRUARY 21, 2008

Chairman Siegfried, members of the committee, thank you for the opportunity to appear today and comment on your review of House Concurrent Resolution 5031. My name is Jim Robinson. I have practiced law in Wichita for 24 years. I am on the Board of Directors of the Kansas Association of Defense Counsel (KADC), and appear today as a representative of that group. KADC is a statewide association of lawyers who defend civil damage suits. KADC supports the current merit selection process for selecting appellate judges.

What is merit selection of judges?

Obtaining qualified, competent, fair and impartial judges who are institutionally immune from outside political pressure in the resolution of individual cases is, of course, the central concern under any judicial selection method. The ongoing debate in this State focuses upon which selection method best serves this end.

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

The linchpin of merit selection in Kansas is the Supreme Court Nominating Commission. This is a nonpartisan commission composed of four lawyer members who are elected by their peers in each congressional district, four nonlawyer members who are appointed by the governor, and one additional lawyer member who serves as chairperson and who is elected by peers in a statewide election. Each member's term is four years and terms are staggered so that the terms of only two members' – one a lawyer and one a nonlawyer – expire each year. Currently there are nonlawyer members who were appointed by both Governors Graves and Sebelius.

The selection process in Kansas is almost entirely transparent, exacting, and virtually devoid of partisan influence or favoritism. No one seriously claims otherwise.

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The Commission's work is familiar to anyone who has made an important hiring decision. It initially reviews resumes and an extensive application that must be completed by all applicants for the Supreme Court and the Court of Appeals. None of the information collected or discussed pertains to political affiliation. It then screens candidates and interviews the most qualified and investigates their references. After the applicants have been thoroughly vetted, the Commission submits the names of the three that in its consensus are the most technically able and experienced to the Governor, who must select an applicant from the list. Judges are selected for retention by the voters statewide in an uncontested election every six years for the Supreme Court and every four years for the Court of Appeals.

How does "merit selection" promote fair and impartial justice for all Kansans?

Courts have a duty to protect individual rights, including the rights of political, racial and ethnic minorities, no matter how unpopular their rulings may be. The legislative and executive branches may use focus groups or public opinion polls to make decisions; judges may not. The role of the courts is to enforce the law, whether it is the First Amendment rights of some radical group on either end of the spectrum to publish political views which most people find offensive, or the right of a child murderer to a fair and impartial trial. Courts necessarily make tough decisions regardless of whether they are popular at the time.

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

Do lawyers exert too much influence in the current merit selection process?

Proponents of HCR 5031 seem to suggest that "merit selection" is a thinly-veiled effort to increase the role of the legal profession in the recruitment and selection of judges. Proponents of the resolution cite the role of lawyers as a reason for distrust of merit selection in Kansas. Regardless, there is no evidence that the lawyer members of the Commission have inappropriate control over Commission procedures or decisions.

Because the legal profession in Kansas elects five members of the Commission, including the chairperson, the legal profession certainly influences the selection of judges. Should that be a cause for concern? Appellate court judges must, by law, be lawyers who are engaged in the active practice of law, as a lawyer, a judge or a law professor. Aren't lawyers in the best position to judge their peers? Lawyers have existing connections to the legal world, know the judicial applicants, understand the courtroom environment, and can draw on their legal expertise to discuss complicated areas of law during interviews with applicants and during deliberations. Although lawyers fill an important role in the process, at prior legislative hearings on judicial selection laypersons who served on the Commission reported that they did not feel as though lawyers dominated the discussion.

If the current system is changed so that the Governor, President of the Senate and Speaker of the House has full control over the selection of commissioners, how immune are commissioners, appointed by political figures, from political influence?

Does the current merit selection process produce the highest quality judges?

Whether any particular selection method produces the highest quality judges is very difficult to evaluate, because "quality" is to ill-defined. Nevertheless, at prior legislative hearings on judicial selection the commissioners themselves have consistently expressed confidence in the quality of applicants that they recommend. Furthermore, in view of the widely available research data that the public is wary of the influence of money and interest group pressure in judicial elections today, the current merit selection system that institutionally immunizes the selection process from partisan influence or favoritism can increase public confidence in the quality of the judiciary. In addition, the most highly qualified candidates may favor the current merit selection process, because they are unwilling or unable to raise the money to run an effective Senate confirmation campaign.

Should the Governor be entitled to select a person not nominated by the Commission?

HCR 5031 provides that "the Governor may appoint one of the nominated persons [nominated by the Commission] or any person possessing the qualifications of office." This provision allows the Governor to reject the Commission's slate of nominees and circumvent the current merit selection process in favor of a pure appointive system, where the Governor and Legislature, by way of Senate confirmation, are solely responsible for appointment of judges—an unquestionably political process that should be avoided.

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

Under the federal process, unlike the state process described above, the President screens and then nominates a candidate. Senate confirmation in the federal process is a check against the President's exercise of appointment power. Shortly after the Constitutional Convention, Alexander Hamilton wrote in No. 76 of *The Federalist Papers* that the role of the Senate was "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit character." In other words, Senate confirmation was put in place at the federal level as a check against nepotism or cronyism, ensuring that nominees are qualified for their jobs.

Kansas does not need this check. The Governor does not screen the candidates; rather, this important work is done by an independent nonpartisan nominating commission. Furthermore, the state process, unlike the federal process, does not grant lifetime judgeships. Finally, state judges, unlike federal judges, are held accountable to the voters in retention elections. Senate confirmation introduces a political element into the selection process that the citizens of Kansas do not need, nor should they want.

Center for the Rule of Law

Honorable Ronald A. Cass
Chairman

February 20, 2008

Honorable Arlen Siegfried, Chairman
Committee on Federal and State Affairs
Kansas House of Representatives
Kansas State Capitol
300 SW 10th Street
Topeka, Kansas 66612

Dear Chairman Siegfried and Honorable Members:

I write to you as someone who has spent decades studying, writing about, and participating in the process of improving the judiciary and especially the selection of our judges. I have been a legal scholar and teacher for more than three decades and spent 14 years as a law school dean. I have written specifically about judicial decision-making and about the relationship between judicial selection and the rule of law. I have served on state judicial selection committees and have participated in the process of evaluating, recommending, and considering nominees to the bench. In addition, I have gone through the process of presidential selection and confirmation to appointive office myself. As you can see from the attached résumé, I am deeply invested in the quality of our legal system and of our judges.

As I understand the current system in Kansas, judicial nominations are made by a commission that includes a majority of representatives from the State Bar and a minority of individuals selected by the Governor. That commission recommends three potential nominees to the Governor, who then selects one from this list. If the Governor fails to make a selection from the list, the selection power then would pass to the Chief Justice of the Kansas Supreme Court (a theoretical possibility, but not one that has occurred). While this system doubtless was thought by many who

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supported it to be a means for obtaining input from experts and reducing the influence of political considerations on judicial selection, it has a serious flaw.

The essential problem is that the current appointment system gives exceptional weight to the representatives of the Bar. Members of the Bar inevitably have personal stakes in the identities and attitudes of the individuals selected. Although it is common to have judicial nominees scrutinized by members of the Bar, this is typically done in an open manner and generally in the form of advice to either the selecting officer or to the entity that confirms that selection. When the advice is given in that form, it can be subject to public scrutiny, to critical evaluation, and to counterbalancing testimony from other sources, including other members of the Bar. Moreover, the selecting official generally is free to reject the advice and to make a selection that does not accord with the wishes of the Bar. That may be good or bad in any individual instance, but it places selection in the hands of an officer who is accountable to the public.

The Kansas procedure for judicial selection unfortunately transforms the role of the Bar from one that provides advice to one that provides a power of selection. The majority of the selection commission is composed of members of the Bar, and the Governor's prerogative is limited to a choice from the relatively short list given to him. This process essentially gives the selection power to given by members of the Bar. If members of the Bar are not self-interested or if the members chosen to fill the seats on the selection commission represent different elements in the Bar so that the self-interest of any particular element of the Bar is effectively eliminated, the current process might work without great difficulty. But there is nothing in the current process that makes this likely. It seems more likely that, at least on occasion, the members chosen to the commission will represent a particular bias of certain elements of the organized Bar.

I do not have first-hand experience with the selections in Kansas and do not presume to criticize the judges selected by the Kansas procedures. The point I want to make is an important, analytical point, not connected immediately to any particular appointment or complaint about any Kansas judge. The point is this: it is very common that processes like the one adopted by Kansas would encourage the most self-interested elements within the state Bar – those whose livelihoods can be most substantially and directly affected by the decisions of the judges – to seek

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influence over the appointment process. That influence could result in the selection of commission members whose views are not broadly representative of the Bar and also are not reflective of the interest of the public in certain, stable, predictable interpretations of the law by judges who are selected for their fidelity to the rules written by others. When that happens, the current system does not provide the sort of check on self-interest that comes with providing greater power over selection to an elected official who is accountable to the public. It does not, in other words, provide a safety valve that would protect the public from the appointment of judges who are congenial to some members of the Bar but not to the greater public interest in the rule of law.

Three sorts of changes could improve the Kansas process for judicial selection.

- The least significant change would be to increase the number of potential nominees submitted to the Governor by the Commission. That change would make it more likely that the Governor would have access to potential appointees who would fit his conception of a judge serving the needs of the people of Kansas rather than the self-interest of the Kansas Bar.

- A second possibility would be to provide the Governor the option of rejecting all of the nominees and requesting a new set of names. While this is a potent power, it also is checked by the political reality that the Governor wants to have someone appointed and, given the limited times Governors serve, will not want to keep rejecting lists. It is checked as well by the fact that there are inevitable political costs to protracted fights over judicial selection.

- Finally, the selection commission itself could be reformed to provide less power in the hands of the Bar and to give more weight to members appointed by the Governor. Any change in the process that increases the authority of the Governor over the selections and that reduces the power of the Bar to less than majority control would serve this end.

In my judgment, all three changes would be salutary, but any of them standing alone would improve the selection process.

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The changes suggested here increase the likelihood that the appointing officer will be someone who is accountable to the people through election and whose accountability comes with a broader mandate than merely judicial selection (a factor that avoids replicating the self-interest problem in another form). The founders of our nation and framers of our Constitution understood the importance of public accountability in selecting judges, making the Chief Executive solely responsible for judicial nominations.

The Kansas selection process need not replicate the federal process. But it needs to be revised to safeguard against the biases that inhere in giving broad selection power to members of the organized Bar who have greatest professional self-interest in this process.

I urge you to update these elements of the Kansas selection process.

Sincerely,

/s/

Ronald A. Cass

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Honorable Ronald A. Cass

Honorable Ronald A. Cass is Chairman of the Center for the Rule of Law, an independent, non-profit center of international scholars analyzing rule of law issues. He also is President, Cass & Associates, PC, a legal consultancy in Great Falls, Virginia. He served Presidents Ronald Reagan and George H.W. Bush as Vice-Chairman and Commissioner of the U.S. International Trade Commission, and is Dean Emeritus of Boston University School of Law, where he was Dean from 1990-2004.

Dean Cass is the author of numerous books and articles, on topics such as antitrust law, intellectual property law, administrative law and regulation, and legal process. His books include *The Rule of Law in America* (Johns Hopkins University Press) and a leading textbook on Administrative Law (KluwerWolters). Dean Cass has participated in numerous judicial selection issues and served as a member of the Special Nominating Committee for Selection of Justices for the Supreme Judicial Court for the Commonwealth of Massachusetts.

He is a Senior Fellow at the International Centre for Economic Research in Torino, Italy, and the Rapporteur for a joint US-EU Task Force on Intellectual Property in Brussels, Belgium, for the Trans-Atlantic Policy Network. Dean Cass has been a professor at the University of Virginia and Boston University (where he was the Melville Madison Bigelow Professor of Law), visiting professor at the Université d'Aix-Marseille III, Aix-en-Provence, France, visiting professor of Comparative Law at the Université Lyon III, Lyon, France, and a lecturer at leading universities around the world.

Dean Cass is a member of many organizations, is a member of the American Law Institute, a fellow of the American Bar Foundation, a former member of the Boston Bar Council, and is active in the leadership of the American Bar Association and the Federalist Society. He serves on the boards of several non-profit enterprises, including the Roger Williams University School of Law. He has been an advisor to governments, law firms, businesses, and international organizations, and also sits as an international arbitrator on cases encompassing both private disputes and matters involving nations' compliance with international legal obligations. Dean Cass is affiliated with the London Court of International Arbitration.

He received his B.A. (with high distinction) from the University of Virginia in 1970 and his J.D. (with honors) from the University of Chicago Law School in 1973.

Legislative Testimony
Before the House Committee on Federal and State Affairs
Rep. Arlen Siegfried, Chairman
Feb. 19, 2008

MR. CHAIRMAN AND MEMBERS OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS:

My name is Stephen Ware. I am a professor of law at the University of Kansas. I have been a lawyer since 1991 and a law professor since 1993. I submit this testimony in support of HCR 5031 and HB 2799, not on behalf of KU, but on my own as a concerned citizen.

I recently published a paper that researched how all 50 states select their supreme court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices. HCR 5031 would accomplish these goals.

I have attached a copy of my paper, *Selection to the Kansas Supreme Court*, and two op-ed pieces I wrote on the subject. I hope you will accept the following written testimony in my absence as I cannot attend the hearings in person.

I. No Other State Gives its Bar as Much Power as Kansas Currently Does

Kansas is the only state that gives its bar (the state's lawyers) majority control over the selection of supreme court justices. The Kansas Supreme Court Nominating Commission consists of nine members, five selected by the bar and four selected by the governor. None of the other 49 states gives its bar so much power. Kansas stands alone.

Examining judicial selection elsewhere in the country reveals a variety of approaches. Nearly half the states, 22 of them, elect their supreme court justices. Elections are the most populist method of judicial selection because they give each voter equal power. A lawyer's vote is worth no more than any other citizen's. By contrast, Kansas' current system is the most elitist method of judicial selection because it concentrates power in the bar, a narrow, elite segment of society. In between these extremes is the more moderate approach of having the governor's nominee win senate confirmation before joining the court.

Our Nation's Founders adopted this moderate approach in the United States Constitution, and today a dozen states also select their supreme courts with confirmation by the senate or similar body. While some claim that senate confirmation in Kansas would be a political "circus," experience in the states that use it contradicts this claim. Experience in these states suggests that senate confirmation of judicial nominees works well and avoids both the extreme of elitist, bar-controlled courts and the extreme of populist courts swaying with the prevailing winds rather than standing firm for the rule of law.

House Fed and State Committee
Februruary 21, 2008

Attachment 11

In short, senate confirmation of Kansas Supreme Court justices is a cautious, prudent reform. Rather than moving Kansas judicial selection from one extreme to another, it would move our state from one extreme toward the moderate mainstream of the country. As a lawyer who cares deeply about our court system, I believe that the legislators who crafted HCR 5031 are to be commended for taking such a measured and thoughtful approach to an issue on which Kansas has for too long been so extreme.

II. Kansas' Current System Includes Much Secrecy and Little Public Accountability

The current process for selecting Kansas Supreme Court justices not only gives the bar an enormous amount of power but also allows that power to be exercised in a largely-secret manner. The Kansas Supreme Court Nominating Commission's votes are secret. By contrast, senate confirmation votes are public. By adding senate confirmation to the judicial selection process, HCR 5031 would reduce the secrecy of the process and increase accountability to the public.

Further increasing public accountability, HCR 5031 would have publicly-elected officials appoint members of the Nominating Commission and allow the governor to appoint to the Supreme Court any qualified individual, whether or not that individual was nominated by the Commission. By placing this responsibility solely on the governor -- the individual in whom executive power is vested -- HCR 5031 follows the United States Constitution. As Northwestern University law professor John McGinnis explains:

> The principal concern of the Framers regarding the Appointment Clause, as in many of the other separation of powers provision of the Constitution, was to ensure accountability while avoiding tyranny. Hence, following the . . . example of the Massachusetts Constitution drafted by John Adams, the Framers gave the power of nomination to the President so that the initiative of choice would be *a single individual's responsibility* but provided the check of advice and consent [of the Senate] to forestall the possibility of abuse of this power.[1]

In sum, giving a single popularly-accountable individual -- the governor -- the responsibility to stand behind his or her choice for the Supreme Court has important advantages over allowing that responsibility to be spread among the members of an unelected commission operating out of the public eye. At the same time, however, HCR 5031 would preserve the Nominating Commission for its valuable service in identifying, interviewing and assessing possible candidates for the judiciary. This is another way in which HCR 5031 strikes a thoughtful, moderate balance between the extremes of populism and elitism.

[1] John McGinnis, *Appointments Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (David F. Forte, ed. 2005) (emphasis added).

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III. Possible Counterarguments

I expect that opponents of HCR 5031 will make the arguments that leaders of the Kansas Bar Association have made in the past. Several of these arguments are misleading.

A. The Empty Claim of "Merit"

Defenders of Kansas' current bar-dominated system often claim that it selects judges based on merit, rather than politics. But this is just an empty assertion. They provide no facts showing that Kansas does better than other states at selecting meritorious justices. It is misleading to suggest that the bar must select members of the Nominating Commission in order to ensure that lawyers' expertise is brought to bear on judicial selection. In states with senate confirmation, the governor and senate avail themselves of lawyers' expertise with respect to potential judges. Furthermore, HCR 5031 ensures that the Nominating Commission include three members of the bar.

B. The Misleading Phrase, "Non-Partisan"

Defenders of Kansas' current system often describe it with the word "non-partisan." In fact, nine of the last 11 people appointed to the Kansas Supreme Court belonged to the same political party as the governor who appointed them. This is a highly partisan outcome from a system advertised as "non-partisan." Moreover, governors consistently appoint only members of their party to the Nominating Commission.

What makes Kansas' current system unusual is not that it's political, but that it gives so much political power to the bar. In both the current system and a senate-confirmation system, the governor has significant power. The difference between the two systems is who serves as the check on the governor's power and whether that check is exercised in secret or in public. Kansas' current system makes the bar the check on the governor's power and allows the bar to exercise that check in secret. HCR 5031 would make the Senate the check on the governor's power and that check would be exercised in a public vote.

C. The Irrelevant "Triple Play"

Some senior members of the Kansas bar like to recall the story of how Kansas got its current Supreme Court selection process, the story of the "triple play" in which a governor essentially got himself appointed to the Court in the mid-1950's. The moral of this story is that governors should not have unchecked power over the selection of supreme court justices. But neither Kansas' current system nor the senate-confirmation system of HCR 5031 would give the governor such power so the "triple play" story is irrelevant to the issue now before your Committee.

D. Senate Confirmation is not a "Circus" in the Many States that Use It

As noted above, some claim that senate confirmation in Kansas would be a political "circus." Rather than speculating about this, one can examine the experience of the twelve states that have

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senate confirmation or confirmation by a similar popularly-elected body. My paper researched the last two votes for initial supreme court confirmation in each of these twelve states. In all twenty four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous. In only two of these twenty four cases was there more than a single dissenting vote. These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus. These facts suggest that governors know that senate confirmation of controversial nominees may be difficult so governors consider, in advance, the wishes of the senate in deciding who to nominate.

E. Judicial Independence Would Not Be Weakened by HCR 5031

In defending Kansas' current system for selecting justices, some members of the bar suggest that senate confirmation would reduce the independence of the Kansas Supreme Court. By contrast, bar groups have not charged that senate confirmation of federal judges reduces the independence of federal courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure. By contrast, it is judges who are subject to reelection or reappointment that have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not by the system of judicial *selection*, but by the system of judicial *retention*, including the length of a justice's term. HCR 5031 would change only judicial selection, not judicial retention, and thus has no effect on judicial independence.

IV. Conclusion

For the reasons stated above and in my paper (available at www.fed-soc.org/kansaspaper), I urge you to support HCR 5031. Similar reasoning applies to the selection of Kansas Court of Appeals judges because the same selection process is currently used in Kansas for both appellate courts and most states around the country have the same selection process for both the state's highest court and the state's intermediate appellate court. Therefore, I urge you to support HB 2799 as well.

Thank you very much for your time and attention.

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Kansas.com
The Wichita Eagle

Posted on Thu, Nov. 29, 2007

STEPHEN J. WARE: BAR HAS TOO MUCH POWER IN PICKING STATE'S JUSTICES

BY STEPHEN J. WARE

Kansas is the only state that gives its bar association -- the state's lawyers -- majority control over the selection of state Supreme Court justices. As a result, lawyers may have more control over the judiciary in Kansas than in any other state. Not only do Kansas lawyers have an extreme amount of power over judicial selection, they exercise this power in secret.

I recently published a paper that researched how all 50 states select their Supreme Court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

The Supreme Court Nominating Commission is now at the center of this process. When there is a vacancy on the Kansas Supreme Court, the commission assesses applicants and submits its three favorites to the governor. The governor must pick one of the three nominees, and that person is thereby appointed a justice on the state Supreme Court, without any further checks on the power of the commission. Therefore, the commission is the gatekeeper to the state Supreme Court.

The bar has majority control over this gatekeeper. The commission consists of nine members, five selected by the bar and four selected by the governor. None of the other 49 states gives its bar majority control over its Supreme Court Nominating Commission.

Kansas has 2.7 million people and only 7,666 lawyers. Yet those few lawyers have more power in selecting our highest court than all other Kansans combined. The bar's majority on the commission can prevent the appointment of an outstanding individual to the Supreme Court, even if that individual is the unanimous choice of the governor, the Legislature and every nonlawyer in Kansas.

Further reducing accountability, the commission's votes are secret. The public can learn the pool of applicants and the three chosen by the commission, but cannot discover which commissioners voted for or against which applicants.

Defenders of this largely secret system claim it selects justices based on merit rather than politics. But 9 of the past 11 people appointed to the Kansas Supreme Court belonged to the same political party as the governor who appointed them. That is a highly partisan outcome from a system advertised as "nonpartisan."

In short, the system gives one small segment of our state (the bar) tremendous power and allows it to exercise that power in secret. Those who hope to join the Kansas Supreme Court -- often lower-court judges -- know they must curry favor with the bar because that interest group holds the key to advancement. We should not be surprised if this system, controlled by a narrow few, begins to resemble a "good ol' boys" club in which members of the club pick those like themselves, rather than being open to diversity and fresh ideas.

Reform of this system should increase its openness and reduce the bar's power. Options for reform can be found in my paper surveying the 50 states' methods for selecting Supreme Court justices, which can be found on the Web site www.fed-soc.org/kansaspaper.

Stephen J. Ware is a professor of law at the University of Kansas in Lawrence.

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Lawrence Journal-World

Professor questions judge selection

By Stephen J. Ware

December 8, 2007

State Rep. Paul Davis, speaking for the Kansas Bar Association, says the current judicial selection process allows the Kansas Supreme Court to maintain its independence from politics ("Judicial selection process criticized," Journal-World," Dec. 1). But nine of the last 11 people appointed to that court belonged to the same political party as the governor who appointed them. This is a highly partisan outcome from a system advertised as "non-partisan." Moreover, governors consistently appoint only members of their party to the Supreme Court Nominating Commission.

What makes the Kansas Supreme Court selection process unusual is not that it's political, but that it gives so much political power to the bar (the state's lawyers). Kansas is the only state that gives its bar majority control over the commission that nominates Supreme Court justices. It's no surprise that members of the Kansas bar are happy with the current system because it gives them more power than the bar has in any of the other 49 states and allows them to exercise that power in secret, without any accountability to the public.

I recently published a paper (available at www.fed-soc.org/kansaspaper) that researched how all 50 states select their supreme court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

While some states have individual quirks, three basic methods prevail around the country: commissions, elections and senate confirmation. The commission system is the most elitist system because it tends to concentrate power in the bar, a narrow, elite segment of society, (although no state gives the bar quite as much power as Kansas). The other extreme — electing judges — is the most populist method of selecting a supreme court. It risks turning judges into politicians and thus weakening the rule of law. In between these extremes is the more moderate approach of having the governor's nominee win senate confirmation before joining the court.

Our nation's founders adopted this approach in the U.S. Constitution, and today more than a dozen states also select their supreme courts with confirmation by the state senate or similar body. While some claim that senate confirmation in Kansas would be a political "circus," experience in the states that use it contradicts this claim. Experience in these states suggests that senate confirmation of judicial nominees works well and avoids both the extreme of elitist, bar-controlled courts and the extreme of populist courts swaying with the prevailing winds rather than standing firm for the rule of law. In short, senate confirmation of Kansas Supreme Court justices is a worthwhile reform.

— Stephen J. Ware is a professor in the Kansas University School of Law.

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the polling company™, inc.
Kellyanne Conway, President & CEO

February 20, 2008

Honorable Arlen Siegfried, Chairman
Committee on Federal and State Affairs
Kansas House of Representatives
Kansas State Capitol
300 SW 10th Street
Topeka, Kansas 66612

Dear Chairman Siegfried and Honorable Members:

I am pleased to present to you the findings of a recent statewide survey of 600 registered voters in Kansas. The main objective of the survey was to assess Sunflower State voters' knowledge and opinions of the process by which Justices are chosen to serve on the Kansas State Supreme Court.

Most Kansans admitted they knew very little about the judicial selection method in Kansas. Their admitted lack of knowledge was reaffirmed when asked to choose from three possible descriptions of the selection process, as only 24% correctly identified that "justices are nominated by a judicial commission and appointed by the governor." In contrast, 29% believed that "justices are elected by the voters of Kansas," and the plurality (37%) thought Kansas followed the Federal Model by which "justices are appointed by the governor of Kansas and confirmed by the legislature."

Once read a description of the current method of "merit selection," an eye-popping 85% asserted they did not know that the nine-member Supreme Court Nominating Commission included five Kansas Bar lawyers. This was six times the 14% who were aware.

Most Kansas expressed discontent with the current selection method. In fact, by a margin of 58% to 35%, voters rejected the current composition of the Supreme Court nominating commission and instead agreed that *"it is best that the deciding majority...of the nominating commission be appointed by the elected political officials because we want the judicial selection process to be accountable to the people of Kansas."* This opinion was shared by majorities of every major demographic group including all three political affiliations: Republicans (60%), Independents (61%), and Democrats (55%).

In addition, 63% of Kansas voters surveyed supported changing the make-up of the nominating commission (as they were told several other states had) to *"include more input from the Governor, state legislature, citizens, and other interested parties and less input from lawyers and state bar associations."* This was more than twice the number (24%) who opposed the change. Again, there was widespread support for this change, as a majority of every demographic group

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concurred, including 66% of Republicans, 59% of Independents, and 62% of Democrats who backed shifting away from the current system.

Kansans overwhelmingly rejected any notion that the Governor of Kansas should be forced to select a Supreme Court nominee from the list of three applicants submitted by the judicial nominating commission. **Fully 64% believed that the Governor "should be able to decline those options" if they are not qualified. This included majorities of men and women, as well as voters of every age, race, region, party, and ideology.** In contrast, only 31% believed that the Governor "should follow the Commission's recommendations and be required to select from the three names provided." This finding clearly indicates that Kansans put prudent policy ahead of politics. With a Democrat currently in the Governor's Mansion and statewide voter registration numbers that favor Republicans by nearly 2:1, it is evident that Kansans deem this right as fundamental and not political.

In conclusion, it is our finding that Kansans may not know the basics of the method by which their State Supreme Court Justices are chosen, but they are unified about how it *ought* to be. Not only did a majority of Kansans agree that lawyers should **not** comprise the majority of the judicial nomination commission, but they also demanded a superior way to hold nominators accountable to voters.

Sincerely,

/s/

Kellyanne Conway, Esq.

Statement of Methodology:
Interviews were conducted November 1-5, 2007 at a Computer-Assisted Telephone Interviewing (CATI) facility using live callers. The sample was randomly drawn utilizing a list of registered voters in Kansas. Potential respondents were then screened to ensure that they were registered to vote in the state.

Sampling controls were used to ensure that a proportional and representative number of people were interviewed from such demographic groups as age, gender, race and ethnicity, and region.

The original survey instrument contained 19 questions, including six demographic inquiries. The margin of error for the survey is $\pm$ 4% at a 95% confidence interval, meaning that in 19 out of 20 cases, the data obtained would not differ by any more than 4 percentage points in either direction had the entire population of registered voters in Kansas been surveyed. Margins of error for subgroups are higher.

Topline Data
Survey of 600 Registered Voters in Kansas

prepared for

The Federalist Society

by the polling company™, inc.

November 2007

Fielding Dates: November 1-5, 2007
Margin of Error = ± 4%

Introduction

A. Are you 18 years of age or older and currently registered to vote here in Kansas, registered in a different state, or not registered at all?

100% YES

B. Thinking for a moment about past elections that you have been eligible to vote or participate in, would you say that you have voted in…(READ CHOICES)

67% ALL OR ALMOST ALL ELECTIONS
18% MOST ELECTIONS
5% ABOUT HALF OF ALL ELECTIONS
4% LESS THAN HALF OF ALL ELECTIONS
1% ONLY LOCAL ELECTIONS BUT NOT CONGRESSIONAL AND PRESIDENTIAL ELECTIONS
3% ONLY PRESIDENTIAL AND CONGRESSIONAL ELECTIONS, BUT NOT LOCAL ELECTIONS
3% I HAVE NEVER VOTED IN AN ELECTION

IMPRESSION OF KANSAS COURTS

1. How familiar would you say you are with the Kansas State Supreme Court and its rulings and decisions? Are you… (READ AND ROTATED TOP TO BOTTOM AND BOTTOM TO TOP)

40%	**TOTAL FAMILIAR (NET)**
7%	VERY FAMILIAR
33%	SOMEWHAT FAMILIAR
60%	**TOTAL NOT FAMILIAR (NET)**
34%	JUST A LITTLE BIT FAMILIAR
26%	NOT AT ALL FAMILIAR
*	DO NOT KNOW (VOLUNTEERED)
-	REFUSED (VOLUNTEERED)

2. Which of the following do you think best describes how Justices are **first** chosen to serve on the Kansas Supreme Court? (READ AND ROTATED)

37%	JUSTICES ARE APPOINTED BY THE GOVERNOR OF KANSAS AND CONFIRMED BY THE LEGISLATURE
29%	JUSTICES ARE ELECTED BY THE VOTERS OF KANSAS
24%	JUSTICES ARE NOMINATED BY A JUDICIAL COMMISSION AND APPOINTED BY THE GOVERNOR
10%	DO NOT KNOW (VOLUNTEERED)
*	REFUSED (VOLUNTEERED)

3. Who do you think **should** have the greatest input on who is selected to serve as a Justice on the Kansas State Supreme Court? (READ AND ROTATED, ACCEPTED ONLY ONE RESPONSE)

55%	KANSAS VOTERS
15%	KANSAS STATE LEGISLATURE
15%	KANSAS GOVERNOR
11%	KANSAS STATE BAR LAWYERS
*	OTHER (VOLUNTEERED)
2%	ALL OF THE ABOVE (VOLUNTEERED)
*	NONE OF THE ABOVE (VOLUNTEERED)
2%	DO NOT KNOW (VOLUNTEERED)
-	REFUSED (VOLUNTEERED)

KANSAS SUPREME COURT APPOINTMENT

As you may know, there are seven Justices on the Kansas Supreme Court who are appointed by a process known as "merit selection." Under this plan, the Supreme Court Nominating Commission selects all the judicial nominees for the Kansas Supreme Court. The Commission is a nine-member group that includes five lawyers selected by the Kansas Bar – made up of all the lawyers in Kansas. It also includes four non-lawyers appointed by a past or present Governor. The Commission sends the names of three nominees to the Governor for each Supreme Court vacancy from which the Governor must choose. The Governor interviews the candidates and must appoint one of them.

4. Were you aware that the Kansas Bar, lawyers in Kansas, selects five out of the nine people that serve on the judicial nominating commission which selects all of the Kansas Supreme Court nominees?

14%	YES
85%	NO
*	DON'T KNOW (VOLUNTEERED)
-	REFUSED (VOLUNTEERED)

5. I am going to read you the opinions of two people regarding this process. Please tell me which one comes closest to your view. (ROTATED)

PERSON 1: It is best that the deciding majority, meaning at least five of the nine members, of the nominating commission consist of people not accountable to the voters of Kansas because we want the judicial selection process to be insulated from the political process.

PERSON 2: It is best that the deciding majority, meaning at least five of the nine members, of the nominating commission be appointed by elected political officials because we want the judicial selection process to be accountable to the people of Kansas.

35%	**TOTAL AGREE PERSON 1 (NET)**
15%	STRONGLY AGREE PERSON 1
20%	SOMEWHAT AGREE PERSON 1
58%	**TOTAL AGREE PERSON 2 (NET)**
32%	SOMEWHAT AGREE PERSON 2
26%	STRONGLY AGREE PERSON 2
7%	DON'T KNOW (VOLUNTEERED)
*	REFUSED (VOLUNTEERED)

6. If the Governor of Kansas does not think any of the three applicants that the commission selects are qualified, do you think that (ROTATED) he or she should be able to decline those options and ask for new nominees OR should he or she be required to select from the three names provided?

64% SHOULD DECLINE THOSE OPTIONS AND ASK FOR NEW NOMINEES
31% SHOULD FOLLOW THE COMMISSION'S RECOMMENDATIONS AND BE REQUIRED TO SELECT FROM THE THREE NAMES PROVIDED

4% DO NOT KNOW (VOLUNTEERED)
* REFUSED (VOLUNTEERED)

7. A number of states have adopted the same process of selecting judicial nominees as Kansas; however, most of them have a judicial nominating commission that includes more input from the Governor, state legislature, citizens, and other interested parties and less input from lawyers and state bar associations. Do you support or oppose changing the way Kansas selects the members of its Commission as other states have?

63% TOTAL SUPPORT (NET)
26% STRONGLY SUPPORT
37% SOMEWHAT SUPPORT

24% TOTAL OPPOSE (NET)
15% SOMEWHAT OPPOSE
9% STRONGLY OPPOSE

4% NEED MORE INFORMATION/ NO BASIS TO JUDGE (VOLUNTEERED)
7% DON'T KNOW/UNSURE (VOLUNTEERED)
1% REFUSED (VOLUNTEERED)

DEMOGRAPHICS

8. Which of the following categories best describes your age?

8% 18-24
13% 25-34
21% 35-44
22% 45-54
14% 55-64
22% 65+

1% REFUSED (VOLUNTEERED)

9. Would you describe your racial or ethnic background as…(READ LIST)?

87%	WHITE/CAUCASIAN
6%	BLACK/AFRICAN-AMERICAN
4%	HISPANIC/LATINO
*	ASIAN
1%	NATIVE AMERICAN
1%	OTHER (VOLUNTEERED)
-	DON'T KNOW (VOLUNTEERED)
1%	REFUSED (VOLUNTEERED)

10. In politics today, do you consider yourself to be a (ROTATED) Republican, Independent, or Democrat?

46%	**TOTAL REPUBLICAN (NET)**
25%	STRONG REPUBLICAN
16%	NOT-SO-STRONG REPUBLICAN
5%	INDEPENDENT LEANING REPUBLICAN
17%	**INDEPENDENT**
32%	**TOTAL DEMOCRAT (NET)**
6%	INDEPENDENT LEANING DEMOCRAT
8%	NOT-SO-STRONG DEMOCRAT
18%	STRONG DEMOCRAT
1%	OTHER (VOLUNTEERED)
4%	DON'T KNOW/REFUSED (VOLUNTEERED)

11. Thinking for a moment about your political views…Do you consider yourself to be…?

50%	**TOTAL CONSERVATIVE (NET)**
21%	VERY CONSERVATIVE
29%	SOMEWHAT CONSERVATIVE
25%	**MODERATE**
18%	**TOTAL LIBERAL (NET)**
14%	SOMEWHAT LIBERAL
4%	VERY LIBERAL
3%	LIBERTARIAN
4%	DON'T KNOW/REFUSED (VOLUNTEERED)

12. Gender

48%	MALE
52%	FEMALE

12-7

13. Region[1]

13%	WEST
14%	NORTH CENTRAL
26%	SOUTH CENTRAL
11%	SOUTHEAST
36%	NORTHEAST

[1] West: Barton, Cheyenne, Clark, Comanche, Decatur, Edwards, Ellis, Finney, Ford, Gove, Graham, Grant, Gray, Greeley, Hamilton, Haskell, Hodgeman, Kearny, Kiowa, Lane, Logan, Meade, Morton, Ness, Norton, Osborne, Pawnee, Phillips, Rawlins, Rooks, Rush, Russell, Scott, Seward, Sheridan, Sherman, Smith, Stanton, Stevens, Thomas, Trego, Wallace, and Wichita Counties

North Central: Chase, Clay, Cloud, Dickinson, Ellsworth, Geary, Jewell, Lincoln, Lyon, McPherson, Marion, Marshall, Mitchell, Nemaha, Ottawa, Pottawatomie, Republic, Rice, Riley, Saline, Wabaunsee, and Washington Counties

South Central: Barber, Butler, Cowley, Harper, Harvey, Kingman, Morris, Pratt, Reno, Sedgwick, Stafford, and Sumner Counties

Southeast: Allen, Anderson, Bourbon, Chautauqua, Cherokee, Coffey, Crawford, Elk, Franklin, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Osage, Wilson, and Woodson Counties

Northeast: Atchison, Brown, Doniphan, Douglas, Jackson, Jefferson, Johnson, Leavenworth, Shawnee, and Wyandotte Counties

LEAGUE OF WOMEN VOTERS® OF KANSAS

February 21, 2008

Honorable Arlen Siegfried, Chair
House Federal and State Affairs Committee
The Kansas House of Representatives

Chairman Siegfried and members of the committee:

I appreciate the opportunity to present testimony on behalf of the League of Women Voters of Kansas, in opposition to HCR 5031. We do not support this legislation for the following reasons:

1. Our existing method of selecting/appointing the Supreme Court Nominating Commission members has honorably served this State for many years.
2. The proposal for Senate confirmation of the Governor's appointment introduces a political element to the process and potentially lengthens the process, adding considerable cost if special sessions of the Senate are needed.
3. The proposal to change the ratio of attorneys to non-attorneys seems to serve no useful purpose, but would reduce the importance of professional scrutiny in screening judicial candidates.
4. By giving equal roles to the Governor, the Speaker of the House and the President of the Senate in appointing members to the Nominating Commission, partisan politics will result in a partisan court system.
5. Changing the process of appointing the Nominating Commission without a compelling basis for such a change is not in the best interests of good public policy for Kansans.

To address point 3 above, I found the following information on the American Judicature Society website. Twenty-eight of the states that use Nominating Commissions to select candidates for appellate courts described their methods in adequate detail.

In 17 states, there are more attorneys than non-attorneys on the Commission
In 5 states, there are an equal number of attorneys and non-attorneys
In 5 states, the non-attorneys exceed the attorneys by one
In 1 state, there is a 2:1 ratio of non-attorneys to attorneys.

It could, arguably, be concluded that the majority of states with merit selection find it best to depend on a strong professional component for evaluating candidates to serve on the Appeals Court and Supreme Court.

A non-politicized court system promotes an independent third branch of government, assuring citizens their fair and impartial day in court, while preserving the necessary checks and balances in our democracy.

We urge you <u>not</u> to support HCR 5031.

Janis McMillen

House Fed and State Committee
Februruary 21, 2008

Attachment 13

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KANSAS ASSOCIATION FOR JUSTICE
FOUNDATION

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www.ksaj.org

Your rights. Our mission.

To: Representative Arlen Siegfreid, Chairman
Members of the House Federal & State Affairs Committee

From: Callie Denton Hartle
Kansas Association for Justice

Date: February 21, 2008

Re: HB 2799--**OPPOSE**

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of attorneys that serve Kansans seeking justice. Thank you for the opportunity to submit written testimony on HB 2799. KsAJ is opposed to HB 2799.

Because the bill was just set for hearing, we regret we are not able to provide the committee with more detailed analysis and comments with regard to the bill. We note only that we believe the current process is fair and effective. We are not convinced that a different approach, such as that outlined in HB 2799, would result in a better or more careful selection process.

We respectfully request that the Committee oppose HCR HB 2799.

House Fed and State Committee
Februruary 21, 2008

Attachment 14

KANSAS ASSOCIATION FOR JUSTICE

719 SW Van Buren St., Ste. 100, Topeka, KS 66603
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Your rights. Our mission.

To: Representative Arlen Siegfreid, Chairman
Members of the House Federal & State Affairs Committee

From: Callie Denton Hartle
Kansas Association for Justice

Date: February 21, 2008

Re: HCR 5031--**OPPOSE**

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of attorneys that serve Kansans seeking justice. Thank you for the opportunity to submit written testimony on HCR 5031. KsAJ is opposed to HCR 5031.

It is important to remember that Kansas has a history of disdain for politics in the courts. One need only remember the infamous "triple play", engineered by outgoing governor Fred Hall in 1956, which outraged Kansas citizens and led to the merit system for selection of judges that we have today.

In considering changes to our process of selecting not only Supreme Court justices, but the Supreme Court Nominating Commission, we must consider whether a new approach would result in a better or more careful review of a judicial nominee's integrity and qualifications for office than our current process.

The importance of an independent judiciary in our system of checks and balances must also be considered, and cannot be overstressed. KsAJ believes the current system for selection of justices protects judicial independence and we oppose changes that politicize the process or discourage qualified individuals from seeking judgeships.

Kansas' current selection process has stood the test of time and was crafted to embrace the value of an independent judiciary. Changing this time-honored process is unnecessary. We respectfully request that the Committee oppose HCR 5031.