Approved: 3-17-09
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 12, 2009, in Room 143-N of the Capitol.

All members were present except:
Representative Kevin Yoder- excused

Committee staff present:
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the committee:
William E. Richards, Lt.C (Retired), NAACP
Bill Eckhardt, Law Professor, University of Missouri Kansas City
Alan Cobb, Americans for Prosperity
Mike DeBow, Law Professor, Samford University, Birmingham, Alabama
Richard Peckham, Chairman and General Counsel, Kansas Judicial Review
Kris Kobach, Law Professor, University of Missouri Kansas City
Michael Dimeno, Law Professor, Widner School of Law, Harrisburg
Steve Ware, Law Professor, Kansas University
Judge Eric R. Yost, and Judge Jeffrey E. Goering, District Court Judges, Wichita
Justice Fred N. Six, Kansas Supreme Court (Retired)
Richard C. Hite, Supreme Court Nominating Commission
Professor Robert C. Casad, John H. and John M. Kane, Professor of Law Emeritus, Kansas University School of Law
James M. Concannon, distinguished Professor of Law, Washburn University
James L. Bush, Hiawatha, Kansas Bar Association
James Robinson, Wichita, Kansas Association of Defense Counsel
Mike Herd, Wichita Bar Association
Diane Kuhn, League of Women Voters of Kansas
Terry Humphery, Kansas Association for Justice

Others attending:
See attached list.

Hearings on **HCR 5005 - Governor appoints supreme court justices, senate confirms; nominating commission membership amended; commission evaluates nominees and makes recommendation**, and **HB 2123 - Court of appeals judges appointed, by governor, subject to senate confirmation; creating a court of appeals nominating commission to evaluate nominees and make recommendations to the governor** were opened and heard together.

Jill Wolters provided an overview of **HCR 5005** (Attachment 1) and **HB 2123** (Attachment 2) to the committee.

Proponents:
William E. Richards, Lt.C(Retired), spoke as a representative of the National Association For The Advancement of Colored People (NAACP), in favor of the bill and Resolution. He stated the Resolution would provide for more democratic oversight, accountability, and, transparency to the selection process than is currently available to the Kansas Electorate. He also said that Kansans must be assured that there are no elements of intentional discrimination in the nominating process, which might be in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. (Attachment 3)

Bill Eckhardt, Law Professor, University of Missouri Kansas City appeared as a proponent to the bill and Resolution. In August of 2007 Professor Eckhardt coauthored, along with John Hilton, "The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992-2007 and is a part of his attachment.

He stated that Judicial selection cannot ever be apolitical, yet we must have an open system of merit selection that emphasizes professional qualifications and quality control with a democratically accountable process. He shared several goals that he had respectfully suggested to the Missouri Legislature to guide this process. He stated some two-thirds of the states that followed Missouri's lead have a much more open and politically accountable judicial selection system. (Attachment 4)

Alan Cobb, appeared as a proponent representing Americans for Prosperity, with more than 30,000 members of Americans. He testified that the Resolution is a step in the right direction for addressing the ever-increasing demand for judicial selection reform and that polling indicates 63% of Kansas voters support changing the nominating commission to have much more public and legislative input and less from the state's lawyers. He compared the current system to having forty Kansas sport coaches getting together and deciding what umpires are going to umpire the world series. He used the recent appointment of attorney Dan Biles to the Kansas Supreme Court as further evidence of the role politics plays under the current system. The political connections Mr. Biles has to Governor Sebelius and the Kansas Democratic Party are reason enough to allow public input via Senate deliberations, prior to an appointment to such an important role. The fact that Mr. Biles is a law partner of Larry Gates, Chairman of the Kansas Democratic Party, begs the question of whether the second largest political party in Kansas would have an undue influence over a Supreme Court Justice. The same could be said if the relationship was with the chairman of the Kansas Republican Party. (Attachment 5)

Mike DeBow, Law Professor, Samford University, Birmingham, Alabama spoke in support of the Resolution and not on behalf of his employer or other any entity, but on his own as a law teacher concerned with the procedures used to select state judges. He explained two views of the current commission, (1) The self-interest of lawyers.....lawyers can be accurately viewed as an interest group, as lawyers in politics and government tend to favor the interests of lawyers as a group, and, (2) The ideology of lawyers....lawyers as a group are more liberal than the public at large, therefore a selection mechanism that gives decisive weight to lawyer's input will yield judges whose views diverge more from the views of average Kansans than would be the case if lawyers did not dominate the process. By reducing the influence of the Bar in the selection of Kansas supreme court justices, the changes in procedure specified in the Resolution should result in a more transparent selection process that gives less weight to the interests of lawyers as a group and more weight to the ideological views held by the average Kansan as compared to the views of the average lawyer. (Attachment 6)

Richard Peckham, Chairman and General Counsel for Kansas Judicial Review, appeared in support of the Bill and Resolution and stated a few Kansas lawyers have controlled the Judge selection process for too long, blocking the flow of information about Judge qualifications to the public, resulting in both an uneducated electorate and a corrupted judicial appointment process for appellate and supreme court positions. He encouraged every Kansas legislator to support openness and public participation through the Senate confirmation process. (Attachment 7)

Kris Kobach, Law Professor, at the University of Missouri Kansas City, spoke in support of the bill and Resolution as a Professor of Law but not as an official position of the UMKC School of Law as they do not take positions on pending legislation. He presented two factors that he believes weigh strongly in favor, (1) the understandings of the Framers of the U.S. Constitution when they proposed the federal model on which the Resolution is based-understandings that proved completely correct, and (2) the fact that the federal model ensures merit in judicial appointments better than the so-called "merit-based judicial selection commissions. He gave testimony of the reform in the 1950's that abandoned systems of judicial election and replaced such systems with judicial selection commissions. The theory behind the selection commissions was that they would produce courts free of political bias. That theory has proven false after half a century of experience. He urges you to look at the evidence and bring the selection of judges in Kansas out from behind closed doors. Attachment 8)

Michael Dimeno, an Associate Professor of Law at Widner, and a Visiting Associate Professor of Law at Florida State University, spoke in favor of the bill and Resolution and stated it would be an improvement over the current system. He provided each committee member with a booklet he wrote called "Notre Dame Journal of Law, Ethics and Public Policy, Symposium on The Judiciary, Notre Dame Law School, Volume 22, Issue No. 2, 2008. He advised the benefit of judicial independence does not come from the ability to appoint judges whose views are unacceptable to the people and their representatives, but rather from the freedom that sitting

judges enjoy to decide cases according to the law without risking their jobs. He also stated that if judicial independence in Kansas is to be strengthened, the appropriate way to do so is to give judges longer terms or to eliminate retention elections entirely, not to insulate the initial appointment of judges from public scrutiny. (Attachment 9)

Steve Ware, a professor of Law at the University of Kansas (KU), spoke not on behalf of KU, but as a concerned citizen. He spoke as a proponent of this bill and said Kansas is the only state that gives its bar (the state's lawyers) majority control over the selection of supreme court justices. Currently the Kansas Supreme Court Nominating Commission consists of nine members, five selected by the bar and four selected by the governor. Professor Ware began his scholarly research and writing on judicial selection and retention in the 1990's and has increasingly focused on the topic the last two years. In the spring of 2008, he published in "The Kansas Journal of Law and Public Policy", "Selection to the Kansas Supreme Count", Volume XVII Number 3 and is included as part of his written testimony. He stated 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. Attachment 10)

Written Proponent:
Judge Eric R. Yost, and Judge Jeffrey E. Goering, District Court Judges, Wichita provided written testimony in support of these bills. (Attachment 11)

Opponents:
Justice Fred N. Six, (Retired), Kansas Supreme Court appeared as an opponent. Justice Six started out explaining the "Birth of Kansas Merit Selection" and told of "The Triple Play of 1957", a series of events combined that so outraged the citizens of Kansas, that a fundamental change was made in the manner in which Supreme Court Justices are chosen. He went on to outline fifteen additional points to support his stand against these two bills. (Attachment 12)

Richard C. Hite, Chair of the Kansas Supreme Court Nominating Commission, spoke as an opponent and stated the proponents are talking about the procedures and not the results. He stated the Commission has a constitutional mandate to nominate persons for appellate positions on a non-partisan merit basis and the Commission takes that charge literally and seriously. He introduced Dale Cushionberry, a non-lawyer member of the Commission, and denied the suggestions by proponents to these bills that the non-lawyer members have little or no input. He also named several other state boards whose members are a majority of that particular profession, such as State Board of healing Arts, State Board of Accountancy, Kansas Dental Board, State Board of Barbering and State board of Mortuary Arts. In addition, he stated all appellate judges are required to stand for retention election at the first general election after their appointment and then every six years after that. He also pointed out these two bills could create major delays in filling vacancies and the establishment of two nominating commissions would be wasteful and counterproductive. (Attachment 13)

Professor Robert C. Casad, Professor of Law Emeritus, KU School of Law spoke as a concerned Kansan , as an opponent, and in support of the current nonpartisan merit system of judicial selection that has served us so well for 50 years. He stated our current system works very well and produces judges that are intelligent, well versed in the law and legal method, and also fair-minded and not driven by partisan political concerns. He stated it was clear the proponents have failed to show the existing system is broken and irreparable and they also failed to show the proposed changes would make the system better. He also took exception to statements by Professor Ware, explaining that Kansas was not alone in giving lawyers a majority on the nominating committee and that Alaska, Missouri, Iowa, Nebraska, South Dakota and Wyoming lawyers also comprise a majority of the nominating commission. Also, when Congress set up a judiciary branch for the District of Columbia, they set up a system very much like our Kansas nonpartisan system. He ended by saying to adopt such a system would be a giant step backward for the people of Kansas. (Attachment 14)

James M. Concannon, Distinguished Professor of Law, Washburn University School of Law appeared before the committee also as an opponent. He was part of a 46 member, bipartisan Commission appointed by the Governor to make recommendations to improve the Kansas justice system. He stated that Commission not only did not recommend changing the way Kansas selects appellate judges, but without a dissenting vote, it did recommend that merit selection, together with judicial performance evaluations like those we now have, replace partisan election in those districts still electing judges. He also spoke of the risk of leaving positions

on the Kansas Supreme Court vacant for an unacceptable long period. (Attachment 15)

James L. Bush, Hiawatha, Past President of the Kansas Bar Association , spoke on their behalf as an opponent. He explained the Kansas Bar Association is a voluntary professional association of Kansas attorneys, whose avowed purpose is to "promote the effective administration of our system of justice" and they strongly oppose the two proposed bills. He took exception and expanded on several issues circulated in an article written by Professor Ware. He questioned the belief of those proponents of this bill that contend that placing the selection of the members of our appellate courts under legislative control would somehow be LESS partisan. He urged the Committee to preserve the integrity, professionalism and independence of the Kansas appellate courts by maintaining the current merit system for selecting appellate judges. He also advised the current system works and to leave the politics to the legislature and justice to our courts. (Attachment 16)

James Robinson, appeared as an opponent and spoke on behalf of the Kansas Association of Defense Counsel, a statewide association of lawyers who defend civil damage suits. He stressed the process has elevated good judges to the state's highest courts. He explained the Commission's process of currently selecting judges and said the mechanics of judicial selection is simply a means to an end...elevating good judges to the appellate courts. He said the debate about judicial selection in Kansas has focused more often on the process than on outcomes. He stated the citizens of Kansas do not need, nor should they want, to replace the present system that is working very well with a Senate confirmation process that is fraught with problems. (Attachment 17)

Mike Herd, a lawyer from Wichita, is currently President of the Wichita Bar Association (WBA) and spoke on their behalf in opposition of the bills and in support of the current merit selection process for selecting appellate judges. He stated the merit system has historically fulfilled its mission of selecting three qualified nominees to submit to the governor with little creditable evidence of political influence. The current political landscape is full of strident partisan politics and to interject the legislative branch in the process by controlling the nominating commission and subsequently the confirmation would impair the ability to protect the independence of our judiciary. (Attachment 18)

Diane Kuhn, spoke before the committee as an opponent on behalf of the League of Women Voters of Kansas and asserted changing the present process without a compelling basis for such a change does not serve the best interests of good public policy for Kansas. She spoke on four specific issues, (1) the current method has served Kansas honorably for many years, (2) The possibility of a judicial vacancy for an extended period could cause undue burden on other judges and delay justice for Kansas citizens, (3) changing the ratio of attorneys to non attorneys diminishes the critical importance of professional scrutiny in screening judicial candidates, (4) giving equal roles to the Governor, Speaker of the House and President of the Senate in appointing members to the Nominating Commissions, partisan politics could result in a partisan court system. She stated Judges must be servants of the law and the Constitution and not of politicians or special interest groups and urged the Committee to not support these two bills. (Attachment 19)

Opponent-Written Only
Terry Humphrey, Executive Director and Callie Denton Hartle, Director of Public Works, provided written testimony on behalf of the Kansas Association for Justice (KsAJ) in opposition of both bills. (Attachment 20)

The hearing on bills **HCR 5005** and **HB 2123** was closed.

The next meeting is scheduled for February 16, 2009.

The meeting was adjourned at 6:05 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: Thursday, Feb. 12, 2009

NAME	REPRESENTING
Sean Miller	Capitol Strategies
Mah Casey	KADC
Jim Robinson	KADC
Mike Heard	Wichita Bar Assoc.
Fred Six	Ret-Justice-Judicial Branch
Willie C. Richards	Topeka NAACP
James M Concannon	
Robert Conrad	Lawrence, KS
Ed Klumpp	KACP & KPOA
[illegible]	Supreme Ct. Nom Comm.
[illegible] Damon	KS Bar Assn.
Joseph Mulinix	KS Bar Assn.
Diana Kiehn	League of Women Voters
Kris Kobach	

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MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee
From: Jill Ann Wolters, Senior Assistant Revisor
Date: February 12, 2009
Subject: HCR 5005, amending section 5 of article 3 of the Kansas constitution to provide for the appointment of Supreme Court Justices by the Governor, subject to Senate confirmation

House Concurrent Resolution No. 5005 amends section 5 of article 3 of the Kansas constitution concerning the selection of justices of the Supreme Court. The proposed amendment would provide for the appointment of Supreme Court Justices by the Governor, subject to Senate confirmation. The nonpartisan supreme court nominating commission membership would be changed to include appointments by the speaker of the house of representatives and the president of the senate. Only one of each such appointments would be a licensed attorney. The gubernatorial appointments to the commission would be reduced from four members to three members. The members of the bar would no longer elect members of the commission. The commission would continue to nominate three persons for appointment by the governor.

A procedure is established for senate confirmation to occur within 30 days of receiving the appointment during the regular legislative session. If the senate does not confirm the appointment, the governor would then select an appointment from three nominated persons by the commission which would again go to the senate for confirmation. The same appointment and confirmation procedure would be followed until a valid appointment is made. If the senate fails to vote on an appointment within 30 days during the regular legislative session, it will be considered that the senate confirmed the appointment.

The resolution, if approved by two-thirds of the members of the House and Senate, would be submitted to the electors of the state at the general election in the year 2010 unless a special election is called at a sooner date by concurrent resolution of the legislature, in which case it shall be submitted to the electors of the state at the special election.

House Judiciary
Date 2-12-09
Attachment # 1

Office of Revisor of Statutes
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Telephone (785) 296-2321 FAX (785) 296-6668

MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee
From: Jill Ann Wolters, Senior Assistant Revisor
Date: February 12, 2009
Subject: HB 2123, creating the Court of Appeals nominating commission and providing for the appointment of Court of Appeals judges by the Governor, subject to Senate confirmation

House Bill No. 2123 establishes the Court of Appeals nominating commission. The nine member commission is composed of three members appointed by the speaker, three members appointed by the president and three members appointed by the governor. Only one member from each of the three appointing authorities shall be a licensed attorney who resides in Kansas. No member of the commission, while a member, shall hold any other public office or any official position in a political party or for six months thereafter be eligible for appointment for the office of judge of the court of appeals. The term of appointment is four years, except the initial terms are staggered, and members are eligible for reappointment. Each member shall serve until a successor is appointed and certified to the clerk of the supreme court.

The commission shall meet from time to time as may be necessary to discharge the responsibilities of the commission. Such meetings shall be held upon the call of the chairperson, or in the event of the chairperson's failure to call a meeting when a meeting is necessary, upon the call of any four members of the commission. The commission shall act only at a meeting, and may act only by the concurrence of a majority of its members. The commission is not subject to the Kansas open meetings act.

Any vacancy occurring on or enlargement by law of the court of appeals; or the retirement or failure of an incumbent to file such judge's declaration of candidacy to be retained in office; or failure of a judge to be elected to be retained in office, shall be filled by appointment by the governor, subject to confirmation by the senate. The governor shall appoint one of the nominees of the court of appeals nominating commission or elect not to appoint one of the nominees and request that the nominating commission submit the names of three new qualified persons to the governor. Such subsequent nomination shall be by the same procedure as provided in statute.

No person appointed shall exercise any powers, duties or functions of the office until confirmed by the senate. The senate shall consider and act upon the appointment within 30 days after such appointment is received by the senate, if the senate is in session during a regular legislative session. If the senate is not in session and will not be in session within the 30-day time period, the vacancy shall remain open until the next regular legislative session. A special session of the legislature shall not be convened for the sole purpose of considering and acting on such appointment. In the event the senate does not confirm the appointment, the commission, within 30 days after the senate vote on the previous appointee, shall meet to submit to the governor three more nominees. Such three nominees may include a person or persons who we

nominated for such vacancy but not appointed by the governor. Such subsequent appointment shall be considered by the senate in the same procedure as provided by law. The same appointment and confirmation procedure shall be followed until a valid appointment has been made. If the senate fails to vote on an appointment within the 30-day time limitation during a regular legislative session, the senate shall be deemed to have confirmed such appointment.

The bill further amends current law to conform to the policy adopted in the bill.

Currently, the Supreme Court Nominating Commission nominates qualified persons to serve as judges of the Court of Appeals. Upon a vacancy, the Supreme Court Nominating Commission submits three nominees to the Governor. If the governor fails to make the appointment within 60 days, the chief justice of the supreme court shall make such appointment from among the persons nominated.

Judges of the Court of Appeals would continue to be subject to retention elections.

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

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

February 12, 2009

TESTIMONY:

Kansas House of Representatives Judicial Committee by: LtC(ret.) William E. Richards,Sr.Lobbyist for the Topeka Branch(4042),National Association for the Advancement of Colored PeopleNAACP).

Mr. Chairman, and Members of the Committee,it is a pleasure to be here!

The Topeka Branch of the NAACP urgesyour affirmative vote and support for the passage of House Concurrent Resolution No. 5005, a Proposition to amend Section 5 of Article 3 of the Kansas Constitution, relating to the selection of Justices for theKansas Supreme Court.

HCR 5005 provides for more democratic oversight, accountability, and, transparency,to the selection process than is currently available to the Kansas Electorate!

In our Democracy, the Kansas Electorate is represented by their elected Governor and Senate legislators! Therefore, the changes made by the passage into law of HCR5005 will update how members to the non-partisan Supreme Court Nominating Commission are appointed(members of the bar wouldno longer, exclusively, elect tht members ofthat Commission) the Kansas Governor, President of the SENATE, and, the Speaker of the House would have authority to appoint members to the Supreme Court Nominating Commission; and, the Governor would make appointments, subject to review and approval by the SENATE.

Kansas has gone through many changes since the days of the Governor Hall episode and the power politics of fifty(50) years ago. Now, it is incumbent on the Kansas Electorate to promote a Supreme Court bench that looks like Kansas, and, thereby maintain the creditability of our Court System!

Kansans, also,must be assured that there are no elements of intentional discrimination in the nominating process, which might be in violation of the Equal Protection Clause, of the 14th Amendment to the U.S. Constitution! VOTE FAVORABLY FOR HCR 5005!!!!

William E. Richards, Sr.

William E. Richards, Sr.

House Judiciary
Date 2-12-09
Attachment # 3

February 12, 2009

STATEMENT OF WILLIAM GEORGE ECKHARDT ON PROPOSED CHANGES IN MISSOURI TO THE MISSOURI PLAN FOR APPOINTING JUDGES

PRESENTED TO THE KANSAS HOUSE JUDICIARY COMMITTEE

Chairman Kinzer:

My name is William George Eckhardt. Currently my position is Teaching Professor of Law at the University of Missouri-Kansas City School of Law where I had the privilege of returning from military service to my family roots in legal education. For the past sixteen years, I have participated in the preparation of future legal leaders for Missouri—a task which is both a high calling and a great responsibility. I am a retired thirty-year Regular Army Colonel in the Army Judge Advocate General's Corps where I provided legal services, litigated in federal and military courts, and taught military law. I am an Honor Graduate of the University of Virginia School of Law, and a member of

the Bars of the Commonwealth of Virginia and of the United States Supreme Court.

Respect for the Rule of Law and confidence in our courts is one of the most important foundational blocks in our political life. How judges are selected and retained is a public policy issue of first importance. Missouri's respected and much emulated Missouri Nonpartisan Court Plan is some sixty-eight years old and in great need of updating. Recognition of the need for reform in Missouri and a call for action began two years ago with the 2007 State of the Judiciary Address on January 10, 2007 by Chief Justice Michael A. Wolff. The Chief Justice wanted to enhance the Court's accountability to the public in the judicial retention part of the equation. He noted the need for timely critiques of information from more than just lawyers but from non-lawyer jurors, litigants and court staff. He, in essence, publicly admitted the retention prong needed reforming and issued the first call to open up the system.

As the judicial reform process began, I quickly discovered that this issue had both a public and a private face. Respected and articulate Missouri lawyers repeatedly told me that the judicial selection and retention system needed to be modernized but that they would not become involved because "it would not be good for business." Currently, I find that a majority of the Missouri lawyers with whom I have spoken say that the system needs updating but will not say so publicly because of professional pressure which is quite intense. I have been a public servant all my life and I feel strongly that such public policy issues need to be addressed. Hence my involvement. Judicial selection reform need not be a partisan political issue. Many of us are doing our best to keep it non-partisan and from unnecessarily harming the reputation of our hardworking, underpaid dedicated judiciary.

In any technical public policy debate, there needs to be some factual basis. Therefore, our first task was to prepare a "White Paper" that could be used as a reference point. In August of 2007, I co-authored—along with John Hilton—"The Consequences of Judicial

Selection: A Review of the Supreme Court of Missouri, 1992-2007." This Paper—which, Mr. Chairman, I request be attached as an Appendix to this Statement—discusses the Missouri Nonpartisan Court Plan and proposed reforms. It then discusses—in non-lawyer language by subject matter—the important judicial decisions from 1992 to 2007. The appendices include biographical and appointment information regarding the Supreme Court Justices.

This Paper is purposely descriptive and not argumentative. Its purpose is to describe--not critique or persuade. Any fair case examination shows that shifts occur in the Court's jurisprudence following changes to its composition. Citizens may either approve or disapprove but judicial selection has consequences. We found that the current trend is:

--to relax tort law causation requirements

--to move toward a more liberal approach to state and constitutional law

--to accord less deference to the legislature and to precedent

--to expand venue rules and statute of limitations

--to relax traditional contract law

--to overturn death sentences for ineffective assistance of counsel and pre-trial publicity

--to overturn criminal convictions for insufficient evidence

Once again, the purpose of this Paper is NOT to Court bash but to demonstrate the obvious—judicial selection has consequences.

Judicial selection cannot ever be apolitical. Yet we must have an open system of merit selection that emphasizes professional qualifications and quality control within a democratically accountable process. There are several goals that I respectfully suggested to the Missouri Legislature to guide this process.

A. Update Missouri's Missouri Plan

Missourians are justifiably proud of their Missouri Plan. The words "Missouri Plan" have become synonymous with merit selection. However, some two-thirds of the states that followed

Missouri's lead have a much more open and politically accountable judicial selection system. Throughout this process the frame of reference should be the national standards for judicial selection of the American Judicature Society. Any reform should be an update and not a reversal of the Missouri Plan.

B. The Sunshine Law should apply.

Missouri has had its Sunshine Law since 1973. Citizens expect important governmental processes to be open and accountable. The Sunshine Law gives the public confidence that appropriate procedures exist and have been followed. Deliberation can be closed when appropriate and necessary. The more current theory and law of Missouri's Sunshine Act should trump a 1972 preexisting court rule.

C. Judges should not select judges.

As recognized by the American Adjudicature Society, the obvious conflict of interest in having a sitting judge select a member of

their own court should be corrected. This is a classic example of an outmoded provision that cries out for reform.

D. The Commission should be non-partisan and politically accountable.

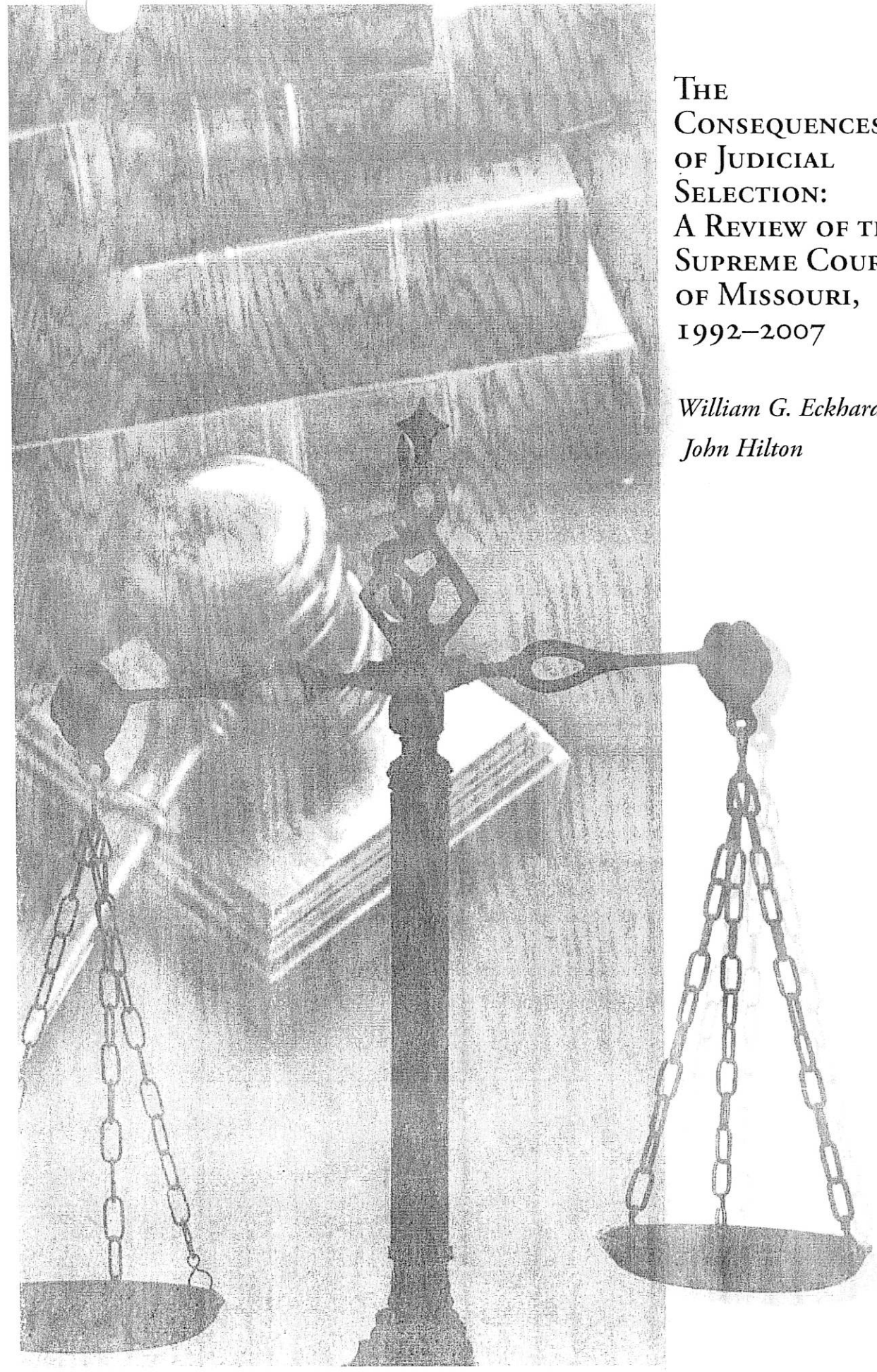
The Commission should be as balanced and non-partisan as possible. Both lawyers and laypersons should be used. Serving lawyers should represent a cross-section of the Missouri Bar and be diverse and politically accountable. They should be appointed by politically accountable entities.

E. The Legislative Branch should be included in the process.

The Legislative Branch should be included in selecting the members of the Commission or in confirming judges. If the right balances can be struck, the retention problem should be eliminated with a lifetime appointment with an appropriate retirement age provision. If retention is still part of the equation and if there is a situation where retention of a judge is in genuine dispute, that

dispute is far better handled by a well run judiciary committee and not in a tumultuous election. In such cases, retention should be handled by the legislature. Legislative and appropriate Executive involvement are necessary for political accountably.

Thank you for your kind attention. We believe Missouri citizens are entitled to and Courts need a respected, reliable, merit selection system for selection and retention of judges. We continue our work to accomplish that objective.



The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992–2007

William G. Eckhardt

John Hilton

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ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars, and other individuals, located in every state and law school in the nation, who are interested in the current state of the legal order. The Society takes no position on particular legal or public policy questions, but is founded on the principles that the State exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the Judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved, and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about The Federalist Society, please visit our website: www.fed-soc.org.

The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992–2007

William G. Eckhardt
John Hilton

August 2007

4-11

The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992–2007

*By William G. Eckhardt & John Hilton**

I. Preamble

Judicial selection is on the public agenda in Missouri. Leaders in all three branches of state government — executive, legislative, and judicial — agree that the current process is ripe for reform. According to Speaker of the House Rod Jetton, "It doesn't appear to me that the nonpartisan court plan is working very well. It appears to be partisan."[1] Reflecting on his own two terms as governor, United States Senator Kit Bond agrees.[2] Governor Matt Blunt favors the federal model for appointment of judges.[3] In his most recent State of the Judiciary address, Chief Justice Michael Wolff asked the Missouri Bar to devise a judicial evaluation system that is independent, nonpartisan, and more easily accessible to the public.[4] The vacancy on the supreme court created by Judge Ronnie White's resignation makes this topic all the more relevant.[5]

The Missouri Nonpartisan Court Plan

Currently, Missouri uses the Nonpartisan Court Plan (the "Plan") to select judges for the supreme court, court of appeals, and trial courts in Jackson, Platte, Clay, and St. Louis counties, and in the City of St. Louis. In Missouri's 110 remaining counties, judges are directly elected. Under the Plan, a seven-member Appellate Judicial Commission (the "Commission") presents three candidates (the "Panel") to the Governor to fill a vacancy on the supreme court or court of appeals.[6] If the Governor does not select one of the three panelists within sixty days, the Commission selects the individual to fill the vacancy.[7] The Commission is composed of three lawyers appointed by the Missouri Bar Association, three citizens selected by either a past or present Governor (depending on term), and the Chief Justice of the Supreme Court.[8] A similarly-structured commission with five members selects trial judges. No hearings are held, and public input is not solicited. Retention is by non-partisan judicial election ("yes" or "no" vote), every twelve years for appellate judges and every six years for trial judges.

Proposed Reforms

Last session the legislature considered three proposals to reform the Missouri Plan. Each bill would authorize a vote in a general election on a constitutional amendment to make the change. House Joint Resolution 31 would follow the federal model for appointing judges.[9] The Governor would nominate judges, who would be confirmed or rejected by a majority vote of the state Senate after public hearings held by the Senate Judiciary Committee. House Joint Resolution 33 would authorize a judicial commission to select judges.[10] This commission would be composed of three members of the Missouri Bar selected by the Governor, two Bar members who are currently serving members of the General Assembly appointed by the Speaker of the House, and two Bar members currently serving in the General Assembly appointed by the President Pro Tempore of the Senate. After public hearings, the commission would select the judge by majority vote. House Joint Resolution 34 affects judicial retention and removal.[11] Every ten years, judges would stand for retention by the General Assembly. After hearings before the House and Senate Judiciary Committees, a majority vote would be required in both legislative chambers. In special cases, a judge could be removed from office at the Governor's request and with a two-thirds vote of both legislative chambers.

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II. Purpose

The debate over how to reform Missouri's judicial selection process has begun. At bottom, the question facing Missourians is how open and democratic this process should be. Changing the selection process is a policy question that should not be influenced by partisan politics. Nor is there any room for "court bashing" in the current debate. This Paper does not advance a partisan agenda and does not undermine the authority of the judiciary or attack the integrity of any judge.

The purpose of this Paper is to provide information that will be useful to Missourians as they consider how judges ought to be selected. This Paper examines the Supreme Court of Missouri's jurisprudence since 1992. The cases discussed illustrate differences among members of the court in areas of the law that are recurrent topics of contention. This Paper shows that shifts in the court's jurisprudence have followed changes in its composition. Simply put, judicial selection has consequences.

The reader may or may not prefer the court circa 1992 to the status quo — the purpose of this Paper is to describe, not to criticize or to persuade. The reader must determine if the changes described herein are to be lauded or lamented. Such a determination, after all, is the proper place for politics in the current debate.

III. The Birth of the Ashcroft Court: 1991 and 1992

When Edward D. Robertson, Jr., became Chief Justice of the Supreme Court of Missouri in July 1991, three of the court's seven members had been appointed by Governor John Ashcroft. Within a month, William Duane Benton, then director of the Missouri Department of Revenue, made a majority for Ashcroft appointees. Ashcroft appointed his fifth supreme court judge in September: Elwood L. Thomas, a practicing attorney and former law professor. In 1992 Ashcroft filled out the court, appointing Kansas City attorney William Ray Price, Jr., and Stephen N. Limbaugh, Jr., a state trial judge from Cape Girardeau. The court was relatively young, too: Judges Benton, Price, and Limbaugh were forty years-old when they were appointed. Judge Ann K. Covington — the first woman to serve on the court — was forty-six when she was appointed in 1988. Judge John C. Holstein, appointed in 1989, was forty-four. At sixty-one, Judge Thomas was the oldest Ashcroft appointee; Judge Robertson was the youngest, only thirty-three when he was appointed in 1985.

Ashcroft is the first Missouri governor to select every judge on the state supreme court by constitutionally irreproachable means. After the Civil War, Governor Thomas C. Fletcher used the state militia to evict the entire court when Radical Republicans took control of the state government.[12] Although his methods were obviously less drastic than Governor Fletcher's, Ashcroft was criticized for his selections. According to future Chief Justice Michael Wolff (then a law professor at St. Louis University), "More than any other governor, Ashcroft's personal ideological interests are represented in his appointments."[13] In the sixty-five-year history of the Missouri Nonpartisan Court Plan, no appellate judge has been voted out of office.[14] With a mandatory judicial retirement age of seventy, Ashcroft's appointees were poised to dominate the Missouri judiciary for several decades.[15]

Today, only two of Ashcroft's seven appointees remain on the court. Constitutionally barred from serving a third term,[16] Ashcroft left the governor's office in 1992, and was replaced by Mel Carnahan, a Democrat. In October 1995 Carnahan appointed Ronnie White, then a member of the Missouri Court of Appeals, to replace Judge Thomas, who died of complications related to Parkinson's disease. Judge Robertson chose not to stand for retention in 1998, and Carnahan replaced him with his chief counsel, Michael Wolff (formerly of the St. Louis University School of Law). When Laura Denvir Stith of the Missouri Court of Appeals replaced Judge Covington in March 2001, the Ashcroft appointees clung to a four-to-three majority. With the retirement of Judge Holstein later that year, the balance of power shifted. In 2004 Judge Benton joined the federal bench, leaving Judges Price and Limbaugh to defend the work of the Ashcroft Court.

IV. The Early Years: 1992 to 1995

In the early 1990s, legal experts predicted that the court would dispense "increasingly conservative court rulings: longer prison sentences, shorter reviews of death penalty cases, smaller jury awards in civil cases and unsympathetic attitudes towards lifestyles differing from the traditional family."[17] The court's decisions were generally, although not uniformly, in keeping with this prediction. The court resisted efforts to expand Missouri's tort law, upheld criminal convictions, and enforced Missouri's death penalty statute. The following survey of cases, although not exhaustive, is a representative sample of the court's jurisprudence between August 1992 and October 1995.

During this time, the court tightened Missouri's post-conviction relief rules (a collateral attack on the judgment analogous to habeas proceedings in the federal system). After firing two attorneys, an appellant filed a motion for post-conviction relief after the 90-day time limit had expired. In Missouri, a motion for post-conviction relief "is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." Because "legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." The court rejected the appellant's claim that the ninety-day time limit violated his right to due process of law under the federal constitution. ***Bullard v. State***, 853 S.W.2d 921 (Mo. banc 1993).

Post-Conviction Relief
1993

In one case challenging the court's supposed "unsympathetic attitudes towards lifestyles differing from the traditional family," the court upheld a statute allowing a court to order grandparent visitation rights over the wishes of the child's natural parents. Recognizing that "parents have a constitutional right to make decisions affecting the family," the court held that the law did not "significantly interfere" with this fundamental right. In a dissent joined by Judge Limbaugh, Judge Covington found that although strict scrutiny was appropriate, and even under the majority's "undue burden" test, the statute should fail, because it allows "a significant intrusion into the traditional family unit." ***Herndon v. Tuhey***, 857 S.W.2d 203 (Mo. banc 1993).

Family Law
1993

When faced with a choice between creating a new rule in Missouri tort law or upholding a substantial jury award to a plaintiff, the court unanimously chose the latter. In ***Callahan v. Cardinal Glennon Hospital***, 863 S.W.2d 852 (Mo. banc 1993), a baby developed a visible abscess after receiving a polio vaccine. The child's legs and left arm were permanently paralyzed as a result of the examining doctors' negligence. The defendant urged the court to impose liability only on joint tortfeasors whose conduct was a "substantial factor" in causing the injury. Rejecting the defendant's proposed new rule, the court held, "the 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury." The court also declined to adopt a "pure foreseeability test," holding that for liability to attach "the injury must be a reasonable and probable consequence of the act or omission of the defendant." The court unanimously upheld the plaintiff's $16 million judgment.

Tort: Causation
1993

In ***R.L. Nichols Insurance, Inc. v. Home Insurance Co.***, 865 S.W.2d 665 (Mo. banc 1993), the court declined to create a private right of action when the statute already specified a remedy. In deference to the people's elected representatives, the court held, "when the legislature has established other means of enforcement rather than by a private cause of action, the courts will not recognize a private civil action unless it appears to be a clear implication that the legislature intended to create a private cause of action."

Statutory Construction
1993

In one case, tension surfaced between the court's alleged status as a vanguard of family values and its reluctance to modify tort law in Missouri. In ***Thomas v. Siddiqui***, 869 S.W.2d 740 (Mo. banc 1994), the court abolished the tort of criminal conversation (defined as sexual intercourse with the plaintiff's spouse). "Criminal conversation is the civil counterpart to the criminal offense of adultery," and the court observed that the legislature repealed the crime of adultery in

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1979, which "evidenced society's intent no longer to punish adultery." Judge Price concurred, adding that he would also abolish the tort of alienation of affection, because it implies the existence of a "'property right' in another person," an idea that Judge Price hoped "is long since passed." Judge Robertson dissented, arguing that in Missouri marriage is a contract, and alienation of affection and criminal conversation are "of the tort genus interference with contract."

TORT & FAMILY LAW
1994

Venue can be crucial to the outcome of a case. In ***State ex rel. Shelton v. Mummert***, 879 S.W.2d 525 (Mo. banc 1994), the court held that the joinder of an underinsurance carrier was pretensive. The underinsurer would only pay if the insurer's policy was exhausted, and so the plaintiff did not have a present cause of action against the underinsurer. The court ordered the case transferred to the proper venue.

TORT:
VENUE
1994

In ***State ex rel. McHaffie v. Bunch***, 891 S.W.2d 822 (Mo. banc 1995), the court limited the application of the tort of negligent entrustment. The court unanimously held, "once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability." When an employer admits that the employee was acting within the scope of his employment at the time of the accident, the negligent entrustment claim is discarded, and "[t]he liability of the employer is fixed by the amount of liability of the employee."

TORT:
RESPONDEAT SUPERIOR
1995

In ***Luethans v. Washington University***, 894 S.W.2d 169 (Mo. banc 1995), the court maintained the traditional distinction between tort and contract law. There, a contractual employee sued for wrongful discharge after he was told that his contract would not be renewed (the employee was paid through the end of the contract period). The court reasoned that an employer can dismiss an at-will employee if "the act of discharge is not otherwise 'wrongful.'" But a contractual employee "has a relationship with the employer that is covered by express or implied terms" (i.e., a contract). "Because a wrongful discharge action is only available to an employee at will," the court unanimously upheld summary judgment for Washington University.

TORT & CONTRACT
1995

A Bible study group member broke his leg after slipping on a patch of ice outside of the group leader's home, and a lawsuit followed (1 Corinthians, Chapter 6 notwithstanding). The case turned on what duty of care the defendant owed to the plaintiff, which depended on the plaintiff's status: trespassor, licensee, or invitee. The court declined to expand Missouri's tort law by creating a fourth class of entrants ("social guests") to whom yet another duty of care would be owed. The court unanimously held that the plaintiff was a licensee, not an invitee, because the defendant did not invite the plaintiff "with the expectation of a material benefit from the visit" and had not "extend[ed] an invitation to the public generally." Because a possessor owes licensees the duty to make safe only those dangers of which the possessor is aware, summary judgment for the defendant was affirmed unanimously. ***Carter v. Kinney***, 896 S.W.2d 926 (Mo. banc 1995).

TORT:
DUTY OF CARE
1995

The court regularly upheld death sentences in capital murder cases by unanimous decision. *See, e.g.*, ***State v. Mease***, 842 S.W.2d 98 (Mo. banc 1992); ***State v. Ramsey***, 864 S.W.2d 320 (Mo. banc 1993); ***State v. Wise***, 879 S.W.2d 494 (Mo. banc 1994); ***State v. Gray***, 887 S.W.2d 369 (Mo. banc 1994); ***State v. Chambers***, 891 S.W.2d 93 (Mo. banc 1994). Recognizing "the death penalty differs from all other forms of criminal sanction," the court's opinions in these cases are thorough, even lengthy, methodically addressing each issue raised by the appellant. ***State v. Isa***, 850 S.W.2d 876, 902 (Mo. banc 1993). But the court did not summarily affirm every death sentence that came before it. *See, e.g.*, ***State v. Debler***, 856 S.W.2d 641 (Mo. banc 1993) (upholding defendant's first-degree murder conviction, but unanimously reversing the death sentence because trial court admitted — and prosecution emphasized — "extensive evidence" of bad acts for which defendant had not been convicted); ***State v. Storey***, 901 S.W.2d 886 (Mo. banc 1995) (upholding

CAPITAL PUNISHMENT
1992 – 1995

first-degree murder conviction but overturning death sentence; during penalty phase defense counsel failed to object when prosecutor argued facts outside the record ("This case is about the most brutal slaying in the history of this county"), personalized the case ("Try to put yourself in [the victim's] place"), and asked jurors to weigh the lives of defendant and victim against one another); ***Isa***, 850 S.W.2d at 903 (upholding defendant's conviction for first-degree murder, but reversing unanimously the death sentence because jury instructions permitted consideration of co-defendant's conduct when deciding defendant's sentence: "As to punishment, Isa must stand alone.").

The court ruled on two cases implicating abortion rights. In one, a motorist was convicted of involuntary manslaughter when she crossed the center line and struck the car of a pregnant woman, killing her unborn child. The defendant appealed, arguing that an unborn child is not a person for the purpose of Missouri's involuntary manslaughter statute (section 565.024, RSMo Supp. 2005). The court noted that under Missouri law, "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." Section 1.205, RSMo 2000. Applying traditional rules of statutory construction (plain meaning, *in pari materia*, rule of lenity), the court held that section 1.205 applies to section 565.024, and unanimously upheld the conviction. ***State v. Knapp***, 843 S.W.2d 345 (Mo. banc 1992). A divided court extended *Knapp* to civil suits for wrongful death in ***Connor v. Monkem Co.***, 898 S.W.2d 89 (Mo. banc 1995).

Statutory Construction 1992, 1995

V. White *vice* Thomas: 1995 to 1998
The Passing of a "Gentle Giant"

In July 1995 Judge Elwood Thomas died of complications related to Parkinson's disease, and Missouri mourned the loss of an outstanding jurist. Judge Robertson described him as "one of the best legal minds in the state," and Judge Limbaugh praised his "uncanny ability to make complex, abstract ideas understandable for the rest of us."[18] The dean of the University of Missouri School of Law, where Judge Thomas once taught, said, "He was a fine teacher when he was here at the law school, a lawyer's lawyer when he went into practice in Kansas City and a judge that other judges looked to when he was on the bench."[19] Judge Robertson delivered a tearful eulogy, predicting that the supreme court building itself would miss Judge Thomas: "For nearly four years, far too short a time, a gentle giant walked its halls. God bless you, Elwood."[20]

Judge Ronnie White: Alone in Dissent

In October 1995 the Commission recommended three nominees to Governor Carnahan: attorney Dale Doerhoff of Jefferson City; Gene Hamilton, a trial judge from central Missouri; and Ronnie White, an appellate judge from St. Louis.[21] Appointed by Carnahan just five months earlier, Judge White then was the only African-American on the Missouri Court of Appeals.[22] When Carnahan chose White to replace Thomas, he became the first African-American supreme court judge in state history.[23] Prior to joining the bench, Judge White was elected to three terms in the state House of Representatives, where he chaired the Judiciary Committee. Judge White also worked as a public defender, and served as city counselor to St. Louis Mayor Freeman Bosley, Jr. When Governor Carnahan selected Judge White for the supreme court, Mayor Bosley described him "one of the most astute, capable and talented individuals ever to put on a robe." Judge White's former colleagues in the legislature were similarly complimentary: "Integrity is a great word for Ronnie," said one; "On a scale of one to 10, he'd be a 10," said another.[24]

The next vacancy on the court did not occur until July 1998, and so for nearly three years Judge White was the only member of the court not appointed by Governor Ashcroft. Judge White dissented alone in nine cases between October 1995 and August 1998. Judge White's dissents are important not only for what they reveal about his judicial philosophy, but also as a harbinger of the jurisprudence of the current court.

The plaintiff in ***Rodriguez v. Suzuki Motor Corp.***, 936 S.W.2d 104 (Mo. banc 1996) was seriously injured when the car she was driving rolled over during an accident. The jury awarded Rodriguez $30 million in compensatory damages, and $60 million in punitive damages (reduced on remittur to $20 million

compensatory and $20 million punitive). Suzuki appealed the trial court's decision to exclude all evidence of alcohol consumption, which Suzuki planned to use to impeach nonparty witnesses and to show comparative fault by Rodriguez. Under Missouri's old contributory negligence regime, evidence of alcohol consumption "was admissible only if coupled with evidence of erratic driving or some other circumstance from which it might be inferred that the driver's physical condition was impaired at the time of the accident." *See* ***Doisy v. Edwards***, 398 S.W.2d 846, 849-50 (Mo. banc 1966). But Missouri became a comparative fault state in 1983, and the court reasoned, "A comparative fault system can better accommodate alcohol evidence than a contributory negligence system." Thus, the court held, "Evidence of alcohol consumption is admissible, if otherwise relevant and material." The court also established a higher standard of proof for punitive damages, following the trend in other states. "Because punitive damages are extraordinary and harsh, this Court concludes that a higher standard of proof is required: For common law punitive damages claims, the evidence must meet the clear and convincing standard of proof." Alone in dissent, Judge White agreed with overturning *Doisy* and with the clear-and-convincing-evidence rule for punitive damages, but argued that both rules should apply prospectively, and that the verdict in this case should stand.

TORT: DAMAGES
1996

Because they involve a seizure without "individualized suspicion of wrongdoing," random drug checkpoints violate the Fourth Amendment. *See* ***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000). In an effort to capture drug couriers traveling through Missouri, law enforcement officers posted road signs declaring, "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD" at odd hours (e.g., 4 a.m.) on highways in remote areas of the state. Immediately following the sign was an exit to a lightly traveled road in a sparsely-populated area, offering no services to travelers. Waiting at the top of the off-ramp, of course, was the real drug checkpoint. All motorists who took the exit were questioned briefly, and those who acted suspiciously were detained longer. A drug dog was on hand. The court upheld this practice against a federal constitutional challenge by a vote of 6-1. The court held that the state's interest in drug interdiction was sufficiently strong, the checkpoint effectively advanced the state's interest, and the intrusion upon individual motorists was minimal.

SEARCH & SEIZURE
1996

Judge White dissented, decrying "attempts by local sheriffs to trick highway travelers into leaving the highway in the middle of the night, so they can be interrogated in remote areas by armed, camouflage-clad men with dogs." Judge White objected to the majority's standard of review, arguing that the facts should be taken "in the light most favorable to the trial court's ruling" (which granted defendant's motion to suppress). While agreeing that "trafficking in illegal drugs is a national problem of the most severe kind," Judge White disagreed that the checkpoints are an effective solution to the problem, or that the intrusion on citizen's privacy is sufficiently minimal. ***State v. Damask***, 936 S.W.2d 565 (Mo. banc 1996).

In ***Warren v. Paragon Technologies Group***, 950 S.W.2d 844 (Mo. banc 1997), the plaintiff recovered $38,000 from her landlord after slipping on an icy sidewalk outside of her apartment. In his pleadings, the defendant invoked the lease's non-liability clause as an affirmative defense, and the plaintiff never replied. The judge concluded the clause was void as against public policy, and the jury found for the plaintiff. The court reversed. In Missouri, a non-liability clause must be "clear, unambiguous, unmistakeable, and conspicuous." *See* ***Alack v. Vic Tanny Int'l of Mo., Inc.***, 923 S.W.2d 330, 337 (Mo. banc 1996). Here, the plaintiff signed the lease with the clause in it. Because "parties are presumed to read what they sign," the court found that the landlord should have been allowed to argue the clause, reversed the judgment, and remanded for a new trial.

CONTRACT LAW
1997

In dissent, Judge White argued that the clause "was not conspicuous as *Alack* requires." Judge White noted that the clause was in the twentieth paragraph of a thirty-three paragraph lease, and suggested several methods for making a clause conspicuous per *Alack*: "rendering language in all capital letters, in larger type, of in other contrasting type or color." Judge White would have held that the clause violated public

policy, concluding, "Remanding the case for a full trial merely to require the plaintiff to plead that the clause is inconspicuous is the height of artificial technicality."

Judge White was not always, however, unalterably opposed to enforcing strict textual construction. In ***Lewis v. City of Marceline***, 934 S.W.2d 280 (Mo. banc 1996), a plaintiff sued the city for injuries when she fell after stepping into a hole on a city street. The trial court granted summary judgment to the city, because the plaintiff did not give written notice of her claim to the mayor. Section 77.600, RSMo 2000. The plaintiff argued that she described the incident to the city clerk, who typed a report. The supreme court overturned the dismissal, holding that because "the statute does not say who must write the notice," it was sufficient that the plaintiff gave an oral statement to the city clerk, and that the city clerk then "reduced the statement to writing." Judge White believed that the majority's holding "frustrates the purpose of the statute, undermines the rule of strict compliance, and is not supported by law." Concluded Judge White, "The legislature can define the waiver of sovereign immunity as narrowly as it chooses, and it is beyond the scope of our power to broaden the statute."

STATUTORY CONSTRUCTION
1996

As Olga Maxiaeva was driving home early one morning, fifteen-year-old Shawn Twine heaved a twenty-pound chunk of concrete onto her car from an overpass, killing her. Twine pled guilty to involuntary manslaughter, and Maxiaeva's family sued the Missouri Highway and Transportation Commission. They argued that the Commission was negligent for not building a tall fence on the overpass and for allowing pieces of concrete to come loose. The plaintiffs argued that because the injury was caused by a dangerous condition of public property, sovereign immunity was waived. *See* 537.600.1(2), RSMo Supp. 2005. The majority disagreed, holding that Twine's intervening act was the cause of Maxiaeva's death, and that the Commission was shielded by sovereign immunity. Judge White dissented, arguing that the jury should have been allowed to decide the issue of causation, i.e., "whether the Commission's alleged negligence set into motion the chain of events that caused the injury." ***State ex rel. Mo. Highway & Transp. Comm'n v. Dierker***, 961 S.W.2d 58 (Mo. banc 1998).

TORT:
CAUSATION
1998

In three cases, Judge White dissented alone when the majority upheld a death sentence for first-degree murder. On the evening of December 8, 1991, Moniteau County Deputy Sheriff Les Roark responded to a domestic disturbance call at the home of James R. Johnson. After being assured by Johnson, his wife, and their daughter that all was well, Deputy Roark turned to leave. Completely unprovoked, Johnson shot Deputy Roark twice in the back, and again in the forehead as he lay wounded on the ground, killing him. Johnson gathered guns and ammunition and drove to the home of Moniteau County Sheriff Kenny Jones. The sheriff was not home, but his wife was hosting a Christmas party. Johnson opened fire sniper-style at the group through the bay window, fatally shooting Pam Jones, the sheriff's wife, in front of her friends and family. Johnson proceeded to the home of Moniteau County Deputy Sheriff Russell Borts, shooting Borts four times as the deputy talked on the phone. Borts survived, but Johnson wasn't finished. Johnson next drove to the sheriff's department, where local law enforcement had gathered. As Cooper County Sheriff Charles Smith left the building, Johnson fatally shot him in an ambush. When Miller County Deputy Sheriff Sandra Wilson arrived on the scene minutes later, Johnson fatally shot her through the heart. Johnson then took a local elderly woman hostage in her home, and surrendered after a stand-off.

CAPITAL
PUNISHMENT
1995–1998

The court upheld Johnson's death sentence for the quadruple-murder, but Judge White dissented. Judge White found ineffective assistance of counsel in the defense counsel's failure to interview two witnesses, which undermined Johnson's defense that he suffered from post-traumatic stress disorder caused by his service in the Vietnam War. Judge White concluded that Johnson was prejudiced by this decision, arguing that the majority's "reasonable probability of a different result" test is "too high," that such a standard is not equal to "outcome-determinative prejudice," and that had counsel interviewed the witnesses there was a

"reasonable likelihood of a different result." ***State v. Johnson***, 968 S.W.2d 123 (Mo. banc 1998). *See also* ***White v. State***, 939 S.W.2d 887 (Mo. banc 1997) (arguing that defendant's late-filed Rule 29.15 motion for an evidentiary hearing alleging ineffective assistance of counsel should be allowed, and that the majority's decision "elevates the form of pleadings over their substance."); ***Kinder***, *infra*.

Accusations of racism figured prominently in two of Judge White's opinions during this period, both of which were suits for post-conviction relief under Rule 29.15. In ***State v. Kinder***, 942 S.W.2d 313 (Mo. banc 1996), the judge presiding over the murder trial of an African-American had issued a press release before the trial began announcing that he was switching to the Republican Party because "the Democrat party places far too much emphasis on representing... people with a skin that's any color other than white." The majority upheld the jury's conviction and the death sentence, but Judge White disagreed. In dissent, Judge White argued that it does not matter that the judge "made no obviously unfair rulings during the trial," rejecting the majority's argument that the statement was "a political act, not a judicial one, and as such, they do not necessarily have any bearing on the judge's in-court treatment of minorities." Judge White found the statement to be "a calculated attempt to influence voters by appealing to their racial prejudice," and that it "created a reasonable suspicion that he could not preside over this case impartially."

Post-Conviction Relief 1996

And in ***State v. Smulls***, 935 S.W.2d 9 (Mo. banc 1996), Judge White (over the dissent of Judge Limbaugh, joined by Judge Price) wrote the majority opinion, holding that Judge William Corrigan erred in refusing the motion to recuse himself from hearing the defendant's Rule 29.15 motion alleging racial bias in the jury panel. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). At trial, Judge William Corrigan overruled the defendant's motion for a mistrial because the jury was all-white, explaining, "Years ago they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people." In his opinion for the majority, Judge White wrote Judge Corrigan's "mental processes are irrevocably tainted with prejudice," and his statement "reeks of racial animus."[25] After criticism in the press for using "intemperate language"[26], Judge White revised the opinion by deleting this language.[27]

VI. The White-Wolff Alliance: 1998 to 2001

From Robertson to Wolff

In 1998 Governor Carnahan had the opportunity to make another appointment. Still young at forty-five, Judge Robertson announced in July that he was resigning from the court to join a firm that had been hired by the attorney general to oversee Missouri's lawsuit against the tobacco industry.[28] To replace Judge Robertson, the Commission recommended: Cole County Prosecuting Attorney Richard G. Callahan; Michael W. Manners, president of the Missouri Association of Trial Attorneys; and, Michael Wolff, Carnahan's legal counsel and a law professor at St. Louis University.[29]

Carnahan did not hesitate, appointing Wolff one week later. Before joining the faculty at St. Louis University, Wolff directed legal aid services in Rapid City, South Dakota, and worked as a reporter and editor for the *Minneapolis Star* while a law student at the University of Minnesota.[30] Wolff ran unsuccessfully for attorney general as a Democrat in 1988. He ran again in 1992, but was defeated in the August primary. Later that year Wolff led Carnahan's transition team and became the Governor's legal counsel.[31] After returning to St. Louis University in 1994, Wolff continued to assist the Governor's office with negotiations to settle the Kansas City and St. Louis school desegregation cases.[32] A fellow member of the bench said Wolff was "a perfect appointment because of that intersection of law, academic theory and practical application." A colleague at St. Louis University predicted that on the court, Wolff "will be a listener and a consensus builder."[33]

The White-Wolff Alliance

Between August 1998 and March 2001, Judges Wolff and White dissented together in six opinions (and separately in three more cases). The significance of this alliance is not in the frequency of their dissents, but rather in what it revealed about where Judges Wolff

and White would take the court if their dissents ever became majority opinions.

Judge Wolff authored five dissents in death penalty cases, and Judge White concurred (alone) each time. In ***State v. Ervin***, 979 S.W.2d 149 (Mo. banc 1998), the dissent argued to uphold the conviction for first-degree murder but to overturn the death sentence because "there is no evidence that Ervin intended to cause [victim] unnecessary or prolonged suffering, or that Ervin inflicted pain for its own sake, so as to support the finding of the trial court that there was torture and depravity of mind."

CAPITAL PUNISHMENT 1998

In ***State v. Barton***, 998 S.W.2d 19 (Mo. banc 1999), a local newspaper published an article about the murder before the trial began. Venirpersons who acknowledged having heard about the case were questioned about "the presence of bias, prejudice, and impartiality as a consequence of pretrial publicity," but not specifically about whether they had read the article. The dissent argued, "the *voir dire* was inadequate to assure that Barton would be tried only on properly admitted evidence." The dissent also cited *Time* magazine and the *St. Louis Post-Dispatch* for statistics showing "the number of death row inmates later found to have been wrongfully convicted is thus about one-seventh of the number of prisoners executed. Even a process as laudable as the American jury system gets it wrong a substantial number of times, as these data show, even though its findings are made unanimously and beyond a reasonable doubt." For these reasons, the dissent argued that the defendant should be given a new trial (his fourth).

CAPITAL PUNISHMENT 1999

On appeal, the court "accepts as true all evidence favorable to the State, including all favorable inferences from the evidence, and disregards all evidence and inferences to the contrary. This Court does not sit as a thirteenth or super juror, voting 'guilty' or 'not guilty' on the charge." ***State v. Grim***, 854 S.W.2d 403, 405 (Mo. banc 1993). In ***State v. Wolfe***, 13 S.W.3d 248 (Mo. banc 2000), the dissent argued that "a careful review of the record in this case leaves considerable doubt as to whether or not Dannie Wolfe committed these murders," and that "in death penalty cases, section 565.035 calls on this Court to make a review of the whole record, independent of the findings and conclusions of the judge and jury, and to assess, among other matters, 'the strength of the evidence.'" Judges Wolff and White argued that the law requires the court to act as a "super juror" in death penalty cases. Thus, the dissent concluded that "a review of all the evidence, not just the evidence favorable to the verdict, should be constitutionally required as a matter of due process of law."

CAPITAL PUNISHMENT 2000

In ***State v. Smith***, 32 S.W.3d 532 (Mo. banc 2000), the prosecutor, while a private practitioner, represented the defendant sixteen years earlier in two petty criminal cases (work permit revocation and felony stealing). The work permit case "amounted to a single appearance made on the day on which the trial court ordered the permit revoked," and as to the felony stealing charge, "the record does not provide support for appellant's assumption that the prosecutor was engaged in any communication with appellant that had any relevance whatsoever to the later murders of the victims in this case." Nevertheless, the dissent argued that "the determination of whether to seek the death penalty... is in essence a judgment on the overall character of the defendant, who happens in this case to have been the prosecutor's former client." The fact that this was a death penalty case, coupled with "[t]he fact is that he [the prosecutor] had a confidential relationship with Smith in which Smith was encouraged to disclose to the attorney the darkest secrets of his life... makes such a dual representation unacceptable."

CAPITAL PUNISHMENT 2000

In ***State v. Johns***, 34 S.W.3d 93 (Mo. banc 2000), the trial court refused to admit evidence that the victim had a reputation for violence when he drank, because the defendant had not testified that he was aware of the victim's reputation. The dissent argued that the defendant did not need to personally testify that he had this knowledge, and that "there was a reasonable inference that John's had such knowledge." The trial court also refused to allow the defendant to mention in his closing argument that the

CAPITAL PUNISHMENT 2000

murder followed a car chase. The dissent argued that there was evidence in the record to support this claim, the defendant was prejudiced by its exclusion, and that the defendant was entitled to a new trial.

Judge Wolff concurred in the dissenting opinion of Judge White in the case of ***Clay v. Dormire***, 37 S.W.3d 214 (Mo. banc 2000). There, defendant was sentenced as a prior offender to twenty years in prison for forcible rape. The prior conviction that the judge considered at sentencing, however, had been expunged. But the petitioner did not raise this issue until habeas proceedings, after his direct appeal and post-conviction motions were denied. The court observed that "the relief available under a writ of habeas corpus has traditionally been very limited," and does not extend to claims "that would have been raised, but were not raised, on direct appeal or in a post-conviction proceeding." The court further noted, "errors during sentencing in non-capital cases are only actionable in habeas corpus if it is shown that the court had no jurisdiction to impose the sentence in question, as in the case where a court imposes a sentence that is in excess of that authorized by law, or where the sentencing court utilized a repealed and inapplicable statute." Thus, the court held that "habeas relief is unwarranted." In dissent, Judge White argued, "Procedural default in remedies previously available *may* provide the basis for denying a petition in habeas corpus, but this limitation may be overcome by establishing the grounds relied on were unknown during the postconviction relief proceedings." The dissent continued, "Mr. Clay's lack of knowledge of this claim until after all procedural remedies were time-barred was the precise reason the court of appeals granted Mr. Clay's habeas writ.... Mr. Clay's claim had not lingered due to lack of diligence, nor was it a deliberate trial strategy justifying waiver of his habeas remedy." The dissent emphasized in conclusion, "*With the judge clearly exceeding his jurisdiction in the sentencing phase of Mr. Clay's trial, habeas corpus relief is available by this Court's own standard in Edwards* [983 S.W.2d 520 (Mo. banc 1999)]."

POST-CONVICTION RELIEF
2000

Judge White dissented alone in ***State v. Neff***, 978 S.W.2d 341 (Mo. banc 1998). After defense counsel objected to another statement made in the prosecution's closing statement, the prosecutor said to the judge (in the presence of the jury), "Well, he didn't take the stand, Judge." The defendant immediately moved for a mistrial. The judge overruled the motion, and said, "The Court will admonish the jury that the last remark made by the Prosecutor will be disregarded by the jury." The majority did not order a new trial, because "the prosecutor's comment is isolated, not directed at the jury, and not obviously intended to poison the minds of the jurors against the defendant."

POST-CONVICTION RELIEF
1998

Judge White argued that Missouri courts have "found it extremely difficult to fashion a remedy that corrects the clear prejudice created by a prosecutor's direct, certain comment on a defendant's failure to testify." Judge White was not satisfied with the court's direction to the jury, because literally the prosecutor's last remark was "There is no evidence of that." Judge White felt that a trial court has "few effective weapons to the prejudice [created by reference to a defendant's failure to testify], short of mistrial." Judge White allowed, "There may be, as the principal opinion holds, some conceivable circumstance where a direct, certain reference by the prosecutor to the defendant's failure to testify does not require a mistrial." But Judge White concluded, "the admonishment here was not just insufficient, it was nonexistent."

In the case of ***Linton v. Missouri Veterinary Medical Board***, 988 S.W.2d 513 (Mo. banc 1999), Judge Price joined Judges White and Wolff in dissent. The principal opinion upheld section 340.240.6, RSMo 1994, disqualifying anyone who failed the veterinary license exam more than three times from getting a license in Missouri, against Dr. Linton's equal protection argument. Dr. Linton failed the exam in Missouri three times before passing in Illinois. The majority held that the statute is rationally related to a legitimate state interest ("healthy domestic animals, a safe food supply and a sound agricultural economy").

CONSTITUTIONAL LAW
1999

The dissent, authored by Judge Wolff, detected "something inherent in the American culture about three strikes, probably because of our national pastime." But "even in baseball, a batter is allowed more than

three swings because a foul ball, which normally counts as a strike, do not count when it occurs on the third strike." Relying on the plaintiff's expert testimony, Judge Wolff believed, "There is simply no basis to believe that a person who scores a 483 on the examination [on the fifth taking] is less qualified than a person who scores 483 (or even 425) on the first time." Judge Wolff did "not mean to imply that an applicant must be allowed to take the examination an unlimited number of times," but simply held that "there must be some reasonable basis for believing that a particular limit would protect the public from unqualified practitioners." Because the statute imposed an "arbitrary three-times-and-out limit," the dissent would have ordered the Board to grant Dr. Linton a license to practice veterinary medicine in Missouri.[34]

The 1996 punitive damage ***Rodriguez*** case returned in 1999, and the court again reversed and remanded for a new trial. The court took ***Rodriguez II*** on direct appeal from the trial court, because Suzuki challenged the constitutionality of three statutes.[35] The plaintiff argued that Suzuki's challenge to these statutes was pretextual, and that the appeal should be heard first in the court of appeals. The majority disagreed, and proceeded to rule on Suzuki's objection to the trial court's refusal to admit government reports that contradicted consumer reports used by the plaintiff. The majority held that the reports satisfied the public records exception to the hearsay doctrine and remanded the case for a new trial.

TORT & EVIDENCE LAW 1999

In dissent, Judge White disagreed with the court's exercise of jurisdiction. As to the reports, Judge White noted that "a trial judge has wide discretion to exclude cumulative evidence," and that the majority's rule amounts to a rule that "such a report, indeed everything in the federal register, is per se admissible, regardless of any concerns about its trustworthiness." Judge White accused the principal opinion of creating "the most liberal government documents rule in the country, and an unworkable one, at that." In conclusion, Judge White reminded the majority, "Kathryn Rodriguez is a real person. She is thirty-four years old and has spent the last nine years of her life paralyzed from the shoulders down." Judge White finally lamented that the principal opinion "seriously undermines the appearance of justice for Ms. Rodriguez, who now faces the ordeal of a third marathon trial." ***Rodriguez v. Suzuki Motor Corp.***, 996 S.W.2d 47 (Mo. banc 1999).

VII. STITH *VICE* COVINGTON: 2001 TO 2002

In December 2000 Judge Covington announced that she would resign effective January 31, 2001.[36] The first woman appointed to Supreme Court of Missouri and to the Court of Appeals, Judge Covington served for 12 years.[37] According to one member of the bar, "She brought a quiet, thoughtful presence to the court. She was not an active questioner, but her questions were always right to the heart of the issue."[38] Chief Justice Price agreed, saying Covington "played a major role in the history of Missouri. She served with absolute dignity and grace."[39] After leaving the court, Judge Covington joined Bryan Cave as a partner in the firm's appellate department.[40]

"A Bridge Builder"

To replace Judge Covington, the Commission nominated three members of the Missouri Court of Appeals: Judges Mary Rhodes Russell and Richard B. Teitelman from the Eastern District, and Judge Laura Denvir Stith from the Western District. Within three years, all three would sit on the supreme court. It was assumed that, because the appointment was to replace Judge Covington, "the choice is probably between Judge Russell and Judge Stith."[41] Governor Holden chose Judge Stith. A graduate of Tufts University and of the Georgetown University Law Center, Judge Stith clerked on the Supreme Court of Missouri and practiced for fifteen years in Kansas City at Shook Hardy & Bacon before joining the Missouri Court of Appeals.[42] One of Judge Stith's colleagues on the court of appeals praised her ability to "analyze[] issues carefully and [] write with clarity and bring focus to difficult legal issues."[43] Another described her as "a bridge builder."[44] For her part, Judge Stith was complimentary of Covington's service on the court, pledging to "do my best to follow in her footsteps."[45]

TORT: VENUE 2001

During her first year on the court, Judge Stith joined Judges White and Wolff in dissent in two

notable cases. In *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), the plaintiff was injured in a ferris wheel accident at the St. Francois County Fair. Plaintiff filed a negligence claim in St. Francois County in August 1998, and, after substantial discovery, voluntarily dismissed the suit without prejudice on June 13, 2000. One week later, plaintiff re-filed in St. Louis City Circuit Court (generally regarded at the time as a plaintiff-friendly venue[46]), naming only Harold Linthicum, an employee of the ferris wheel company and a resident of Arkansas, in her petition. Under Missouri venue law at the time, "When all defendants are nonresidents of the state, suit may be brought in any county in this state." Section 508.010(4), RSMo Supp. 2005. The next day (and before process was served on Mr. Linthicum) the plaintiff amended her petition to include the other defendants, one of whom was a Missouri resident.

The question was when suit was "brought" under Missouri law: when the original petition was filed, or when the new defendants were added. In a per curiam opinion, the majority began, "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." The court held, "a suit instituted by summons is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. This interpretation protects all party defendants equally and gives effect to the intent of the legislature." Judges Stith, Wolff, and White each filed separate dissents, and concurred in one another's opinions.

In dissent, Judge Stith tried to determine the legislature's intent, observing, "the term 'brought' has been equated with 'instituted' or 'commenced,' by the legislature, the Revisor, and even Black's *Law Dictionary*." Judge Stith continued, "Had the legislature wanted venue to be redeterminable whenever parties were added, it would have been easy to provide for such a mechanism." Judge Stith argued that the legislature intended that "the time suit is brought as the time to determine venue." Judge Stith noted that the case could be decided on narrower grounds, suggesting the court hold, "when an amended pleading has been filed before service of the original petition, or the filing of the original defendant's answer, then the amended pleading, rather than the original pleading, becomes the basis for determining venue, as that is the pleading which defendant must answer."

In *State v. Callen*, 45 S.W.3d 888 (Mo. banc 2001), the court's four remaining Ashcroft appointees voted to uphold Missouri's hate crime statute, while Judges Wolff, White, and Stith argued in dissent that it is unconstitutionally vague. The statute, section 557.035.2, RSMo 2000, allowed for increased penalties for certain crimes "which the state believes to be knowingly motivated because of race, color, religion, national origin, sex, sexual orientation or disability of the victim." The defendant argued that the "state believes" portion of the statute is unconstitutionally vague because "'no person is on notice as to what the state believes, and no person could ever have a fair warning as to what the state believes regarding the motive element of a crime.'"

Statutory Construction 2001

The court held although the statute was "poorly worded," it was clear that the "state believes" portion was not an element of the crime. Rather, "the prosecutor's verification of a complaint or information — is simply a procedural prerequisite to the filing of the charge in the first place, a mechanism designed to ensure the prosecutor's 'good faith' in bringing the charge." Judge White worried in dissent that "a would-be offender would not have notice of when his or her legally protected thoughts might cross into the no-man's land of the 'state's beliefs' and subject them to enhanced criminal penalties for actions wholly unrelated to those thoughts." Judge White concluded that, "since the statute seeks punishment for motives stemming from beliefs and biases which are lawful to hold and express, application of the vagueness doctrine in construing this statute requires greater legislative clarity than in statutes where fundamental rights are not so seriously implicated."

Judge Stith wrote for a unanimous court in two cases between March 2001 and February 2002. *See State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2001) (upholding first-degree murder conviction but reversing death sentence when the

Capital Punishment 2001

court refused to instruct the jury during the penalty phase that no adverse inference could be drawn from the defendant's failure to testify); ***State ex rel. Nixon v. Kelly***, 58 S.W.3d 513 (Mo. banc 2001) (denying habeas corpus to defendant who sought credit for time served between when he began serving his sentence and when he was convicted of a second crime, because the time he spent in custody was not related to the second conviction).

POST-CONVICTION RELIEF 2001

In ***State v. Whalen***, 49 S.W.3d 181 (Mo. banc 2001), the defendant fired a shotgun in a hallway at a police officer, seriously injuring him. Two officers nearby were injured as well. Judge Stith (joined by Judges Wolff, White, and Limbaugh) upheld the assault conviction related to the first officer, but overturned the assault conviction related to the other officers, because "the State failed to present evidence from which the jury could find beyond a reasonable doubt that Defendant attempted to cause serious physical injury to the two officers who were the subjects of the two counts of class B assault in the first degree." And in ***Fisher v. Waste Management of Missouri***, 58 S.W.3d 523 (Mo. banc 2001), Judge Stith joined Judge Wolff's principal opinion (along with Judges White, Benton, and Price), to hold that a surveillance videotape made of an employee was a "statement" per section 287.215, RSMo Supp. 2005, and could not be considered at a workers' compensation administrative hearing because it was not given to the employee during discovery.[47]

CRIMINAL LAW 2001

STATUTORY CONSTRUCTION 2001

VIII. The Tipping Point and Beyond: The Court Since 2002

From Holstein to Teitelman

In January 2002 Judge John C. Holstein announced his retirement, effective March 1. With twenty-seven years of service in Missouri's judicial system, one colleague described Judge Holstein as "a legend in Missouri law."[48] After retiring from the court, Judge Holstein joined the Springfield office of Shughart, Thomson & Kilroy.[49] Holstein's retirement marked the end of the "Ashcroft Court," and to replace him the Commission recommended: Judge Richard B. Teitelman of the Missouri Court of Appeals; Michael W. Manners, now serving as a trial judge on the Jackson County Circuit Court; and Clifton M. Smart III, a Springfield attorney.[50] The Commission previously had recommended Judges Teitelman and Manners for appointment to the court in 2001 and 1998, respectively.

Two days after the Commission announced its panel, Governor Holden picked Judge Teitelman. Legally blind since birth, Judge Teitelman is also the court's first Jewish member. After graduating from law school at Washington University, Judge Teitelman worked for twenty-three years at Legal Services for Eastern Missouri. According to a fellow bar member, "There isn't anybody who doesn't like him, doesn't think he's an eminent jurist."[51] Others described Judge Teitelman as "an outstanding person and just a wonderful human being," and as "a good listener" who "devotes himself to making sure that all views are heard."[52]

As a member of the Missouri Court of Appeals, Judge Teitelman perhaps was best known for his opinion in ***Scott v. SSM Healthcare St. Louis***, 70 S.W.3d 560 (Mo. App. 2002). In that case, Judge Teitelman held that Missouri's $528,000 statutory cap for non-economic damages caused by medical malpractice applied to each "occurrence" of malpractice, not to each "occurrence" of death or injury sustained by the plaintiff. Section 538.210, RSMo Supp. 2005. Because Matthew Scott suffered two acts of malpractice during treatment for one injury, he was entitled to recover $1,056,000.[53] Judge Teitelman's opinion in *Scott* was prominently featured in literature and e-mails distributed by groups opposing his retention in 2004.[54]

Russell Replaces Benton

In June 2003, Judge Theodore McMillian on the United States Court of Appeals for the Eighth Circuit took senior status, and President Bush nominated Judge Benton for the open seat in February 2004. At a time when many of the President's nominees to the federal bench experienced long delays in the Senate, Judge Benton was confirmed unanimously by a voice vote in June. To replace Benton, the Commission's panel

included two repeat candidates: Judge Mary Rhodes Russell; attorney Clifton Smart; and Nannette A. Baker, a state trial judge from St. Louis.[55] Governor Holden picked the "unpretentious and enthusiastic" Judge Russell to become the second woman on the court.[56] A graduate of the University of Missouri School of Law and a former law clerk on the Missouri Supreme Court, Judge Russell practiced law for ten years before joining the court of appeals in 1994.

The Tipping Point

Because he brought the Carnahan-Holden appointees into the majority, Judge Teitelman's appointment in 2002 is the crucial tipping point in the court's jurisprudence over the past fifteen years. The court since has become more willing to modify Missouri tort law, to overturn criminal convictions and death sentences, and to overturn legislative and executive acts as unconstitutional (often over dissents by Judges Limbaugh, Price, and/or Benton/Russell). What follows is a sample of the court's major decisions since 2002.

In 2004 the legislature voted to put a constitutional amendment defining marriage as the union of one man and one woman on the ballot. Governor Holden, a Democrat, issued a proclamation calling for the issue to appear on the August primary ballot, rather than in November. Mo. Const. art. XII, sec. 2(b). Under Missouri law the secretary of state must send an official copy of the amendment to local election officials within ten weeks of the election. Section 116.240, RSMo 2000. But the presiding officers of the Missouri House and Senate (both Republicans) did not sign the resolution proposing the amendment until May 28, after the ten-week deadline. Attorney General Jay Nixon, a Democrat, sued for a writ of mandamus to compel Secretary of State Matt Blunt, the Republican Party's candidate for governor in 2004, to put the issue on the August ballot. The court noted that nothing in Missouri law *prohibits* the secretary of state from sending notice to local election officials after the ten-week mark has passed. The court held that the Governor's constitutional authority to set the date of an election trumps statutory technicalities like the timing of the act's delivery to the secretary of state. Although the court denied the writ of mandamus, the court held that Blunt had "a duty to take such actions as are necessary, in an expedited manner, to prepare SJR 29 for submission to the people of Missouri at the August 3, 2004, election in accordance with the Governor's proclamation."

Constitutional Law
2004

In a concurring opinion, Judge Benton stressed, "No court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election." Here, "because the Governor constitutionally called a special election over 10 weeks before the election, because all four statewide officers involved agree that all required acts will be completed more than six weeks before the election, and because local election authorities had notice 10 weeks before the election," Judge Benton concurred in the majority's per curiam opinion.

Judge Limbaugh dissented, observing, "By ordering the secretary of state to proceed with an August 3rd election regardless of the ten-week deadline, the Court effectively renders section 116.240 unenforceable, and I suppose unconstitutional, at least in relation to the governor's power to call special elections." Instead, Judge Limbaugh proposed to hold that the ten-week deadline "is a prerequisite to the conduct of this or any other election." ***State ex rel. Nixon v. Blunt***, 135 S.W.3d 416 (Mo. banc 2004).[57]

Missouri law holds parents responsible for ensuring that their children attend school regularly. Section 167.031.1, RSMo Supp. 2005. In ***State v. Self***, 155 S.W.3d 756 (Mo. banc 2005), the court overturned the conviction of a parent whose child missed 40 days of school over six months. The court did not reach the plaintiff's void-for-vagueness challenge, holding instead that the state must prove that the parent acted "purposely or knowingly." The court rejected the state's strict liability interpretation, noting, "where a specific mental state is not prescribed in a statute, 'a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly....'" Because 23 of the student's absences were the result of illness and doctor's appointments, there was not enough evidence in the record to convict the child's mother of knowingly

Statutory Construction
2005

4-25

violating the law. In dissent, Judge Price argued that a trial court's judgment should be upheld "if there is substantial evidence to support its findings." Here, the student had missed seventeen days of school unexcused, and there was evidence that the parent was aware of these absences. Judge Price, joined by Judge Limbaugh, rejected the state's strict liability argument, but believed there was sufficient evidence to infer that the parent had the requisite mental state to be convicted.

STATUTORY INTERPRETATION 2006

The case of ***Reed v. Director of Revenue***, 184 S.W.3d 564 (Mo. banc 2006), turned on the definition of "accident." Nicholas Reed backed his truck into a ditch while intoxicated and walked home. Reed was arrested without a warrant three hours later, after police found the truck where Reed left it. Missouri law "provides that an arrest without a warrant for driving while intoxicated or driving with an excessive blood alcohol content is lawful when 'made within one and one-half hours after such claimed violation occurred, unless the person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment.'" Section 577.039, RSMo 2000. In an opinion joined by Judges White, Wolff, and Stith, Judge Teitelman held that in Missouri an accident must entail "either property damage or personal injury." Because Reed caused neither, his arrest was unlawful, and the blood alcohol tests that were taken after his arrest were inadmissible.

In dissent, Judge Limbaugh looked to Webster's Dictionary for the "plain and ordinary meaning" of "accident." "If a word in a statute has a plain and ordinary meaning, and if there is no specific statutory definition to the contrary, the plain and ordinary meaning controls, and there is no need to apply rules of statutory construction" (as Judge Teitelman did). Because the case obviously involved an accident under the plain meaning of the word, Reed's arrest was lawful. Judges Price and Russell concurred in Judge Limbaugh's dissenting opinion.

STATUTORY INTERPRETATION 2006

Missouri law prohibits public funding of abortion. Section 188.205, RSMo 2000. For several years in the 1990s the state department of health entered into contracts with Planned Parenthood to provide non-abortion services (e.g., gynecological exams). In 1999, the legislature added language to an appropriations bill to ensure that none of the money Planned Parenthood received from the state was used to subsidize the organization's abortion-related activities. Specifically, the legislation stated, "an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following: (a) The same or similar name; (b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms; (c) Expenses; (d) Employee wages or salaries; or (e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies." The legislation also specified that the two organizations must be separately incorporated. Planned Parenthood restructured its operations and continued to receive state funds for non-abortion services ($168,900 in FY2000, $499,950 in FY2003). Daniel Shipley brought a taxpayer suit claiming that the director of the Department of Health should not have disbursed this money, because Planned Parenthood's re-organization did not comply with the statute. Planned Parenthood subsequently chose to forego state funding altogether, and the only issue remaining was whether it should repay the money it had already received.

The court held that restitution was improper, because the contract was neither void nor voidable. The contract was not void because the director did not lack the authority to enter into the contract — Shipley merely argued that the director had misapplied the statute's criteria. The contract was not voidable because "[t]here is no evidence that the director or Planned Parenthood acted fraudulently or in bad faith in contracting for the services." Ultimately, "Planned Parenthood under the law is not responsible for knowing whether the director's interpretation was correct."

In dissent, Judge Limbaugh (joined by Judges Price and Russell), argued that the contracts were void from their inception, because the director had misinterpreted the law. The majority opinion disposed of the claim that the contracts were void *ab initio* in two sentences, but Judge Limbaugh argued emphatically that the director's interpretation of the contracts (although

possibly reasonable) was incorrect. It did not matter to the dissent that the services had been performed already. "In short, the Director had no authority to enter into the contracts with the Planned Parenthood defendants because the defendants were too intertwined with their abortion providers, and consequently, they were not eligible for funding under the appropriations statute." ***Shipley v. Cates***, 200 S.W.3d 529 (Mo. banc 2006).

In response to the filing of fraudulent voter registration cards and to the presence of deceased persons and fake addresses on the state's voter rolls, in 2006 the legislature passed a law requiring voters to show a government-issued photo ID before casting a ballot. But the court struck down the law in a per curiam opinion, holding that it violated the Missouri Constitution's Equal Protection Clause.[58] While recognizing that the state has a "compelling interest in preserving electoral integrity and combating voter fraud," the court held that the law could not withstand strict scrutiny.

CONSTITUTIONAL LAW
2006

The court first deferred to the trial court's factual findings that "voter impersonation fraud" has not been a problem in Missouri since 2002, undermining the state's asserted interest. It also held that the photo ID requirement would not work to prevent other types of alleged fraud, such as "absentee ballot fraud, voter intimidation, and inflated voter registration rolls." Thus, the court concluded that the law was not narrowly tailored. Alone in dissent, Judge Limbaugh argued that the issue was not yet ripe. Limbaugh noted that the law's two-year transition period meant that no citizen's right to vote would be burdened until the 2008 general election, and so the plaintiffs lacked standing until then. ***Weinschenk v. State***, 203 S.W.3d 201 (Mo. banc 2006).

The court's recent decisions in capital murder cases indicate a greater willingness to overturn death sentences. Judges Price, Limbaugh, and Benton frequently dissented. In ***State v. Baumruk***, 85 S.W.3d 644 (Mo. banc 2002), the defendant shot and killed his wife (and wounded his attorney, her attorney, a police officer, and a courthouse security officer) during a hearing at the St. Louis County courthouse. The defendant was convicted of first-degree murder at a trial held at the same courthouse, and sentenced to death. The court overturned the conviction, holding that the defendant's motion for change of venue should have been granted. The majority believed that having the trial at the same courthouse where the crime occurred violated the Sixth and Fourteenth Amendments: "the physical setting of the trial was a constant reminder of the horrible events that occurred in the very place where the trial was being held."

CAPITAL PUNISHMENT
2002

Judge Benton, joined by Judge Price and Limbaugh, dissented. Judge Benton stressed that the problem could not be the physical location of the trial, "but whether the actual jurors have fixed opinions such that they could not judge impartially whether the defendant was guilty." Here, nine years passed between the shooting and the trial, and voir dire was extensive, leading the dissent to conclude that, "the defendant received a fair and impartial trial, free of the influence of pretrial publicity, a huge wave of public passion or an inflammatory atmosphere."

In ***State ex rel. Amrine v. Roper***, 102 S.W.3d 541 (Mo. banc 2003), the court overturned the death sentence of an inmate convicted of killing another prisoner: "a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." In other words, a habeas petition could be supported by a claim of actual innocence based purely on the evidence, "freestanding" of any constitutional defect in the trial.

CAPITAL PUNISHMENT
2003

Judge Benton dissented, proposing that a master be appointed to consider Amrine's claims, because allegations "do not prove themselves." Judge Price agreed with Judge Benton's dissent, adding that the court could set aside Amrine's death sentence without reaching the question of actual innocence under section 565.035.3(3), RSMo 2000 (allowing the supreme court to set aside a death sentence on "the strength of the evidence").

In ***State ex rel. Simmons v. Roper***, 112 S.W.3d 397 (Mo. banc 2003), the court held that the Eighth Amendment prohibited the execution of a defendant who committed murder when he was a juvenile. The

court found that a "national consensus" had emerged on this issue, similar to the "national consensus" discovered by the U.S. Supreme Court regarding the execution of the mentally disabled in ***Atkins v. Virginia***, 536 U.S. 304 (2002). In dissent, Judge Benton (joined by Price and Limbaugh) argued that Missouri's death penalty statute, which allows the execution of sixteen-year-olds, "is the enacted will of the people of Missouri and must be enforced unless it is in violation of either the Missouri or the United States Constitutions." The Court upheld the execution of a juvenile in ***Stanford v. Kentucky***, 492 U.S. 361 (1989), and the dissent argued that the majority had no authority to overrule this decision.[59]

CAPITAL PUNISHMENT 2003

In ***State v. Johnson***, 968 S.W.2d 123 (Mo. banc 1998), Judge White dissented alone, arguing that a quadruple-murderer's death sentence should be overturned for ineffective assistance of counsel. In ***Hutchinson v. State***, 150 S.W.3d 292 (Mo. banc 2004), Chief Justice White joined the majority opinion of Judge Wolff in overturning the death sentence of a convicted double murderer for ineffective assistance of counsel. The majority found that "Hutchison's counsel were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." Thus, "the jury did not hear compelling evidence for mitigation in the penalty phase," such as that Hutchinson has a low IQ and was abused as a child.

CAPITAL PUNISHMENT 2004

Judge Limbaugh, joined by Judge Price, argued in dissent that the majority's decision ran counter to the U.S. Supreme Court's admonition against the "distorting effects of hindsight" when considering an ineffective-assistance-of-counsel claim. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984). The dissent reviewed the evidence that was admitted during the penalty phase, and argued, "the majority's conclusion that counsel 'did not investigate Hutchison's medical, educational, family, and social history and did not present available evidence of Hutchison's emotional and intellectual impairment' is a gross mischaracterization of the record." *See also* ***State v. McFadden***, 191 S.W.3d 648 (Mo. banc 2006) (overturning a death sentence and remanding for new trial when the state used peremptory strikes against African-American venirpersons. Although the state offered individually valid explanations, when taken together it was clear that the state's true purpose was racial discrimination. Judges Price and Russell join Limbaugh in dissent); ***State v. Barriner***, 111 S.W.3d 396 (Mo. banc 2003) (reversing death sentence because trial court abused its discretion by excluding the introduction of hair evidence found at the crime scene, which could have helped defendant prove that another person committed the murders. Judge Price joins Judge Benton's dissenting opinion).

During the last four years the court also has become more willing to overturn criminal convictions because of alleged errors by the trial court, often by five-to-two and four-to-three votes. *See, e.g.*, ***State v. Seibert***, 93 S.W.3d 700 (Mo. banc 2002) (defendant was arrested for arson that resulted in one death, confessed before being read her Miranda rights, and confessed again after being Mirandized; the court held that the tactic of interrogating before and after the Miranda warning weakened the defendant's ability to exercise her right against self-incrimination, and that neither statement was admissible; Judge Benton dissents, joined by Price and Limbaugh); ***State v. Langdon***, 110 S.W.3d 807 (Mo. banc 2003) (overturning conviction for receiving stolen property because there was insufficient evidence to permit an inference of knowing possession of stolen property; Judge Price concurs in Limbaugh's dissent); ***State v. Blocker***, 133 S.W.3d 502 (Mo. banc 2004) (reversing the conviction of a persistent controlled substance offender because he was denied a continuance to secure the testimony of a pharmacist who would testify that the pills were for the defendant's grandmother; Judges Benton and Price concur in Limbaugh's dissent); ***State v. Long***, 140 S.W.3d 27 (Mo. banc 2004) (granting new trial to a defendant who was not allowed to introduce evidence of prior false allegations of a rape victim, when the defendant chose not to cross-examine the victim; Judges Price and Limbaugh, joined by Benton, file separate dissents).

CRIMINAL LAW 2002–2004

In the area of tort law, the court's decisions since 2002 have followed a different track than

TORT: DUTY OF CARE 2002

the court of the 1990s. In *L.A.C. v. Ward Parkway Shopping Center Co.*, 75 S.W.3d 247 (Mo. banc 2002), a twelve-year-old girl claimed that she was raped in a deserted catwalk at a shopping mall. While the rape was occurring, her friend tried to get help from two different security guards, neither of whom took the report seriously. Although many material facts were disputed, the court held that the girl could pursue a negligence claim against the mall's owners and the security company, and reversed summary judgment. The girl was a business invitee, and so she "must show evidence that would cause a reasonable person to anticipate danger and take precautionary actions to protect its business invitees against the criminal activities of unknown third parties." Because the record showed seventy-five violent crimes on the premises over the last three years, 62% of which involved solely female defendants, the court held that the alleged rape was foreseeable, and allowed the suit to go forward. The court also held that plaintiff could sue the security company for breach of contract as a "creditor beneficiary" of its contract with the mall's owner, and for negligence.

Judge Limbaugh filed a dissent, joined by Judge Benton. As to the claims against the mall owner, the dissent worried that "the violent crimes exception, which by definition should be applied only under extraordinary circumstances, swallows up the general rule that 'there is no duty to protect business invitees from the criminal acts of unknown third persons.'" Specifically, the dissent questioned the empirical evidence of past criminal activity on the premises, pointing out that none of the crimes were "remotely similar" to the alleged rape. The dissent also would have held that the security company was not liable to the plaintiff, for negligence or for breach of contract.

In *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo. banc 2004), a class action suit was filed against the owner of a lead smelter for negligence and negligence per se, strict liability, private nuisance, and trespass. The defendant argued that the company's chief financial officer was joined pretensively so that venue could be in St. Louis City. Defendants argued that the CFO was not a proper defendant, because his acts were carried out as a corporate officer, not in his individual capacity. The majority held that the CFO was properly joined, because the plaintiffs alleged that he had "actual or constructive knowledge of, and participated in, an actionable wrong."

TORT: VENUE 2004

The dissent stressed that the exception to individual liability for a corporate officer is actually much narrower: "Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." Because the CFO was "staff officer," and not a person with discretion to make decisions for the company like the president or the owner, he could not be held personally liable. The dissent also noted that the allegations against the CFO in the petition merely restated the words of the exception. Because the CFO "did not actively participate in making environmental decisions," the dissent concluded that joinder was pretensive.

The court extended its decision in *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. banc 1994) (abolishing the tort of criminal conversation) in *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. banc 2003). For the majority, Judge Teitelman argued that the tort of alienation of affection was grounded in "the antiquated concept that husbands had a proprietary interest in the person and services of their wives." Judge Teitelman also doubted that the tort is "a useful means of preserving marriages and protecting families," because suits were usually brought after the marriage was dissolved. "Revenge, not reconciliation, is often the primary motive." Finally, the majority cited the need for consistency with its decision in *Thomas*: "If a spouse cannot recover because of an adulterous affair under a criminal conversation theory, a spouse should likewise be barred from recovery by simply attaching the moniker of 'alienation of affection' to the petition."

TORT & FAMILY LAW 2003

In dissent, and joined by Judge Limbaugh, Judge Benton pointed out that the majority's rationale could also be used to abolish a claim for loss of consortium. Noting that the Restatement defines loss of consortium as an "Indirect Interference with Marriage Relation," and alienation of affection as a "Direct Interference with Marriage Relation," Judge Benton argued, "It is inconsistent that the law compensates for indirect interference with the marriage relation, but (after this opinion) not for direct interference." And loss

of consortium has its roots in the same "antiquated property concepts" that so troubled the majority. As to the need for "consistency," the dissent noted that, "a rationale for abolishing criminal conversation [in *Thomas*] was that the tort of alienation of affection would still compensate for interference with the marriage relation." Preferring to "leave further action to the General Assembly," Judge Benton and Limbaugh dissented.

The statute of limitations on a tort claim does not begin to run until "the damage resulting [from the breach of duty] is sustained and is capable of ascertainment." Section 516.100, RSMo 2000. In ***Powel v. Chaminade College Preparatory, Inc.***, 197 S.W.3d 576 (Mo. banc 2006), a forty-two-year-old man recovered memories of childhood sexual abuse, and argued that the statute of limitations should not begin to run until the memory was recovered. The defendant argued that the abuse was "capable of ascertainment" when it happened, and so the statute of limitations had long since expired. The court adopted what it labeled an objective test, holding that the statute of limitations begins to run "when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages." The court held that there were questions of fact to be resolved, overturned summary judgment, and remanded the case. In his concurrence, Judge Wolff agreed with the court's test, but doubted that the plaintiff should survive summary judgment, because he admitted that he always remembered the abuse, even when the specific memories were repressed.

TORT: STATUTE OF LIMITATIONS 2006

In dissent, Judge Price accused the majority of "stat[ing] an 'objective' standard, but apply[ing] a 'subjective' one." Judge Price allowed an exception for "victims who are so young or lacking in understanding that they might not ascertain that they have been abused or harmed," but argued that this was not such a case. Judge Price also noted that the party who argues for avoidance of the statute bears the burden of proof, and here the plaintiff did not meet this burden.

On May 11, 2001, Fred Schoemehl injured his knee at work, and died soon afterward from unrelated causes. His wife and sole dependant, Annette Schoemehl, sued for workers' compensation benefits. An ALJ ruled that the deceased had suffered a total permanent disability, and awarded Annette benefits until Fred's death. The widow appealed, claiming that she should receive his workers' compensation benefits for the rest of her life, and the court agreed. The court was forced to reconcile two apparently inconsistent statutes. Section 287.230.2, RSMo 2000, required that disability payments would cease upon the death of the disabled, "unless there are surviving dependents at the time of death." But Section 287.200.1, RSMo 2000, stated that PTD disability benefits should be paid "during the continuance of such disability for the lifetime of the employee". Respondents argued that, because the disability ceased at death, the widow could not collect the benefits. The majority held that, as a dependent of the deceased, the widow is included in the definition of an "employee" under Section 287.020.1, RSMo Supp. 2005.

STATUTORY CONSTRUCTION 2007

The majority construed the "continuance of such disability" language to apply to situations where the disabled employee recovered. The dissent responded that even if the requirement that benefits were only payable "for the lifetime of the employee" could be overcome by defining dependents as employees, the majority "improperly excises from section 287.200.1 the additional requirement that the compensation is payable for the lifetime of the employee only 'during the continuance of such disability.'" ***Schoemehl v. Treasurer of State***, 217 S.W.3d 900 (Mo. banc 2007).

In an unsigned, unanimous per curiam opinion, the court narrowly construed a statute creating a civil cause of action against anyone who "shall intentionally cause, aid, or assist a minor to obtain an abortion" without parental consent or a valid court order. *See* section 188.250, RSMo Supp. 2005. After establishing that Planned Parenthood has standing and that the case is ripe, the court observed, "[t]he information and counseling provided by Planned Parenthood do not fall into any unprotected category, but rather are core protected speech." Rather than find that the statute infringed on Planned Parenthood's

STATUTORY CONSTRUCTION 2007

protected First Amendment activity, the court used a "narrowing construction," which is "the preferred remedy in First Amendment cases." Presuming the legislature "would not pass laws in violation of the constitution," the court held that the phrase "aid or assist" does not "include protected activities such as providing information or counseling." The court upheld the statute against vagueness, Commerce Clause, Due Process Clause, and Right to Travel Clause challenges. Further, because "the Untied States Supreme Court has upheld Missouri's parental consent statute," as well as other states' "parental consent with judicial bypass statutes," the court held that the statute was not an "undue burden" on a minor to obtain an abortion, per ***Planned Parenthood v. Casey***, 505 U.S. 833 (1992). ***Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon***, 2007 WL 1260923 (Mo. banc May 1, 2007).

Collective bargaining for public-sector employees has been a contentious issue in Missouri for decades. The legislature has considered, and rejected, legislation granting public-sector employees collective bargaining rights nearly on an annual basis. Within six months of taking office in 2001, Governor Holden issued an executive order giving state government employees collective bargaining rights.[60] Then-Secretary of State Matt Blunt refused to publish the resulting administrative rule, and was sued by AFSCME, a public-sector union.[61] Collective bargaining for public employees was a major issue in the 2004 gubernatorial campaign.[62] Blunt, the Republican candidate, pledged to repeal the order on his first day in office, if elected.[63] He was, and he did.[64]

The Missouri Constitution guarantees, "employees shall have the right to organize and to bargain collectively through representatives of their own choosing."[65] For sixty years, the law in Missouri was that this provision applies to private-sector employees only, not to employees in the public sector. *See* ***City of Springfield v. Clouse***, 206 S.W. 539 (Mo. banc 1947). Three employee organizations, including a local chapter of the National Education Association, sued the Independence School District for "chang[ing] the terms of employment of the employees represented by these associations." The district adopted a "Collaborative Team Policy" conflicting with an existing "memorandum of understanding," without consulting the employee associations. The district "acknowledges that its unilateral adoption of the new policy constituted a refusal to bargain collectively with these employee associations."

The majority held, "'Employees' plainly means employees. There is no adjective; there are no words that limit employees to private sector employees." The majority explained that the court does not have the authority "to read into the Constitution words that are not there." As for *Clouse*, stare decisis "is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." The majority explained, "If the people want to change the language of the constitution, the means are available to do so. This Court will not change the language the people have adopted. *Clouse* is overruled." The majority also overruled ***Sumpter v. City of Moberly***, 645 S.W.2d 359 (Mo banc 1982), which it described as holding "that a city was free to disregard agreements made with employee associations or unions." Thus, the majority established a constitutional right for public-sector employees to engage in collective bargaining (although not to strike, "unlike their private-sector counterparts").

In dissent, Judge Price (joined by Judge Limbaugh) noted, "[t]he decision in *Clouse*, that public employees do not enjoy the right to collective bargaining under the constitution, was handed down only two years following the convention [that wrote and adopted the current Missouri constitution]. There is no doubt the Court then knew the intent of the framers and the mood of the 1945 electorate better than the Court does now." Judge Price argued that "the appellants are entitled to relief on most, but not all, of their claims," under the existing labor law in Missouri and without overruling *Clouse* or *Sumpter*. Failing a narrower resolution of the case, Judge Price argued that *Clouse* should not be overruled, but that *Sumpter* could be: "while a governmental entity may not be forced to enter into a labor agreement, once it does so, it should be bound accordingly." As Judge Price explained, *Sumpter* "acknowledged that a governing body may adopt the proposal of an employee group by way of an ordinance, resolution or other appropriate form, depending on the nature of the

public body." Therefore, "*Sumpter* held that governing bodies are free to disregard the agreement so long as the agreement is rescinded by appropriate action."

Under Missouri law, however, there is a "long recognized prohibition of one legislative body from binding a subsequent legislative body." For the dissent, overruling *Sumpter* would have a limited effect: "the only difference in result from overruling *Sumpter* is the extent of time that may be found to exist between one school board and its successor. The appellants are entitled to relief on their claim that any given Board may not unilaterally change agreements it votes to adopt. However, any subsequent Board cannot be bound by a previous board's vote." *See* ***Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.***, 2007 WL 1532737 (Mo. banc May 29, 2007).

IX. Conclusion

In 1992, it appeared that Governor Ashcroft's appointees would dominate the Supreme Court of Missouri for many years. Today, only two of those judges remain on the court. And the court's jurisprudence has tracked this shift in the balance of power. The court of the 1990s enforced Missouri's post-conviction relief rules;[66] recently, the court has relaxed the law of habeas corpus in Missouri.[67] The current court has modified Missouri tort law to relax the causation requirement,[68] and takes a more liberal approach to federal and state constitutional law.[69] The court exhibits less deference to the legislature and to precedent,[70] and has expanded Missouri's venue rules[71] and statute of limitations,[72] while relaxing traditional contract law.[73] The current court is also more willing to overturn death sentences for ineffective assistance of counsel[74] and for lack of a fair trial caused by pre-trial publicity,[75] and to overturn other criminal convictions for insufficient evidence.[76]

This Paper is descriptive, not argumentative. Its purpose is to provide information about the jurisprudence of the Supreme Court of Missouri since 1992 and about the backgrounds of its members, in order to inform the current public debate. Some readers may prefer the current court's jurisprudence, while others may look to yesterday's court for inspiration and guidance. It is clear, however, that the court has taken a new direction in recent years, and this shift followed changes in the court's composition. The seeds of some of today's majority opinions can be found in earlier dissenting opinions. Partisanship and personal preferences aside, the obvious lesson is that judicial selection definitely has consequences.

Endnotes

1 David Lieb, *Top Republicans Frustrated with Mo. Court System*, The Associated Press State & Local Wire, 2/18/2007.

2 *Id.*

3 Jo Mannies, *Battle Brews Over Judges*, St. Louis Post-Dispatch, 5/1/2007.

4 "My hope is that the group of citizens convened by the The Missouri Bar will propose a judicial evaluation system that is driven by nonlawyers as well as by the members of the Bar; that is independent and nonpartisan; and that produces credible results made widely available to the voting public." *Chief Justice Michael A. Wolff: 2007 State of the Judiciary Address, available at* http://www.mobar.org/851b6221-fd7a-4878-8234-8342a15c6317.aspx (last accessed 6/3/2007).

5 Virginia Young & Jeremy Kohler, *Judge White to Resign from State High Court*, St. Louis Post-Dispatch, 5/19/2007.

6 Mo. Const. art. V, sec. 25(a).

7 *Id.*

8 Mo. Const. art. V, sec. 25(d).

9 HJR 31, *available at* http://www.house.mo.gov/bills071/bills/HJR31.HTM (last accessed May 25, 2007).

22 10 HJR 33, *available at* http://www.house.mo.gov/bills071/bills/HJR33.HTM (last accessed May 25, 2007).

11 HJR 34, *available at* http://www.house.mo.gov/bills071/bills/HJR34.HTM (last accessed 5/25/2007).

12 William C. Lhotka, *Benchmark: Ashcroft Appointees Ensure Judicial Legacy*, St. Louis Post-Dispatch, 5/26/1991.

13 *Id.*

14 Two trial judges have been voted out of office: Judge Marion D. Waltner of Jackson County in 1942, and Judge John R. Hutcherson of Clay County in 1992. *See* "Missouri Nonpartisan Court Plan," *available at* http://www.courts.mo.gov/index.nsf/b820afdc4fc4737f86256c0900633c6a/3febf2c901768abe862564ce004ba8a1?OpenDocument (last accessed 2/1/2007).

15 Mo. Const. art. V., § 26. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (upholding Missouri's mandatory judicial retirement against federal age discrimination and equal protection challenges).

16 Mo. Const. art IV, § 17.

17 Lhotka, *supra* note 12.

18 Will Sentell, *Missouri Mourns Loss of Admired Judge*, Kansas City Star, 7/31/1995.

19 *Id.*

20 AP, *Colleagues Remember State Judge*, Kansas City Star, 8/3/1995.

21 AP, *Carnahan Could Name Black to High Court*, Kansas City Star, 10/4/1995.

22 *Id.*

23 Fred W. Lindecke, *St. Louisan Named to Court*, St. Louis Post-Dispatch, 10/24/1995. The Plan has been criticized for under-representing minorities because it prevents voters in Missouri's two main urban areas from directly electing local judges. *See* State Sen. J.B. "Jet" Banks, *The Case For, Against Missouri Court Plan*, St. Louis Post-Dispatch, 3/12/1992.

24 *Id.*

25 *Dissonance in Black and White*, St. Louis Post-Dispatch, 6/29/1996.

26 *Id.*

27 *Judge White's Judicious Revision*, St. Louis Post-Dispatch, 11/26/1996.

28 Dan Margolies, *Robertson Leaves Supremes to Sing Big Tobacco Blues*, Kansas City Business Journal, 7/10/1998.

29 Virginia Young, *Finalists are Announced for a Supreme Court Vacancy*, St. Louis Post-Dispatch, 8/6/1998.

30 Virginia Young, *Mike Wolff Takes Oath of Office as State Supreme Court Judge*, St. Louis Post-Dispatch, 9/9/1998.

31 Terry Ganey, *Governor Picks SLU Professor to Fill Vacancy on High Court*, St. Louis Post-Dispatch, 8/11/1998.

32 Young, *supra* note 30.

33 Ganey, *supra* note 31.

34 Following the court's decision, in 1999 the legislature repealed the three-strike rule, formerly section 340.240.6. *See* S.B. 424, *available at* http://www.senate.mo.gov/99info/bills/SB424.htm (last viewed 2/27/2007).

35 Mo. Const. art. V, sec. 3: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of... a statute or provision of the constitution of this state...."

36 Bill Bell, Jr., *Ann Covington, 1st Woman on State High Court, Resigns*, St. Louis Post-Dispatch, 12/15/2000.

37 *Covington's Solid Record*, Kansas City Star, 12/27/2000.

38 David A. Lieb, *Retiring Judge Says She Has Job Offers in Private Sector*, The Associated Press State & Local Wire, 12/15/2000.

39 Bell, *supra* note 36.

40 *For the Defense, A Little Reshuffling*, Kansas City Star, 4/17/2001.

41 *Three Solid Candidates*, St. Louis Post-Dispatch, 3/1/2001.

42 Virginia Young, *New Judge on Missouri Supreme Court Says She'll Try to Follow in Footsteps of the Woman She's Replacing*, St. Louis Post-Dispatch, 3/3/2001.

43 *Id.*

44 Virginia Young, *State Supreme Court Swears in Newest Member*, St. Louis Post-Dispatch, 4/13/2001.

45 Young, *supra* note 42.

46 "Bringing Justice to Judicial Hellholes 2003," American Tort Reform Association, *available at* http://www.atra.org/reports/hellholes/2003/report.pdf (last accessed 2/26/2007).

47 In 2005 the legislature amended section 287.215 to overturn the court's decision, adding the words, "The term 'statement' as used in this section shall not include a videotape, motion picture, or visual reproduction of an image of an employee. *See* SBs 1 & 130, *available at* http://www.senate.mo.gov/05info/BTS_Web/Bill.aspx?SessionType=R&BillID=126 (last accessed 2/27/2007).

48 Aaron Deslatte, *State High Court Jurist, an Ozarker, to Retire*, Springfield News-Leader, 1/4/2002.

49 Erin Suess, *Retired Missouri Supreme Court Judge Joins Law Firm*, St. Louis Daily Record, 3/2/2002.

50 Virginia Young, *Teitelman is Finalist for Missouri High Court*, St. Louis Post-Dispatch, 2/20/2002.

51 Virginia Young, *Holden Picks Judge for High Court*, St. Louis Post-Dispatch, 2/23/2002.

52 Tim Bryant & Virginia Young, *New High Court Judge Is a Good Listener, Overcame Obstacles, Friends Say*, St. Louis Post-Dispatch, 2/25/2002.

53 In 2005 the legislature amended section 538.210 to overturn the *Scott* decision. The statute now reads, "no plaintiff shall recover more than three hundred fifty thousand dollars for non-economic damages irrespective of the number of defendants." *See* HB 393, *available at* http://www.house.mo.gov/bills051/bills/HB393.htm (last accessed 2/27/2007).

54 Donna Walter, *Supporters Rally to Defense of MO Supreme Court Judge Richard B. Teitelman*, Kansas City Daily Record, 11/1/2004.

55 *Supreme Court Candidates Proposed*, Kansas City Star, 9/4/2004.

56 Virginia Young, *Appeals Judge is Named to High Court*, St. Louis Post-Dispatch, 9/21/2004.

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61 Kelly Wiese, *Union Goes to Court over Collective Bargaining Rule*, The Associated Press State & Local Wire, 8/19/2004.

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63 David A. Lieb, *Governor's Candidates Squabble Over Cost-Savings in Government*, The Associated Press State & Local Wire, 3/4/2004.

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65 Mo. Const. art. I, sec. 29.

66 Bullard v. State, 853 S.W.2d 921 (Mo. banc 1993) (all concur); White v. State, 939 S.W.2d 887 (Mo. banc 1997) (6-1 decision) (White, J. dissenting); Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) (5-2 decision) (White, J., dissenting).

67 State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003) (4-3 decision) (Benton and Price, JJ., dissenting).

68 *Compare* Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993) (all concur), *and* Carter v. Kinney, 896 S.W.2d 926 (Mo. banc 1995) (all concur) (Price, J., concurring in the result), *and* State ex rel. Mo. Highway & Transp. Comm'n v. Dierker, 961 S.W.2d 58 (Mo. banc 1998) (6-1 decision) (White, J. dissenting), *with* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247 (Mo. banc 2002) (4-2 decision) (Limbaugh, C.J., dissenting).

69 *Compare* State v. Damask, 936 S.W.2d 565 (Mo. banc 1996) (6-1 decision) (White, J., dissenting), *and* Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513 (Mo. banc 1999) (4-3 decision) (Wolff, J., dissenting), *with* State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. banc 2003) (4-3 decision) (Price, J., dissenting), *and* Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006) (6-1 decision) (Limbaugh, J., dissenting).

70 *Compare* R.L. Nichols Ins., Inc. v. Home Ins. Co., 865 S.W.2d 665 (Mo. banc 1993) (all concur), Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513 (Mo. banc 1999) (4-3 decision) (Wolff, J., dissenting), *and* State v. Callen, 45 S.W.3d 888 (Mo. banc 2001) (4-3 decision) (White, J., dissenting), *with* State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. banc 2003) (4-3 decision) (Price, J., dissenting), Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006) (6-1 decision) (Limbaugh, J., dissenting), Schoemehl v. Treasurer of State, 21 S.W.3d 900 (Mo. banc 2007), Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 2007 WL 1260923 (Mo. banc May 1, 2007), *and* Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 2000 WL 1532737 (Mo. banc May 29, 2007).

71 *Compare* State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994) (all concur), *and* State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001) (4-3 decision) (White, Wolff, and Stith, JJ., dissenting), *with* State ex rel. Doe Run Res. Corp. v. Neill, 128 S.W.3d 502 (Mo. banc 2004) (4-3 decision) (Benton, J., dissenting).

72 Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576 (Mo. banc 2006) (6-1 decision) (Price, J., dissenting).

73 *Compare* Luethans v. Washington Univ., 894 S.W.2d 169 (Mo. banc 1995) (all concur), *and* Warren v. Paragon Techs. Group, 950 S.W.2d 844 (Mo. banc 1997) (6-1 decision) (White, J., dissenting), *with* Shipley v. Cates, 200 S.W.3d 529 (Mo. banc 2006) (4-3 decision) (Limbaugh, J., dissenting).

74 *Compare* State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998) (6-1 decision) (White, J., dissenting), *with* Hutchinson v. State, 150 S.W.3d 292 (Mo. banc 2004) (5-2 decision) (Limbaugh, J., dissenting on ineffective assistance of counsel issue).

75 *Compare* State v. Barton, 998 S.W.2d 19 (Mo. banc 1999) (5-2 decision) (Wolff, J., dissenting), *with* State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002) (4-3 decision) (Benton, J., dissenting).

76 State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001) (4-3 decision) (Price, J., dissenting), State v. Langdon, 110 S.W.3d 807 (Mo. banc 2003) (5-2 decision) (Limbaugh, J., dissenting), State v. Self, 155 S.W.3d 756 (Mo. banc 2005) (5-2 decision) (Price, J., dissenting on sufficiency of the evidence issue).

Appendix A

DUANE BENTON was born September 8, 1950, in Springfield and grew up in Mountain View, Willow Springs and Cape Girardeau.

Judge Benton is a 1972 graduate of Northwestern University, Evanston, Illinois, graduating *summa cum laude* and Phi Beta Kappa. He received a law degree from Yale Law School in 1975, distinguishing himself as editor and managing editor of the *Yale Law Journal*. Selected as a Danforth fellow, he completed the Senior Executives Program at Harvard University, John F. Kennedy School of Government. He has also accomplished the post-graduate Appellate Judges Course at the Institute of Judicial Administration, New York University. He holds a Master of Laws degree from the University of Virginia and honorary Doctor of Laws degrees from Central Missouri State University and Westminster College.

From 1975 to 1979 served with the U.S. Navy as a judge advocate. While in the Navy, he attended Memphis State University and earned a master's degree in business administration and accountancy. He became a certified public accountant in Missouri in 1983 and is the only Certified Public Accountant serving on any supreme court in America. Judge Benton is a member of the American Institute of Certified Public Accountants; and the Missouri Society of Certified Public Accountants.

Before joining the Supreme Court, Judge Benton practiced law as a private attorney in Jefferson City for six years. He is admitted to practice before the United States Supreme Court, United States Tax Court, United States Court of Appeals for the Armed Forces and all Missouri Courts. From 1980 through 1982 he served as chief of staff to then-Congressman Wendell Bailey in the U.S. House of Representatives.

Judge Benton served as director of the Missouri Department of Revenue from 1989 to 1991. He also served on the Multistate Tax Commission, with tax administrators from 32 other states, who elected him chair, and as president of the Midwestern States Association of Tax Administrators.

Judge Benton, a Vietnam veteran, retired from the U.S. Naval Reserve as the rank of captain, after 30 years of active and reserve duty. He belongs to the Veterans of Foreign Wars, the American Legion, the Navy League, the Vietnam Veterans of America, the Military Order of the World Wars and served on the Missouri Military Advisory Commission.

From 1987 through 1989 Judge Benton was a member of the board of regents for Central Missouri State University in Warrensburg. He has also served as chair of the board of trustees for the Missouri State Employees' Retirement System, the Missouri Commission on Intergovernmental Cooperation, the Council for Drug-Free Youth and as director of the Jefferson City United Way.

Judge Benton is an adjunct professor at both Westminster College and the University of Missouri-Columbia School of Law. A deacon and trustee of the First Baptist Church in Jefferson City, he is former counsel to the Missouri Baptist Convention. Duane and his spouse, Sandra, a registered nurse, have two children: Megan and Grant.

Judge Benton was appointed to the Missouri Supreme Court on August 16, 1991, and retained at the November 1992 election. His term expires December 31, 2004. He served as Chief Justice of the Missouri Supreme Court from July 1, 1997 through June 30, 1999.

ANN K. COVINGTON was born in Fairmont, West Virginia, on March 5, 1942. She received her education in the public schools of Fairmont, West Virginia. She obtained her bachelor of arts degree at Duke University, Durham, North Carolina, in 1963. Following her graduation, Judge Covington joined the teaching staff at Oxfordshire Schools, Oxford, England, from 1963 to 1965. She then attended Rutgers University for graduate work in English literature. Judge Covington earned a juris doctorate in May 1977, from the University of Missouri School of Law. She has accomplished the post-graduate Appellate judges Course at the Institute of Judicial Administration, New York University.

From 1977 to 1979, Judge Covington served as an Assistant Attorney General of Missouri. She then entered the private practice of law in Columbia. While practicing law there Judge Covington served on the board of directors of Mid-Missouri Legal Services Corporation and Ellis Fischel State Cancer Hospital. She was chair of the Juvenile Justice Advisory Board, the City of Columbia Industrial Revenue Bond Authority and committees of the Missouri United Methodist Church.

Judge Covington is a member of the American Law Institute, elected in 1998. She serves on the Board of the National Center for State Courts. She is a member of the American, Missouri and Boone County Bar Associations, as well as the American Judicature Society. Judge Covington has served as a member of the Advisory Committee on Evidence Rules of the Judicial Conference of the United States and as vice president of the Conference of Chief Justices of the United States.

Judge Covington was a Council of State Governments' 1988 Toll Fellow. She is a member of the Academy of Missouri Squires. She received the Citizen of Merit Award from the University of Missouri Law School and the Faculty-Alumni Award from the University of Missouri. In 1995, the Robert C. Goshorn Foundation named Covington "Statesman of the Year," an award for the State of Missouri's outstanding public servant. She also received the Spurgeon-Smithson Award from the Foundation of The Missouri Bar for outstanding contributions to the profession. She is an honorary member of the Order of the Coif, Mortar Board and Phi Alpha Delta legal fraternity.

Judge Covington is married to Charles J. McClain. She has two children, Elizabeth and Paul.

Judge Covington was appointed to the Missouri Court of Appeals, Western District, in September of 1987. In December of 1988, she was appointed to the Missouri Supreme Court. She was the first woman in Missouri to serve in each capacity. Judge Covington served as Chief Justice of the Missouri Supreme Court from July of 1993 through June of 1995. She was retained in office by Missouri voters in the November 1990 election. Her term expires December 31, 2002.

JOHN C. HOLSTEIN was born January 10, 1945, in Springfield. He attended Springfield public schools and graduated from Parkview High School in 1963. He attended Kansas State College and earned degrees from Southwest Missouri State University (B.A., political science); University of Missouri-Columbia (J.D.); and University of Virginia (LL.M.).

Judge Holstein was married August 26, 1967, to Mary Brummell. They have three children. He is a member of the Second Baptist Church of Springfield. He was commissioned in the U.S. Army in 1969 and served on active duty, in the Army Reserve and National Guard, attaining the rank of lieutenant colonel. A graduate of the Army's Command and General Staff College, he commanded National Guard units in West Plains and Jefferson City.

Holstein began practicing law in 1970 in West Plains and taught business law at Southwest Missouri State University, 1974-1975. While in private law practice, he served as city attorney for the city of Mountain View, 1972-1975. He also chaired the Howell County Chapter of the American Red Cross and served on its board of directors. For several years he served as chair of the Ozark Area Care and Counseling Services in West Plains. He served on the Board of Trustees of Southwest Baptist University.

As a circuit judge, he was a member of the Circuit Courts Budget Committee. Holstein also served on the Legislative Steering Committee and Judicial Records Committee while on the Court of Appeals. He chaired the Supreme Court Task Force on Abused and Neglected Children and was a member of the Missouri Bar Committee on Public Perception of the Judiciary and the Bar's Foresight Committee. He has served as chair of the Supreme Court Critical Issues Committee and the executive council of the Judicial Conference. He also chaired the Central States Judicial Conference on Child Support Enforcement. He is an honorary member of the Order of the Coif and Phi Alpha Delta legal fraternity.

Judge Holstein was appointed probate and *ex officio* magistrate in 1975 and was elected probate judge to fill an unexpired term in 1976. He was elected associate circuit judge of Howell County, 1978, and circuit judge of the 37th Judicial Circuit, 1982, where he also served as presiding circuit judge. He was appointed to the Missouri Court of Appeals, Southern District, by Governor John Ashcroft in April 1987. He became chief judge of that court in 1988. He was appointed to the Supreme Court by Governor Ashcroft in October 1989. Judge Holstein served as Chief Justice from July 1995-June 1997. Retained at the 1990 general election, his term expires December 31, 2002.

STEPHEN N. LIMBAUGH JR. was born January 25, 1952, in Cape Girardeau.

Judge Limbaugh was educated in the Cape Girardeau public schools and later graduated from Southern Methodist University (Bachelor of Arts, 1973; Juris Doctor, 1976) and the University of Virginia (Master of laws in Judicial Process, 1998).

Judge Limbaugh was admitted to the State Bar of Texas and The Missouri Bar in 1977. He was engaged in private practice with the Cape Girardeau law firm of Limbaugh, Limbaugh and Russell from 1997-1978. In November 1978 he was elected prosecuting attorney of Cape Girardeau County and served from 1979-1982. He then returned to private practice with the Limbaugh firm from 1983 until September 1987 when he was appointed Circuit Judge, 32nd Judicial Circuit, for a portion of an unexpired term. He was elected in 1988 for the remainder of the unexpired term and re-elected in 1990 for a full six-year term. While circuit judge, he served as Presiding Judge of the 32nd Judicial Circuit and as judge of the Juvenile Court.

Judge Limbaugh has served on the Missouri Division of Youth Services Advisory Board and the governing boards of Southeast Missouri Hospital, Southeast Missouri Council and Great Rivers Council of the Boy Scouts of America, Southeast Missouri Symphony, Cape Girardeau United Way, Cape Girardeau Civic Center, Cape Girardeau and Jefferson City Community Concert Associations, Cape Girardeau Rotary Club, Cape Girardeau Jaycees, Greater Cape Girardeau Development Corporation, Centenary United Methodist Church, William Woods University, Southern Methodist University Law Alumni Association and Friends of the Missouri State Archives. He is a member, and past president, of the Cape Girardeau Rotary Club and is a Paul Harris Fellow. He is also a member of the American Bar Association and the American Judicature Society and is a Follow of the American Bar Foundation. He is a recipient of the University of Missouri-Columbia School of Law Distinguished Non-Alumnus Award, the Distinguished Eagle Scout Award from the National Eagle scout Association and the honorary degree of Legum Doctorem from William Woods University.

He was married on July 21, 1973, to the former Marsha D. Moore. They have two sons, Stephen III and Christopher. His father, Stephen N. Limbaugh, is a senior United States District Judge in St. Louis.

Judge Limbaugh was appointed by Governor John Ashcroft to the Supreme Court in August 1992. He was retained at the November 8, 1994 general election for a term expiring December 31, 2006. Judge Limbaugh served as Chief Justice, July 1, 2001 to June 30, 2003.

WILLIAM RAY PRICE JR., Kansas City. Born January 30, 1952 in Fairfield, Iowa.

Judge Price was educated at Keokuk, Iowa public schools; University of Iowa, B.A. *with high distinction*, religion, 1974; Yale University Divinity School, 1974-1975; Washington and Lee University School of Law, J.D., *cum laude*, 1978. He is the recipient of the Hancher-Finkbine Undergraduate Man of the Year Award from University of Iowa, 1974; Burks Scholar Individual Winner at Washington and Lee University School of Law, 1976.

Price was married to Susan Marie Trainor on January 4, 1975. They have two children: Emily Margaret Price and William Joseph Dodds Price.

Admitted to the Bar in 1978, Judge Price practiced law with a Kansas City law firm, 1978-1992. He served as chair of the Business Litigation Section and was a member of the executive committee.

He was president of the Kansas City Board of Police Commissioners; member of the *G.L. v. Zumwalt* monitoring committee in the United States District Court for the Western District of Missouri; member of the board of directors of the Truman Medical Center, the Together Center and the Family Development Center; chair of the Merit Selection Commission for United States Marshal, Western District of Missouri, 1990.

He is a member of Christian Church (Disciples of Christ), Phi Beta Kappa, Omicron Delta Kappa, Phi Eta Sigma and Kappa Sigma.

Judge Price served as Chief Justice of the Missouri Supreme Court from July 1, 1999 through July 1, 2001, and as vice president of the Conference of Chief Justices of the United States from August 1, 2000 through August 1, 2001. He is presently chairman of the Missouri Drug Court Commission.

Judge Price was appointed to the Supreme Court by Governor John Ashcroft on April 7, 1992. He was retained in 1994 for a term expiring December 31, 2006.

EDWARD D. ROBERTSON JR., Jefferson City. Born May 1, 1952, in Durham, N.C.

Robertson was educated in the public schools of Charleston, S.C.; North Kansas City and Hickman Mills, graduating from Ruskin High School in 1970.

He continued his education at Westminster College, Fulton (B.A., *cum laude*, 1974); Perkins School of Theology, Southern Methodist University, Dallas; University of Missouri-Kansas City School of Law (J.D., *with distinction*, 1977). While in law school, Robertson was an editor of the law review and was elected to the scholastic honorary, Order of the Bench and Robe.

Robertson earned a Master of Laws degree from the University of Virginia (1990), was a Danforth Fellow at Harvard University's, John F. Kennedy School of Government (1983), and was awarded a Doctor of Laws degree by Westminster College (1989). He currently serves as adjunct professor of constitutional law at Westminster College.

Robertson served as an assistant attorney general of Missouri, 1978, 1979; practiced law in Kansas City, 1979-1981, during which time he also served as the municipal judge of Belton; returned to government service as the deputy attorney general of Missouri, 1981-1985, and prior to his appointment to the Supreme Court, served as Governor John Ashcroft's chief of staff. Governor Ashcroft appointed Robertson a judge of the Missouri Supreme Court on June 26, 1985.

Robertson has served as a member of the Freedom's Foundation National Awards Jury and is a member of Omicron Delta Kappa, Phi Alpha Theta, Zeta Tau Delta, and Phi Alpha Delta. He was selected an Outstanding Young Man of America in 1984 and holds the Alumni Achievement Award from the University of Missouri-Kansas City and the Decade Award of the University of Missouri-Kansas City School of Law. In 1992, the Robert C. Goshorn Foundation named Robertson Statesman of the Year, an award for the State of Missouri's outstanding public servant. The Missouri Bar awarded Robertson its President's Award for outstanding contributions to the Bar in 1992. Robertson is the first sitting member of the judiciary to receive the award in the Bar's history.

Robertson is a member of the First United Methodist Church of Jefferson City where he chairs the Administrative Board, is a member of the Board of Trustees and teaches an adult Sunday School class. Robertson is an ordained deacon of the United Methodist Church and a member of the board of curators of Central Methodist College in Fayette.

Robertson and his wife, Renee are the parents of three children: Edward III (Kip), Matthew and Meredith. They reside in Jefferson City.

Judge Robertson assumed office on June 28, 1985. Retained in office by the voters of Missouri at the general election, November 4, 1986, his term expires December 31, 1998.

MARY R. RUSSELL was born July 28, 1958, in Hannibal, a seventh-generation Missourian, one of five children. Educated in Hannibal public schools; Truman State Univ., graduating summa cum laude with a B.S. and B.A.; University of Missouri-Columbia School of Law, 1983.

Upon graduation from law school, Judge Russell clerked for the Honorable George Gunn, of the Supreme Court of Missouri. She practiced law in Hannibal until her appointment to the Court of Appeals, Eastern District, 1995, where she served as Chief Judge from 1999-2000.

Active in many professional organizations, she is currently a member of the Missouri Bar Association; the American Bar Association; the National Association of Women Judges; the Bar Association of Metropolitan St. Louis; the Lawyers' Association; the Kansas City Metropolitan Bar Association; the Springfield Metropolitan Bar Association; the Cole County Bar Association; the 10th Circuit Bar Association; the Women Lawyers Association of St. Louis; and the Mid-Missouri Women Lawyers Association.

Always promoting the administration of justice, Judge Russell has served on the Commission on Retirement, Removal and Discipline of Judges; Missouri Lawyer's Trust Account Foundation; Commission to Select a Federal Judge for the Eastern District of Missouri, 1993; House of Delegates to the American Bar Association; Young Lawyers Council; numerous Missouri Bar committees; the Missouri Press-Bar Commission; and the Supreme Court Civil Rules Committee and Appellate Practice Committee. She is a past co-chair of the Appellate Practice Committee of BAMSL and has served as chair on other committees in BAMSL.

She has served on a variety of statewide boards and commissions including: the Board of Governors of Truman State Univ., president, 1996; Mo. State Senate Reapportionment Commission, 1991; the Mo. Council on Women's Economic Development; and Mo. Job Training Council.

Judge Russell is the recipient of numerous awards including: Faculty/Alumni Award, Univ. of Mo.-Columbia; Citation of Merit Award, UMC Law School; Distinguished Alumni Award, Truman State Univ.; Legal Services of Eastern Mo. Equal Justice Award; Soroptomist International Women Helping Women Award; Matthews-Dickey Boys' & Girls' Club Appreciation Award; and Kirkwood Citizen of the Year in 2003. She was named a Henry Toll Fellow in 1997 and a member of the Missouri Academy of Squires in 2002.

Active in many community organizations, Judge Russell is a member of the Jefferson City Rotary Club, PEO, the St. Louis Forum, and Grace Episcopal Church. She currently serves on the Board of Directors of the Matthews-Dickey Boys' and Girls' Clubs and the Missouri CASA Bd. She also volunteers at the Samaritan Center and as a Truancy Court Judge at Lewis and Clark Middle School, in Jefferson City. She was active in many organizations in Hannibal and Kirkwood prior to her move to Jefferson City. An easily approachable judge, she devotes much time to mentoring young women.

Judge Russell and her husband, Jim, a governmental consultant, live in Jefferson City. She was sworn in as a Supreme Court Judge, October 8, 2004, her term expires Dec. 31, 2006.

LAURA DENVIR STITH was born in St. Louis, on October 30, 1953. She was raised in St. Louis and graduated with honors from the John Burroughs School, in 1971. She received a National Merit Scholarship to attend Tufts University in Boston, Mass. While there, she was an Iglauer Fellowship Intern in Washington, D.C. for Sen. Thomas Eagleton, in 1973. She studied at the Univ. of Madrid through a program administered by the Institute of European Studies. In 1975, she graduated *magna cum laude* from Tufts, receiving her B.A. in political science and social psychology. She then attended the Georgetown Univ. Law Center, distinguishing herself as an editor of *Law and Policy in International Business Journal*. Judge Stith graduated *magna cum laude* from Georgetown in 1978.

Following her graduation from law school, Judge Stith served for one year as a law clerk to the Hon. Robert E. Seiler of the Missouri Supreme Court. In 1979, she moved to Kansas City and practiced law with the firm of Shook Hardy & Bacon, becoming a partner of the firm in 1984 and later co-founding the firm's appellate practice group.

In the fall of 1994, Governor Mel Carnahan appointed Judge Stith to the Missouri Court of Appeals, Western District. She was retained at the Nov. 1996 general election. During her time on the court of appeals, Judge Stith authored over 400 opinions in cases involving nearly every area of state law.

Governor Bob Holden appointed Judge Stith to the Supreme Court of Missouri effective March 7, 2001. She is the second woman in Missouri history to serve on the Supreme Court.

Judge Stith has been involved in many organizations in the legal community. She has served as chair of the Gender and Justice Jt. Committee of the Missouri Bar and the Missouri Supreme Court. She was a founding director of Lawyers Encouraging Academic Performance (LEAP), an inter-bar lawyers' public service organization. She has served as president and member of the board of directors of the Assn. for Women Lawyers (AWL) of Greater Kansas City; chair and vice chair of the Missouri Bar Civil Practice and Procedure Committee; chair of the Appellate Practice Committee and vice chair of the Tort Law Committee of the Kansas City Metropolitan Bar Association (KCMBA); and a member of the American Bar Association (ABA).

Judge Stith has served as a speaker on appellate practice at the annual conventions of ABA, Missouri Bar, Missouri Association of Trial Attorneys (MATA), and Missouri Organization of Defense Lawyers (MODL). She has also served as a speaker or moderator on civil procedure and evidence at Missouri Bar, KCMBA, AWL and Univ. of Missouri-Kansas City (UMKC) Continuing Legal Education programs; and as a speaker on gender bias at the Missouri New Judges School. She has authored many CLE publications, including a law review article, *Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Valparaiso Law Rev. 421 (Spring 2004).

Judge Stith has been involved in many community activities in Kansas City; serving as a mentor and tutor to young students at St. Vincent's Operation Breakthrough; and as guest speaker at many local civic organizations, talking about the law, the role of the courts and public service.

Judge Stith is married to fellow attorney Donald G. Scott. He served as a law clerk for Judge Warren D. Welliver of the Missouri Supreme Court. He is a shareholder in McDowell, Rice, Smith and Buchanan, P.C. in Kansas City. They have three daughters.

RICHARD TEITELMAN was born in Philadelphia, Pa. He received a bachelor's degree in mathematics, 1969 from the University of Pennsylvania.

After graduating from Washington University School of Law, St. Louis in 1973 he opened a solo law practice. In 1975 he joined Legal Services of Eastern Missouri, serving for 23 years, 18 of those as executive director and general counsel. His dedication to the Legal Services programs, which provides a wide range of programs for Missourians unable to pay for civil legal services, earned him many honors, including the prestigious Missouri Bar President's Award, the American Council for the Blind's Durward K. McDaniel Ambassador Award, the Women's Legal Caucus Good Guy Award, the Mound City Bar Association's Legal Service Award, the Bar Association of Metropolitan St. Louis, Young Lawyers Section Award of Merit, the St. Louis Bar Foundation Award, and the American Bar Association's Make a Difference Award.

Judge Teitelman served as president of the Young Lawyers Section of the St. Louis Bar Association and as the St. Louis Bar Association's president. He served as president of the St. Louis Bar Foundation. He serves as a board member, executive committee member, and past-president of the Bar Association of Metropolitan St. Louis. He served as a member of the Board of Governors, vice president and president-elect of The Missouri Bar. Her served as trustee of the National Council of Bar Foundations of the ABA and is a lifetime member of the Fellows of the ABA. He was chair of the ABA's Commission on Mental and Physical Disability Law. He is a member of the executive committee of the American Judicature Society.

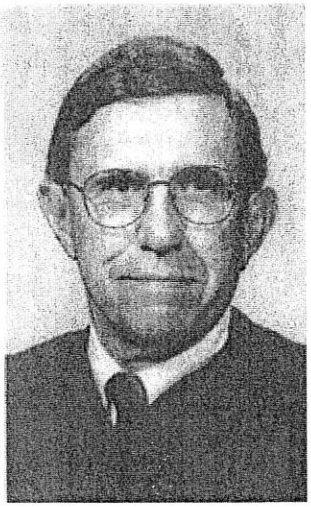
Judge Teitelman serves in a variety of roles in his pursuit of equality and access to justice for all. He is a member of the African-American/Jewish Task Force. He served on the midwest board of the American Federation for the Blind, the board of Paraquad, and the United Way Government Relations Committee. He is a board member of the St. Louis Public Library and a lifetime member of the Urban League of Metropolitan St. Louis.

He has received several honors, including the Missouri Bar's Purcell Award for Professionalism; the American Jewish Congress' Democracy in Action Award; the Lawyer's Association of St. Louis Award of Honor; and the St. Louis Society for the Blind's Lifetime Achievement Award.

He is an honorary dean of St. Louis University School of Law's DuBourg Society. He is an honorary member of the Order of the Coif of Washington University School of Law and its Eliot Society. He was honored as a Distinguished Alumnus at Washington University's 2002 Founders Day celebration and has been selected by The Council of State Governments to participate in the 2003 Toll Fellowship Program.

Judge Teitelman served on the Missouri Court of Appeals from 1998 to 2002. Richard Teitelman was appointed to the Missouri Supreme Court in 2002, becoming the first legally blind and first Jewish judge to serve on Missouri's highest court. He was retained at the 2004 general election.

IN MEMORIAM



Missourians lost a great legal mind and a respected teacher on July 30, 1995, with the death of Judge Elwood L. Thomas.

Judge Thomas was respected both as a "lawyer's lawyer" and as a "judge's judge." He was known as an expert in jury instruction and regarded as an effective communicator who could make complex legal issues clear. He taught many hundreds of law students during a 13-year tenure at the University of Missouri Law School, including two contemporaries on the state's high court, and was a frequent lecturer and guest instructor.

Judge Thomas was sworn in to the court on October 1, 1991, after being appointed by then-Governor John Ashcroft. Prior to his appointment, he was a partner in the Kansas City law firm of Shook, Hardy & Bacon.

Judge Thomas was born July 24, 1930, in Council Bluffs, Iowa. He attended Simpson College (B.A., 1954) and Drake University (J.D., 1957). During law school, he served as co-editor of the Drake Law Review, was elected to the Order of the Coif and received Iowa State Bar Association's Certificate of Merit as Outstanding Law Student. He practiced law in Iowa from 1957-1965 before coming to Missouri.

Judge Thomas was a major force on the Missouri Supreme Court Committee on Civil Instructions from 1976-1991, chairing the committee from 1981-1991. He also chaired The Missouri Bar Task Force on Evidence, 1982-1985. His leadership developed approved instructions for Missouri, which became a national model. In addition, he served as faculty for the National Judicial College in Reno, Nevada, for 12 years, as faculty for the National Institute for Trial Advocacy in 1982 and 1983, and from 1973-1992 as faculty for Missouri's Judicial College.

The author of numerous legal texts, Judge Thomas also received recognition including the Faculty-Alumni Award and the Distinguished Faculty Award from the University of Missouri-Columbia, the Missouri Bar President's Award, the Charles Evans Whittaker Award from the Lawyers Association of Kansas City, the 10 Year Faculty Service Award from the National Judicial College, the Spurgeon Smithson Award from The Missouri Bar Foundation, the Distinguished Non-Alumni Award from the University of Missouri-Columbia School of Law, the 1992 Drake University Law School Outstanding Alumni Award and the 1993 Simpson College Alumni Achievement Award.

Judge Thomas is survived by his wife Susanne; sons Mark Thomas of Seattle and Steven Thomas of Kansas City; and one daughter, Sandra Thomas Hawley of Kansas City.

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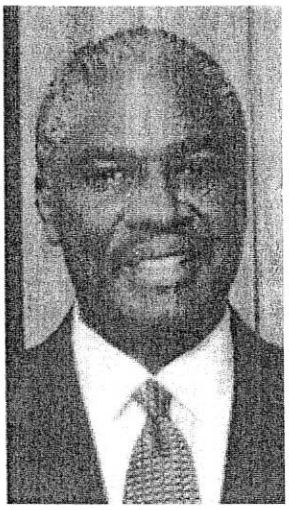


RONNIE L. WHITE was born May 31, 1953 in St. Louis.

He attended elementary school in St. Louis and graduated from Beaumont High School in 1971. Judge White received an Associate of Arts degree from St. Louis Community College in 1977. Two years later he earned a Bachelor of Arts degree in political science from St. Louis University.

Judge White graduated from the University of Missouri-Kansas City Law School in 1983. During law school he served as a legal intern for the Jackson County prosecutor. He later worked as a legal assistant for the Department of Defense Mapping Agency. White served as a trial attorney for the public defender's office in both the City of St. Louis and St. Louis County. In 1987 Judge White entered private practice as a principal for the law firm of Cahill, White and Hemphill. While in private practice he was elected to serve three terms in the Missouri House of Representatives.

In 1993 Mayor Freeman Bosley Jr. appointed Judge White city counselor for the City of St. Louis. While serving as city counselor, Judge White argued his first case before the Missouri Supreme Court in April 1994. One month later, Governor Mel Carnahan appointed Judge White to the Missouri Court of Appeals, Eastern District. In September 1995 he served as a special judge for the Missouri Supreme Court. During that same year he served as an adjunct faculty member for the National Institute of Trial Advocacy.

Governor Carnahan appointed Judge White to the Missouri Supreme Court in October 1995. He was retained in the November 5, 1996 election. His term expires December 31, 2008. Judge White served as Chief Justice from July 1, 2003 through June 30, 2005.

MICHAEL A. WOLFF served on the faculty of St. Louis University School of Law for 23 years before being appointed to the Supreme Court of Missouri in August 1998. His term as chief justice is from July 1, 2005 to June 30, 2007.

During his time in St. Louis, Judge Wolff was active in trial practice and was co-author of *Federal Jury Practice and Instructions, (4th edition)*, which is used by lawyers and judges throughout the country. As a law school teacher, he taught Civil Procedure, Trial Advocacy, Health Law, Criminal Sentencing, Constitutional Law and Administrative Law, among other courses. He was a recipient of the law school's Teaching Excellence Award. Judge Wolff was on the faculty of the University's School of Medicine and School of Public Health. He is a member of the American Law Institute. Judge Wolff is a member of the Missouri Sentencing Advisory Commission and served as its chair in 2004 and 2005.

In 1992, while on leave from the University, Judge Wolff was Transition Director for Governor-elect Mel Carnahan, served as Chief Counsel to the governor in 1993-1994, and was Special Counsel to the governor 1994-1998 after returning to the law school. As special counsel, Wolff was active in seeking solutions, including legislation that passed in 1998, for dealing with the problems of urban schools after the end of court ordered desegregation.

Wolff also served from 1993-1998 as chairman of the Board of Trustees of the Missouri Consolidated Health Care Plan, the health insurance program for public employees. Wolff was a candidate for attorney general in 1988 and 1992.

In addition to The Missouri Bar, Judge Wolff is a member of the Lawyers Association of St. Louis and the Bar Association of Metropolitan St. Louis. He has also served several charitable and educational organizations in various capacities.

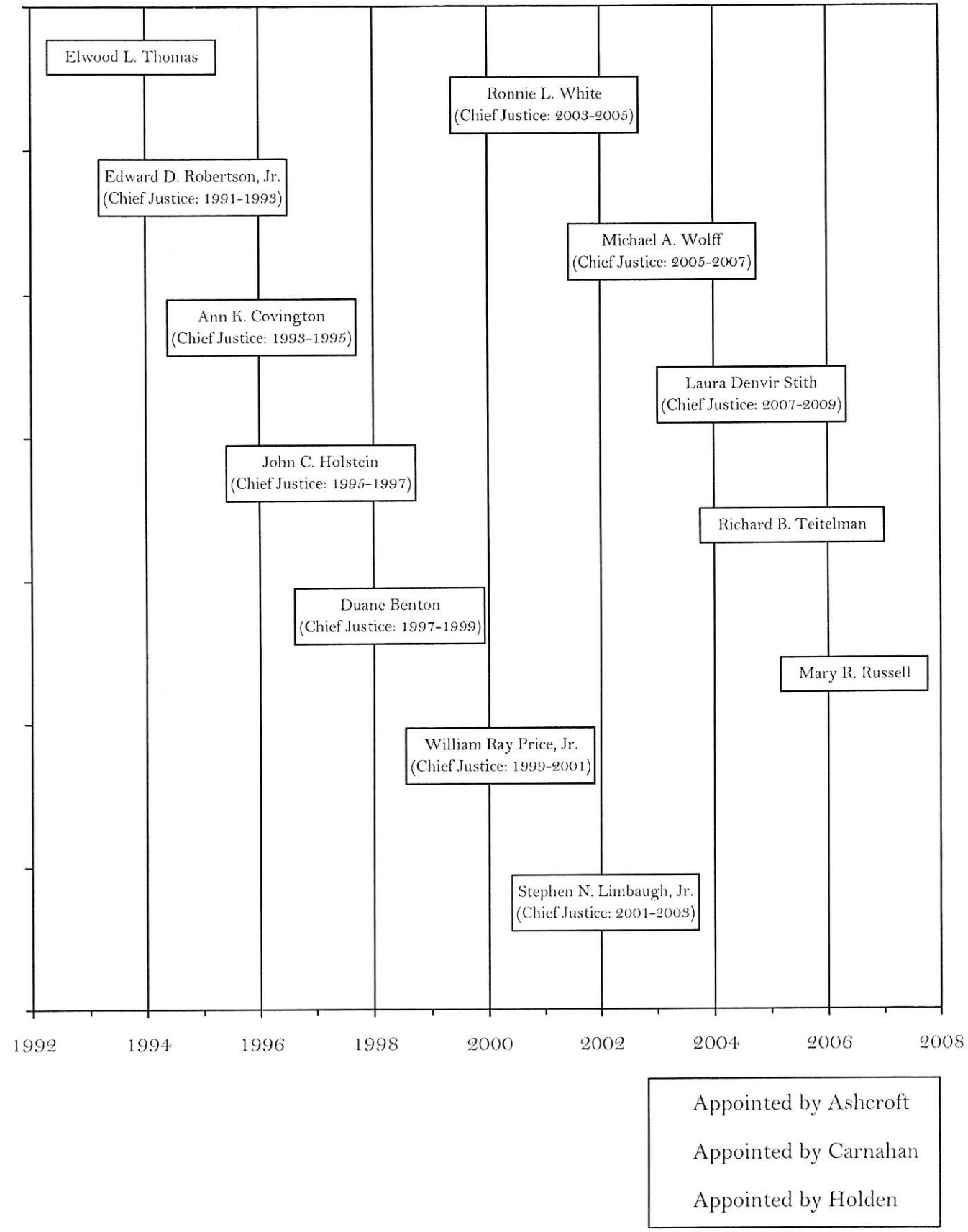
In his early legal career, Wolff was a federal court law clerk in 1970-1971 and served in legal services programs in St. Paul, Minnesota, and Denver, Colorado, and was director of Black Hills Legal Services in Rapid City, South Dakota, from 1973 to 1975. He joined the St. Louis University faculty in 1975.

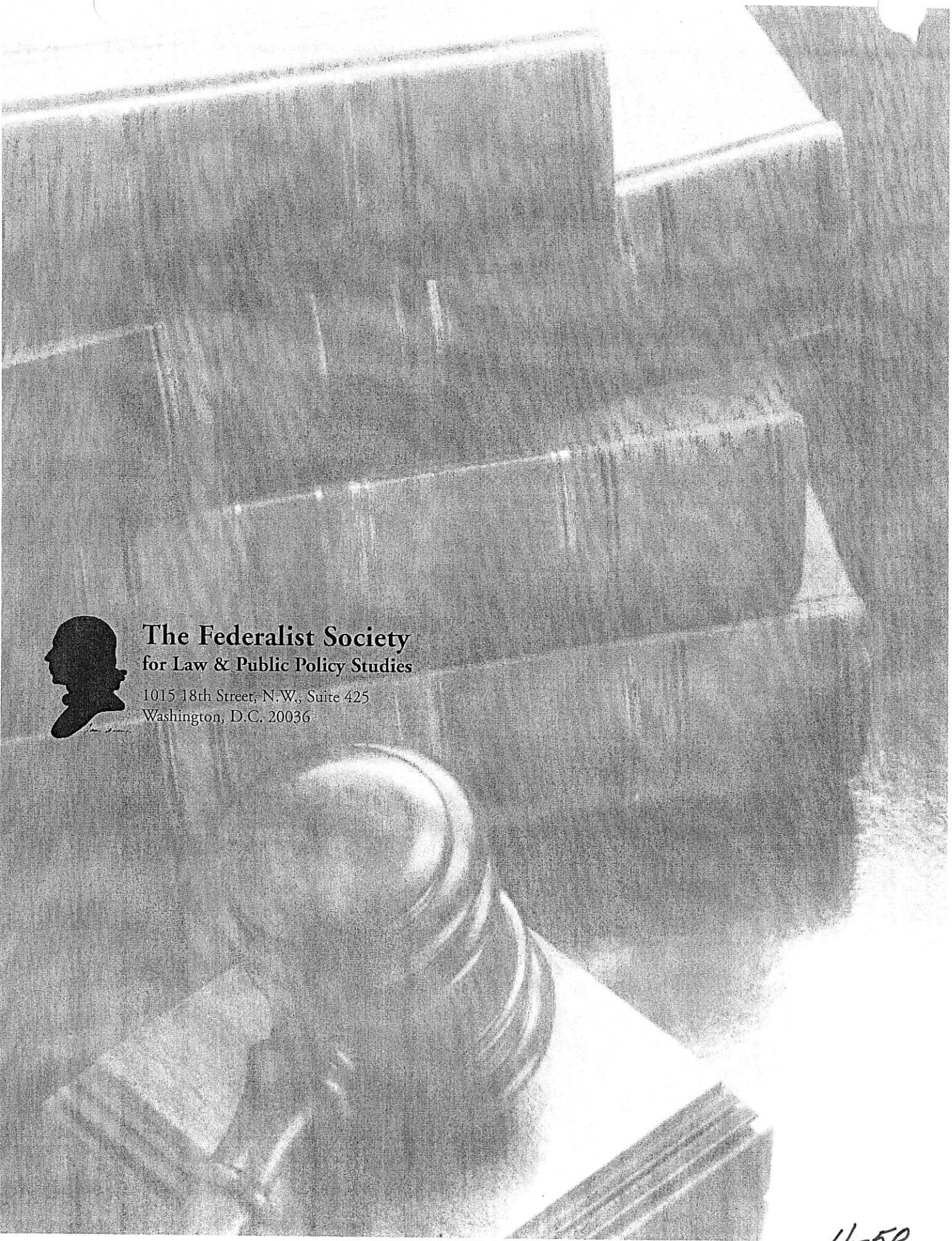
Judge Wolff was born April 1, 1945, in La Crosse, Wisconsin, and was educated in Catholic grade schools and Lourdes High School in Rochester, Minnesota. He graduated in 1967 from Dartmouth College, Hanover, New Hampshire, where he was editor-in-chief of *The Dartmouth*, the student daily newspaper. He received his law degree with honors from the University of Minnesota law school in 1970. During law school, he worked as a reporter and copy editor for *The Minneapolis Star*. He and his wife, Patricia B. Wolff, M.D., who is a pediatrician, have been married since 1968. They have two grown sons, Andrew Barrett Wolff, born in 1974, and Benjamin Barrett Wolff, born in 1977.

Appendix B

This table and the chart on the next page show how the Supreme Court of Missouri has changed over the last 15 years. From 1992 to 1995, every judge on the court had been appointed by Governor John Ashcroft. A majority of the current court's members were selected by Governors Mel Carnahan and Bob Holden. On May 18, 2007, Judge White (a Carnahan appointee) announced his resignation, effective July 6. The two-year term for chief justice runs from July 1 to June 30. Judge Thomas never served as chief justice.

Name	Governor	Appointed	Retained	Left Office	Chief
Edward D. Robertson, Jr.	Ashcroft	June 1985	1986	Resigned July 1998	1991–1993
Ann K. Covington	Ashcroft	December 1988	1990	Resigned Jan. 2001	1993–1995
John C. Holstein	Ashcroft	October 1989	1990	Resigned March 2002	1995–1997
Duane Benton	Ashcroft	August 1991	1992	Resigned July 2004	1997–1999
Elwood L. Thomas	Ashcroft	October 1991	1992	Died July 1995	—
William Ray Price, Jr.	Ashcroft	April 1992	1994 & 2006	*Still Serving*	1999–2001
Stephen N. Limbaugh, Jr.	Ashcroft	August 1992	1994 & 2006	*Still Serving*	2001–2003
Ronnie L. White	Carnahan	October 1995	1996	Resigned July 2007	2003–2005
Michael A. Wolff	Carnahan	August 1998	2000	*Still Serving*	2005–2007
Laura Denvir Stith	Holden	March 2001	2002	*Still Serving*	2007 –
Richard B. Teitelman	Holden	June 2002	2004	*Still Serving*	—
Mary R. Russell	Holden	October 2004	2006	*Still Serving*	—


Elwood L. Thomas
Edward D. Robertson, Jr.
(Chief Justice: 1991-1993)
Ann K. Covington
(Chief Justice: 1993-1995)
John C. Holstein
(Chief Justice: 1995-1997)
Duane Benton
(Chief Justice: 1997-1999)
William Ray Price, Jr.
(Chief Justice: 1999-2001)
Stephen N. Limbaugh, Jr.
(Chief Justice: 2001-2003)
Ronnie L. White
(Chief Justice: 2003-2005)
Michael A. Wolff
(Chief Justice: 2005-2007)
Laura Denvir Stith
(Chief Justice: 2007-2009)
Richard B. Teitelman
Mary R. Russell
1992
1994
1996
1998
2000
2002
2004
2006
2008
Appointed by Ashcroft
Appointed by Carnahan
Appointed by Holden



The Federalist Society
for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036

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AFP AMERICANS FOR PROSPERITY
KANSAS

February 12, 2009

House Concurrent Resolution No. 5005

Mr. Chairman and members of the committee,

I am proudly before you today, representing the more than 30,000 members of Americans for Prosperity-Kansas.

HCR 5005 is a step in the right direction for addressing the ever-increasing demand for judicial selection reform. Polling indicates that 63% of Kansas voters support changing the nominating commission to have much more public and legislative input and less from the state's lawyers. This legislation retains the Governor's obligation to select an individual for the court and more importantly, allows public input in a manner that resembles the selection process at the federal level.

Politics Are Part of the Process

Despite what some might say, politics have been and always will be a part of the selection process. What HCR 5005 does is provide a transparent vehicle for this political process. The recent appointment of Overland Park attorney Dan Biles to the Kansas Supreme Court is further evidence of the role politics plays under the current system.

The political connections Mr. Biles has to Governor Sebelius and the Kansas Democratic Party are reason enough to allow public input via Senate deliberations, prior to appointment to such an important role. The fact that Mr. Biles is a law partner of Larry Gates, Chairman of the Kansas Democratic Party, begs the question of whether the second largest political party in Kansas would have an undue influence over a Supreme Court Justice. The same could be said if the relationship was with the Chairman of the Kansas Republican Party.

More than ever, the citizens of this state want increased transparency in the way government operates. The legislature has made some initial, key steps in providing transparency in the way state government spends taxpayer money. Why stop short of applying it to our judicial selection system?

Accountability to the People

A primary factor contributing to lagging public confidence in the basic fairness of our judiciary is the growing sense that judicial selection in Kansas is controlled by an elite group of societal managers who, while purporting to be objective and neutral, in fact exercise political control over one-third of our government. Kansans, with our basic faith in our democratic institutions of government, are generally quite accepting of the judicial rulings handed down by our courts, even when they are adverse, so long as the system does not violate our fundamental common sense of fair play. The recent political acrimony over certain important judicial decisions in

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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. 5005 which would return the selection of Kansas appellate and supreme court 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 carry 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.

It is true that 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.

Legislative Testimony
Before the House Committee on the Judiciary
Rep. Lance Kinzer, Chairman
February 12, 2009

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE ON THE JUDICIARY:

My name is Michael DeBow. I have been a professor of law at Samford University in Birmingham, Alabama, for just over twenty years. I submit this testimony in support of HCR 5005, not on behalf of my employer or any other entity, but on my own as a law teacher concerned with the procedures used to select state judges.

My testimony today draws in part on some other work I've done on the issue of state judicial selection. I have read a good bit of the relevant social science research on the subject and I have tried to make its findings known to lawyers engaged in the debate. (For those who might be interested, a short article of mine summarizing what I've learned to date was published last year and is available online.[i]) In other words, what I say here today is based entirely on research conducted by others. Accordingly, I would like to remind members of the committee of the ancient advice against shooting the messenger.

As I understand it, HCR 5005 is designed to reduce the influence of the Kansas bar on the filling of vacancies on the Kansas Supreme Court by 1) reforming the supreme court nominating commission so that all commissioners are chosen by elected officials (rather than a majority being chosen by the Kansas bar) and lawyers no longer comprise a majority of its members, and 2) requiring Senate confirmation of the Governor's nominee. These two changes would, I believe, ameliorate two problems with the current nominating commission; the lawyer majority on the current commission will tend to give too much weight to the financial interests of lawyers, generally speaking, and it will tend to give too much weight to the ideological views of lawyers, generally speaking.

Such a view of the current commission may sound harsh, but is backed up by an impressive body of social science research. To restate the first problem: lawyers can be accurately viewed as an interest group, as lawyers in politics and government tend to favor the interests of lawyers as a group. To restate the second problem: lawyers as a group are more liberal than the public at large. Thus, a selection mechanism that gives decisive weight to lawyers' input – as Kansas's appears to – will yield judges whose views diverge more from the views of average Kansans than would be the case if lawyers did not dominate the process. Let me expand on these two points.

I. The self-interest of lawyers.

It is widely recognized that any type of so-called "merit" system involves the following trade-off: overt, out-in-the-open electoral politics is replaced mostly by committee politics. A "merit" system thus raises the possibility of back-room deals and less-than-transparent governance – or, in the memorable words of one political scientist. "a

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somewhat subterranean process of bar and bench politics, in which there is little popular control."[ii] The murkiness of this "somewhat subterranean process" is compounded if there is a lawyer majority on the commission, for the simple reason that the lawyers will be tempted to use their position to choose nominees on the basis of their likely positive impact on lawyer incomes. This danger seems particularly acute in areas such as punitive damages and other "tort reform."

There is, I submit, substantial empirical support for this view. One recent study by Andrew Hanssen, an economist at Montana State University, investigated the support of lawyers' groups for the merit plan and found that "the self-interest of lawyers" was the strongest explanation for their support of the merit plan – for two reasons. "First, merit plan procedures involve lawyers and bar associations prominently in the selection process. Second, by reducing a judge's susceptibility to political pressure, the procedures increase the amount of litigation in the state. This article finds that merit plan procedures are associated with between eighteen and thirty-two percent more filings in state supreme courts between 1985 and 1994."[iii]

Another, older study by two economists at Emory University, Paul Rubin and Martin Bailey, concluded that "[t]he shape of modern product liability law is due to the interests of tort lawyers." Their research showed that the rejection of the privity requirement and the adoption of contributory negligence were driven primarily by "the preferences of attorneys, not of litigants or judges."[iv]

An earlier study by University of Chicago law professor Richard Epstein reached the same conclusion about the power of the bar as an interest group in combating product liability reform efforts.[v]

Finally, University of California economist Michelle White has explained the interest lawyers as a group have in increasing the complexity of our legal system, and thus increasing the demand for legal services.[vi] She illustrated this point with respect to complexity of the tax code, which she says is supported by "tax professionals" (including lawyers) in a self-interested fashion.[vii]

The claim that lawyers constitute an interest group is not meant as a criticism of lawyers. We all act out of self-interest, most of the time. Rather, my point is that there is no reason to believe that lawyers are any better than other humans at ignoring their own self-interest. If you give any interest group a majority on the nominating commission, you would create the same potential for, and likelihood of, self-interested behavior. Wouldn't you expect that if a majority of the commissioners were physicians, they would look for judicial candidates with sympathetic views about malpractice litigation? Similar self-interestedness could be expected from a commission majority of public school teachers, or plumbers, or hairdressers. For this reason, the nominating commission should not be dominated by a single interest group – lawyers, or otherwise.

The primary benefit from having lawyers on the commission is that they have a more informed view of the prior judicial performance and/or practice experience of candidates

for court vacancies. However, this expertise can still be made available to the non-lawyer members even when the lawyers comprise less than a majority of the commission.

II. The ideology of lawyers.

A recent law review article portrays the legal profession as "a blue state."[viii] There is much to this view. If the ideological center of the legal profession is to the "left" of the ideological views of the public as a whole, then a nominating commission dominated by lawyers will tend to skew further to the political left than would a commission that is not dominated by lawyers. I think that is the case.

Certainly the Association of Trial Lawyers of America – recently renamed the American Association for Justice – is widely recognized as a politically liberal interest group. The broader-based American Bar Association also takes positions on numerous public policy issues, and its announced liberal position on quite a few topics – including abortion and capital punishment – has generated some debate among its membership. Furthermore, there is some evidence that the ABA's role in vetting nominees to the federal courts has been co-opted by partisanship, and has treated Democratic nominees more favorably than Republican nominees.[ix] This is consistent with a (relatively) left-liberal bar, but the evidence is somewhat mixed.

Data on contributions to political candidates also support the idea that lawyers tend to be more liberal than the public at large. A recent study by Northwestern University law professor John McGinnis and two co-authors looked at political campaign contributions by professors at the "top" 21 law schools during the years 1992-2002.[x] They found that "law professors contribute to Democrats in a proportion much higher than the overall American population [78% to 33%] and . . . contribute to Republicans in a proportion much lower than the overall American population [14% to 50%]." A study just last year found that 92.7% of the contributions of 635 law professors went to Democratic candidates for President in 2008, and only 7.3% went to Republican candidates.[xi] In short, and probably to no one's surprise, the legal academy skews quite left.[xii]

It is not likely that the bar as a whole is as liberal as law professors are, but I think it's also reasonable to think that the lawyers as a group are more liberal than the public – particularly in a relatively conservative state like Kansas. Lawyers have all attended law school, of course, and been exposed to the legal academy's self-congratulatory view of legal activism of all types. Furthermore, lawyers' self-image is, to some degree, dependent on their having a more positive view of the legal system than do members of the general public. Finally, because the incomes of lawyers will be positively correlated with the size and significance of the legal system, lawyers tend to be more appreciative of increases in the size and significance of the legal system, when compared with the general public.

This difference in opinion seems particularly acute with respect to such topics as criminal defendants' rights, same-sex marriage,[xiii] and public school finance reform. As with the federal constitution, activist lawyers favor using elastic language in state constitutions –

such as due process and equal protection guarantees – to "discover" new rights in these areas. Such state constitutional litigation actually follows a suggestion made by U.S. Supreme Court Justice William Brennan who, in 1977, urged state supreme courts to continue the work of the activist Warren Court at the state level.[xiv]

Such state supreme court activism will, I submit, receive more support from the bar than from the public as a whole – particularly in conservative states like Kansas. I can think of no reason why the Kansas supreme court nominating commission should contain a majority of members from a subset of the population which tends to hold views to the left of the population as a whole.

III. Summing up

By reducing the influence of the Bar in the selection of Kansas supreme court justices, the changes in procedure specified in HCR 5005 should result in a more transparent selection process that gives less weight to the interests of lawyers as a group and more weight to the ideological views held by the average Kansan as compared with the views of the average lawyer.

Thank you very much for your time and attention.

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[i] Michael E. DeBow, *State Judicial Selection: Once More Unto the Breach*, Engage: The Journal of the Federalist Society's Practice Groups, vol. 9, no. 1 (Feb. 2008), pp. 128-131, http://www.fed-soc.org/doclib/20080313_Judicial.Selection.Engage9.1.pdf In addition, I chaired the committee that wrote the report, *The Case for Partisan Judicial Elections* (Federalist Society, 2001), http://www.fed-soc.org/publications/pubid.90/pub_detail.asp (without footnotes), reprinted (with footnotes) at 33 U. Tol. L. Rev. 393 (2002).

[ii] Harry P. Stumpf, American Judicial Politics 167 (1988) (describing Richard A. Watson & Rondal G. Downing, The Politics of the Bench and Bar (1969)).

[iii] F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 Pub. Choice 79 (2002).

[iv] Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. Legal Studies 807 (1994).

[v] Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 Am. Econ. Rev. 311, 313-14 (1988).

[vi] Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 Int'l Rev. L. & Econ. 381 (1992), http://econ.ucsd.edu/~miwhite/complexity.pdf

[vii] Michelle J. White, *Why Are Taxes So Complex and Who Benefits?*, 47 Tax Notes 341 (Apr. 16, 1990), http://econ.ucsd.edu/~miwhite/tax-complexity.pdf

[viii] Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 Fordham L. Rev. 1339 (2006).

[ix] James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeal for Political Bias, 1989-2000*, 17 J.L. & Politics 1 (2001), http://ssrn.com/abstract=290186

[x] John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 Geo. L.J. 1167 (2005).

[xi] Paul L. Caron, *Law Prof Presidential Campaign Contributions: 95% to Obama, 5% to McCain*, Sept. 10, 2008, http://taxprof.typepad.com/taxprof_blog/2008/09/law-prof-presid.html

[xii] For more on this point, see Peter Schuck, *Leftward Leaning*, Am. Lawyer, Dec. 2005, at 77, http://www.law.yale.edu/news/1855.htm, and James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 Yale L. & Pol'y Rev. 5 (2005).

[xiii] See William C. Duncan, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. Pub L. 137 (2001).

[xiv] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Liberties*, 90 Harv. L. Rev. 489 (1977). See also William J. Brennan, Jr., *The Bill of Rights and the Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L. Rev. 535 (1986).

BEFORE THE JUDICIARY COMMITTEE
KANSAS HOUSE OF REPRESENTATIVES

HCR 5005, 2009 Session
Changing Judge Selection System

Hearing Testimony, February 12, 2009

Richard J. Peckham
Chairman, Kansas Judicial Review
105 E. Rhondda
Andover, KS 67002
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SPEAKING IN FAVOR OF HCR 5005

I have practiced law 31 years and currently serve as Chairman and General Counsel for Kansas Judicial Review, a committee which educates the public regarding the Kansas judicial system, its structure, function, strengths and weaknesses. KJR, along with the District Court Judges, Charles Hart and Robb Rumsey, successfully secured a Federal Court injunction overturning Canon 5 of the Kansas Code of Judicial Conduct as violative of the Constitutional rights of the Kansas voters and Judges, restoring their rights to speak and hear information concerning the philosophies, backgrounds and temperaments of Judge candidates. A few Kansas lawyers have controlled the Judge selection process for too long, blocking the flow of information about Judge qualifications to the public, resulting in both an uneducated electorate and a corrupted judicial appointment process for appellate and supreme court positions.

EXAMPLE: Topeka attorney, Mark Braun, was founder and president of Republicans for Sebelius, a PAC to re-elect Governor Sebelius after declaring his candidacy for a District Court appointment, he continued to serve as a PAC Officer and raise money for the Sebelius campaign in violation of the Judicial Code of Conduct as it applies to attorney candidates for the bench. Though billed as a "merit selection",

Gov. Sebelius ignored the law and chose Braun, based strictly on political patronage and financial contributions.

EXAMPLE: Recently the Governor was presented with three names from which to pick a new Supreme Court Justice. Two of the nominees were distinguished and experienced lower court judges. They were bypassed for Kansas City attorney Dan Biles who had made substantial financial contributions to Gov. Sebelius' campaigns and served as Democratic State Party Chairman. He had no judicial experience, and his legal representation of the Kansas State Board of Education in the School Finance Case, Montoy vs. State, was poorly done. Once again, political patronage.

The HCR 5005 configuration would shine the light of day into a dark mushroom farm where a very small interest group of lawyers controls the Judge selection system, blocking scrutiny by the public and the press.

I urge every Kansas legislator to support openness and public participation through the Senate confirmation process.

Mushrooms are grown in thick manure in the dark, but Judges should not be grown in mushroom farms.

A BROAD BASE OF DECISION MAKERS IS THE BEST WAY TO SECURE THE PUBLIC INTEREST.

Richard J. Peckham

Testimony of
Kris W. Kobach
Professor of Constitutional Law
University of Missouri (Kansas City)

Committee on the Judiciary
Kansas House of Representatives

February 12, 2009

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Introduction

Mr. Chairman and Members of the Committee, I come before you today in my capacity as a Professor of Constitutional Law at the University of Missouri (Kansas City). It is an honor and a privilege to testify before you today regarding what is one of the most important votes that you will take as Representatives of the People of Kansas—a vote on the method of selecting Supreme Court Justices. My testimony should not be taken as an official position of the UMKC School of Law, because the UMKC School of Law does not take positions on pending legislation.

I will present two factors that I believe weigh strongly in favor of HCR 5008: (1) the understandings of the Framers of the U.S. Constitution when they proposed the federal model on which HCR 5005 is based—understandings that proved completely correct; and (2) the fact that the federal model ensures merit in judicial appointments better than the so-called "merit-based judicial selection commissions." Before I do so, let me provide some background information that may be useful to the committee.

The Various Systems

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

Today, the methods of selecting supreme court justices in the 50 states are as follows. 22 states use some system of selection by nominating commission, most with retention elections thereafter. 22 states elect their supreme court justices. And the remaining six states use some variation of the federal model of appointment with confirmation by the political branches of government. (Those six states are California, Maine, New Hampshire, New Jersey, South Carolina, and Virginia.) HCR 5005 would bring two central aspects of the federal model to Kansas—(1) Senate confirmation, plus (2) more freedom for the executive to make his or her selection (and be held politically accountable for doing so).

The Virtues of the Federal Model

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

The most famous defense of the federal model of judicial appointment was written by Alexander Hamilton in *Federalist Paper No. 76*. Hamilton compared the

system of executive appointment to every other framework conceivable. His words ring as true today as they were in 1788.

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

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

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

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

In short, Hamilton surmised that Senate confirmation "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters…" Plainly the 220 years that this system has been in operation have proven Hamilton correct. Although we all have our favorite U.S. Supreme Court Justices and there may be others whose opinions we dislike, it is difficult to make the case that any of the Justices of the U.S. Supreme Court have been unqualified

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

Moreover, it is also correct that the possibility of Senate rejection has pushed U.S. Presidents to nominate Justices with unassailable credentials. Executives whose nominees do not have to run the gauntlet of Senate confirmation may be tempted to nominate judges on the basis of personal loyalty, rather than on the basis of qualifications and experience. That is exactly the problem with the current system in Kansas.

HCR 5005 Will Produce Justices of Higher Merit than does the Status Quo System

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

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

Some of these qualifications are evident on the surface of a Justice's resume, such as academic talent and positions held prior to elevation to the Supreme Court. I have presented to this committee the biographies of the Justices of the Kansas Supreme Court, as well as the biographies of the Justices of two states that use the federal model—New Jersey and Maine. I invite you to compare the qualifications of the Justices on the three courts. I think you will agree that it is very difficult to make the case that the federal model results in a less qualified court. On the contrary, the opposite seems to be the case.

This is not an accident. The federal model forces a governor to place his or her reputation on a judicial nominee. Selection rests more squarely on his or her shoulders, and Senate confirmation process can have profound consequences not only for the nominee, but for the governor as well. Consequently, governors naturally seek those nominees with unassailable credentials. Their own political survival may depend on it.

In contrast, the nominating commission system operates behind closed doors; and the members of the commission are unknown to the vast majority of people in the state. Indeed, my guess is that most state legislators—people very well acquainted with Kansas government—would be hard pressed to name even one member of the nominating commission. No single elected official has to stand up and take credit or blame for the nominee. The Governor escapes responsibility because he or she is limited only to the

names put forward by the commission. In contrast, HCR 5005 retains a commission, but allows the Kansas Governor to return all three names and ask for another set of choices. This forces the Governor to take a much greater level of responsibility for the nominee he or she chooses.

After fifty years of experimentation with the current system, the results are quite clear. The current system allows the Governor to escape any political responsibility for his or her choices, because the executive's hands are tied. And because there is no public scrutiny of nominees before the politically-accountable Senate, a mediocre candidate whose only distinction is being well connected in the bar and a political supporter of the Governor can be appointed. Thus we have the great irony of the nominating commission system: a system that was supposed to remove politics from judicial selection actually makes it *more* likely that political connections will dominate the system, because there is no public scrutiny of nominees and the Governor is not forced take responsibility for his or her choice.

Alexander Hamilton words from 1788 ring true. His arguments have proven to be exactly correct. I urge you to look at the incontrovertible evidence before you, and bring the selection of judges in Kansas out from behind closed doors. The people of this great state deserve no less.

Honorable Robert E. Davis
Chief Justice 2009 - Present
Justice, Kansas Supreme Court 1993 - 2009

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

A member of the U.S. Army Judge Advocate General's Corps, Justice Davis served as trial counsel in the Republic of Korea and as government appellate counsel in Washington D.C. from 1964- 1967. Memberships include the Governor's Advisory Commission on Alcoholism from 1971-76, St. John Hospital, Leavenworth, Board of Trustees (chairman, 1980 to 1984), Leavenworth County Community Corrections Board (director and president, 1980-84), Leavenworth National Bank and Trust Co. (general counsel and board of directors, 1972- 1984), Leavenworth Historical Society (director, 1970-75), and St. Mary College, Leavenworth, (council member 1984). He also has been the Supreme Court's liaison for Alternate Dispute Resolution (1993) and Kansas Lawyer Specialization (1993), a member of the Kansas Department of Corrections Task Force on Female Offenders (1990), and a member and officer of the American Inns of Court since 1992. He presently is a member of the Governor's Adoption Reform Task Force.

Honorable Lawton R. Nuss
Justice, Kansas Supreme Court 2002 -

Lawton R. Nuss was born in Salina, Kansas, in 1952. After graduating from Salina High School in 1970, he attended the University of Kansas on a Naval Reserve Officers Training Corps scholarship. He graduated in January 1975 as a Distinguished Military Graduate with a Bachelor of Arts in English and History and was commissioned a second lieutenant in the United States Marine Corps. He then served as a combat engineering officer with the Fleet Marine Force Pacific. After his discharge in 1979, he entered law school at the University of Kansas and graduated in May 1982.

Justice Nuss began his law practice with the Salina firm of Clark Mize & Linville, Chartered in August 1982. For the next 20 years, he was involved in a wide range of legal issues and proceedings. He represented corporations and individuals as plaintiffs as well as defendants in civil cases. He also represented the government as well as defendants in criminal cases. During this time his professional activities included serving as Chairman of the Board of Editors for the Journal of the Kansas Bar Association; as President of the Kansas Association of Defense Counsel, where he also received the Distinguished Service Award; as President of the Saline-Ottawa County Bar Association; and as a mediator for the United States District Court for the District of Kansas. Justice Nuss also served as Chairman of the Salvation Army Advisory Board, and as a member of the Board of Trustees of St. John's Military School, the Board of Directors of the Salina Child Care Association, the Board of Directors of the Friends of the Salina Public Library, the Board of Advisors of the Coronado Area Council of Boy Scouts, and the Site Council for Roosevelt-Lincoln Middle School. He was appointed to the Supreme Court by Governor Bill Graves in August 2002, becoming the first Court member in more than 20 years to move directly from the bar to the bench.

Justice Nuss is a graduate of the Appellate Judges School at New York University School of Law. He is a member of the Dwight D. Opperman Institute of Judicial Administration at New York University School of Law, the American Judges Association, and the Kansas Bar Association. He serves on the Board of Editors for the Journal of the Kansas Bar Association and on the Advisory Board for the Topeka-Shawnee County Youth Court. Justice Nuss is the author of several published legal and historical articles and is a frequent presenter for legal and lay audiences.

Justice Nuss has five children. He and his wife Barbara live in Topeka.

Honorable Marla J. Luckert
Justice, Kansas Supreme Court 2003-

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

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

Justice Luckert has served as president of the Kansas Bar Association, the Kansas District Judges Association, the Kansas Women Attorneys Association, the Topeka Bar Association, the Sam A. Crow Inn of Court, and the Women Attorneys Association of Topeka. She is a fellow of the American Bar Foundation and the Kansas Bar Foundation. She has served as a delegate to the American Bar Association's (ABA) Conference of State Trial Judges and of the Young Lawyer's Division Assembly. She has served on several ABA committees, and been a member of the National Conference of Bar Presidents and the Southern Conference of Bar Presidents. She has served as a member of the American Inn of Court education committee. She is also a member of the American Judges Association, the National Association of Women Judges, the American Judicature Society, the National Center for State Courts and the Supreme Court Historical Society. She has received awards for outstanding achievement or service from the Kansas Bar Association, the Kansas Women Attorneys Association, and other bar groups.

She has also been active in numerous community groups, and has received the outstanding volunteer award from her children's elementary school and the Topeka YWCA's Woman of Excellence award. She served on the Board of Governor's of the Washburn University School of Law Alumni Association for several years. She and her spouse have three children.

Honorable Carol A. Beier
Justice, Kansas Supreme Court 2003-

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

Before joining the Court on September 5, 2003, she had served as a judge of the Court of Appeals since February 2000.

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

Justice Beier is a member of the American Judicature Society, the National Association of Women Judges, the Kansas Bar Association, the D.C. Bar, the Kansas Women Attorneys Association, and the Wichita Bar Association. She has been appointed to serve on the Kansas Children's Cabinet. She is a past officer and board member of the statewide and city women's bars and has chaired and served on numerous bar committees and on the boards of several community organizations. Justice Beier is the author of several legal publications and is a frequent presenter for legal and lay audiences.

Justice Beier is married to Richard W. Green and has three children.

Honorable Eric S. Rosen
Justice, Kansas Supreme Court 2005-

Eric S. Rosen was born in Topeka, KS, on May 25, 1953. He earned both a Bachelors and a Masters Degree with honors from the University of Kansas. He received his law degree from the Washburn University School of Law in 1984.

Justice Rosen was sworn in as a Justice of the Supreme Court in November 2005 following 12 years of service as a State District Court Judge in Shawnee County. His assignments at the district court included criminal and civil cases, as well as two years as chief judge of the District Court's Domestic Division from 1993 to 1995. During his judicial career, he served as an adjunct professor for Washburn University School of Law, a lecturer at the Menninger School of Law and Psychiatry, and presently an instructor at the Kansas Law Enforcement Training Center. Additionally, Justice Rosen was appointed to hear numerous cases for the state Court of Appeals. In July 2002, the Chief Justice appointed him to the Kansas Sentencing Commission.

Also in 2002, Justice Rosen was appointed to the 24-member Presidential commission charged with commemorating the 50th anniversary of the *Brown v. Board of Education* decision of the United States Supreme Court. In January of 2002, he received the Martin Luther King Living the Dream Humanitarian Award. In March 2001, he was awarded an honorary diploma and certificate of honor for his many contributions to Topeka High School. In April of 2000, he received the Attorney General's Victim Service Award for Outstanding Judge and further was recognized as Kansan of Distinction for Law in 1999 by the *Topeka Capital-Journal*.

Prior to his appointment to the bench, he was a partner in the law firm of Hein, Ebert and Rosen. In addition, he previously served as Associate General Counsel for the Kansas Securities Commissioner, as an Assistant District Attorney and Assistant Public Defender in Shawnee County, Kansas.

Justice Rosen is a graduate of the Appellate Judges School at New York University School of Law and a member of that law school's Dwight D. Opperman Institute of Judicial Administration. Other professional activities include President of the Sam A. Crow Inns of Court 2004-05, and as a member of American Judges Association, American Judicature Society, Kansas District Judges Association, the American, Kansas and Topeka Bar Associations.

Justice Rosen is a member of numerous community and neighborhood groups, including The Brown Foundation, the Jerome Horton Foundation, former Vice-Chair of Community Corrections Advisory Board, former President of Topeka High School Site Council, Topeka High Booster Club, Indian Woods Neighborhood Association, Temple Beth Shalom, and is an active YMCA member.

Justice Rosen is married to Elizabeth A. (Libby) Rosen and has four adult children and four grandchildren.

Honorable Lee A. Johnson
Justice, Kansas Supreme Court 2007-

Lee A. Johnson was born in Caldwell, Kansas, on June 28, 1947. He received a B.S. in Business Administration from the University of Kansas in 1969. After serving two years on active duty with the U.S. Army, Corps of Engineers, he became a licensed, multi-line insurance agent. In 1977, he entered Washburn University School of Law and graduated Summa Cum Laude with the class of 1980. Upon graduation, he practiced law in Caldwell, Kansas; first in partnership with Don B. Stallings and later as a sole practitioner. He was appointed to the Kansas Supreme Court effective January 8, 2007, following his tenure on the Kansas Court Appeals from 2001 - 2007.

Justice Johnson was active in numerous community organizations, including serving on the Sumner Mental Health board for 16 years. He served as Mayor of Caldwell in 1975-1976, and as Caldwell City Attorney from 1987 to 1997. He is a member of the Kansas and Sumner County Bar Associations, serving as the local bar association president in 1992.

Justice Johnson and his wife, Donna, have two children, Jordan and Jennifer.

 to be sworn in 3/6/09

GATES, BILES, SHIELDS & RYAN, P.A.

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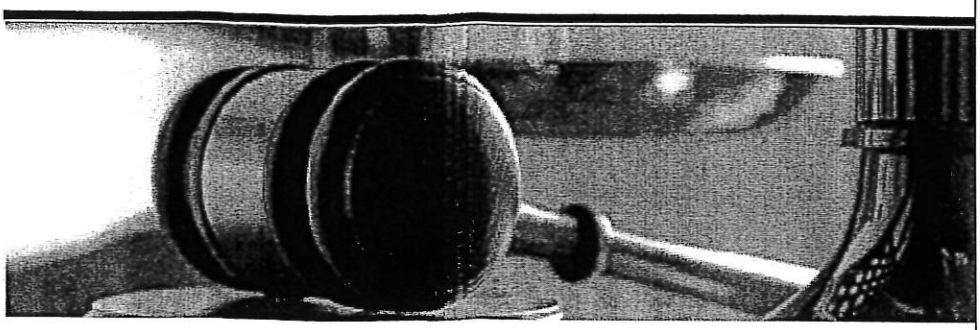

ATTORNEYS

» Lawrence C. Gates
» Dan Biles
» Eldon J. Shields
» Thomas Kelly Ryan
» Cathy G. Zumbehl
» Nancy R. Ryan
» Jennifer L. Robinson
» Robert F. Flynn
» Thomas E. Hammond, II

ATTORNEY INFORMATION

Dan Biles

Partner

Reported Decisions

Practice Areas

Commercial Litigation; Education Law; Administrative Law; Appellate Practice; Real Estate Transaction; Employment Law; Transportation; Municipal Financing; Civil Rights; First Amendment; Media Law.

Contact

Email: danbiles@gbsrlaw.com
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Fax: 913-491-6398

Education

Law School: Washburn University, 1978
Undergraduate: Kansas State University, BS in Journalism, 1974
Bar Admissions: Kansas, 1978; United States District Court for the District of Kansas, 1978; United States Court of Appeals for the 10th Circuit, 1978; United States Supreme Court, 1982; United States Court of Appeals for the Federal Circuit, 1995.

Associations/Organizations

National Council of State Education Attorneys; Kansas Bar Association; Kansas Trial Lawyers Association; Johnson County Bar Association; Kansas City Metropolitan Bar Association; board of directors, Community Living Opportunities, Inc.

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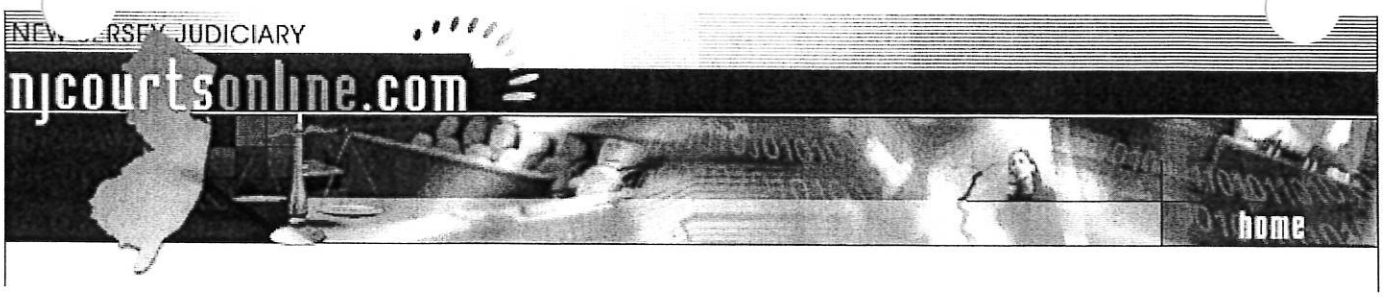

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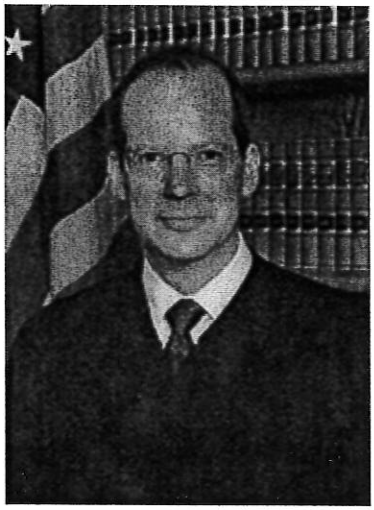
Chief Justice Stuart Rabner



Chief Justice Stuart Rabner was sworn into office on June 29, 2007 after being nominated by Governor Jon S. Corzine and confirmed by the Senate. He is the eighth Chief Justice to lead the New Jersey Supreme Court since the 1947 Constitution.

Born on June 30, 1960, Chief Justice Rabner was raised in Passaic. He graduated summa cum laude from the Woodrow Wilson School of Public and International Affairs at Princeton University in 1982. He graduated cum laude from Harvard Law School in 1985. He was a law clerk to U.S. District Court Judge Dickinson R. Debevoise before joining the U.S. Attorney's Office in Newark in 1986.

After beginning his career as an assistant U.S. attorney, Chief Justice Rabner worked in a number of positions including first assistant U.S. attorney and chief of the terrorism unit. He was chief of the office's criminal division when he was named chief counsel to Governor Corzine in January 2006. He was named New Jersey attorney general in September 2006 and served in that position until his nomination to the Court.

Chief Justice Rabner and his wife, the former Deborah Wiener, have three children.

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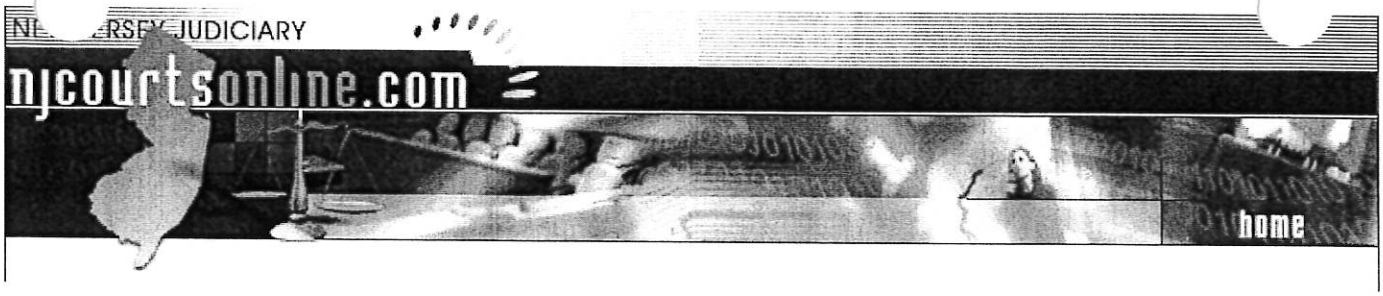

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Justice Virginia Long

Justice Long was nominated to serve on the Supreme Court by Governor Christine Todd Whitman on June 17, 1999. Her appointment was confirmed by the Senate on June 21, 1999 and she was sworn in as an Associate Justice on September 1, 1999, by then-Justice Marie L. Garibaldi. Justice Long was confirmed by the Senate for a second term and tenure on June 19, 2006.

At the time of her nomination, she was serving as a presiding judge of the Appellate Division of the Superior Court.

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

A member of the bar for more than 40 years, she has served as a Deputy Attorney General; a litigation associate at Pitney, Hardin, Kipp and Szuch; Director of the New Jersey Division of Consumer Affairs and Commissioner of the former New Jersey Department of Banking. In 1978, Governor Brendan T. Byrne appointed her to the Superior Court, where she presided over civil, criminal and family law cases. From 1983 to 1984, she was the General Equity judge for the Mercer, Somerset and Hunterdon vicinage. In 1984, then-Chief Justice Robert N. Wilentz elevated her to the Appellate Division. During her tenure there, she penned more than 2,000 opinions. She became a presiding judge in 1995. She has also chaired and served as a member of numerous Supreme Court committees including Extra-judicial Activities and Judicial Performance.

Justice Long is married to Jonathan D. Weiner, Esq., a partner at Fox Rothschild of Philadelphia and Lawrenceville. She is the mother of three children, and a grandmother of four.

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Justice Jaynee LaVecchia

Justice LaVecchia was nominated by Governor Christine Todd Whitman to serve on the Supreme Court on January 6, 2000. She was confirmed by the Senate on January 10, 2000 and sworn in for a term to begin February 1, 2000.

At the time of her nomination, Justice LaVecchia had been serving as the New Jersey Commissioner of Banking and Insurance since August 24, 1998. Prior to her appointment as commissioner, Justice LaVecchia had been the Director of the Division of Law within the Department of Law and Public Safety since August 1, 1984. As director, she was responsible for the legal work of all lawyers assigned to the civil side of the New Jersey Attorney General's Office.

In addition, Justice LaVecchia served as Director and Chief Administrative Law Judge for the Office of Administrative Law from 1989 through July 1994. She also served in the Office of Counsel to Governor Thomas H. Kean, first as an Assistant Counsel and then as Deputy Chief Counsel. She also has been in private practice and worked as a deputy attorney general in the Division of Law.

Justice LaVecchia was born in Paterson on October 9, 1954. She is a 1976 graduate of Douglass College and graduated in 1979 from Rutgers School of Law in Newark. She has been a member of the New Jersey Bar since 1980. In 1996, she was elected a Fellow of the American Bar Association. She has chaired or served on various Supreme Court Committees, subcommittees, and other Court-assigned projects. She has been an active member of the Douglass College Alumnae Association.

Justice LaVecchia is married to Michael R. Cole. They live in Morris Township.

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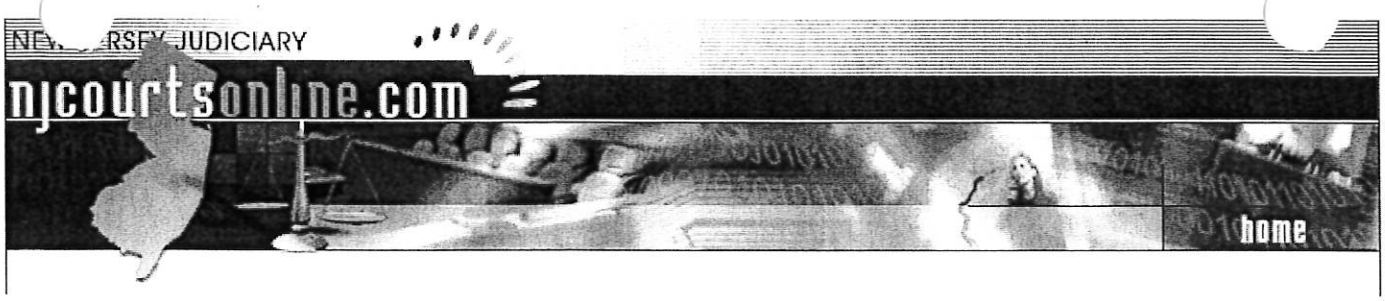

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Justice Barry T. Albin

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

At the time of his nomination, Justice Albin was a partner in the Woodbridge law firm of Wilentz, Goldman and Spitzer.

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

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

He and his wife, Inna, have two sons, Gerald and Daniel.

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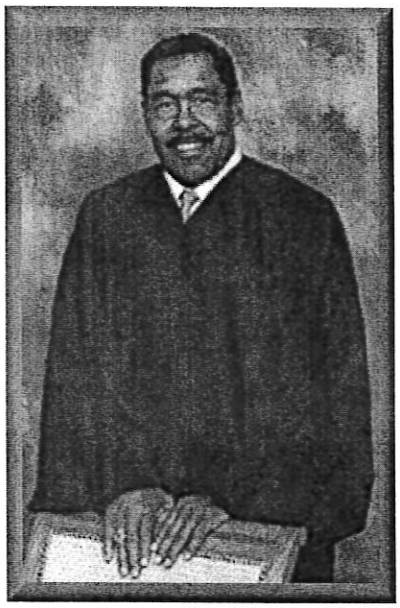
Justice John E. Wallace, Jr.



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

At the time of his nomination, Justice Wallace was a New Jersey Superior Court Judge, sitting in the Appellate Division. Appointed to the Superior Court in 1984, Justice Wallace was promoted to the Appellate Division in 1992. As a trial judge, Justice Wallace sat in Criminal and Civil Divisions, as well as the Family Part, in the Gloucester County vicinage.

Prior to being appointed to the New Jersey Superior Court, Justice Wallace was a partner in the law firm of Atkinson, Myers, Archie & Wallace. During that time he also served as the Municipal Judge for Washington Township in Gloucester County. He was also an Associate at the Philadelphia law firm of Montgomery, McCracken, Walker & Rhodes, and an attorney for the Trustees of the Penn Central Transportation Co.

Justice Wallace was born in 1942 in Pitman, New Jersey. He received his B.A. from the University of Delaware in 1964 and his J.D. from Harvard Law School in 1967. Justice Wallace served in the United States Army from 1968 to 1970, attaining the rank of Captain.

Justice Wallace is a member of the Gloucester and Camden County Bar Associations, the American Bar Association, the National Bar Association, the New Jersey State Bar Association, and the Garden State Bar Association. He has also served on the New Jersey Supreme Court Task Force for Minority Concerns, the New Jersey Ethics Commission, the Judiciary Advisory Committee on Americans with Disabilities Act, the Supreme Court Special Committee on Matrimonial Litigation, and the Appellate Division Rules Committee, and was the Chairman of the Supreme Court Ad Hoc Committee on Admissions.

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

Justice Wallace has also coached Little League Baseball since 1970, and for the last 12 years has volunteered on the football coaching staff at Washington Township High School.

Justice Wallace currently resides in Sewell, with his wife Barbara. The couple has five children.

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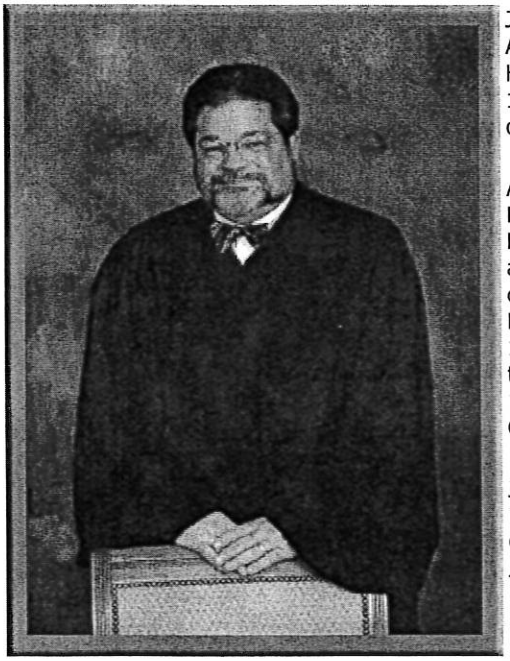
Roberto A. Rivera-Soto
Associate Justice, Supreme Court of New Jersey



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

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

Justice Rivera-Soto graduated with high honors from Colegio Nuestra Señora del Pilar, Rio Piedras, Puerto Rico in 1970. He is a 1974 honors graduate of Haverford College, where he was the Jose Pad ín Scholar of the Class of 1974. He received his J.D. in 1977 from Cornell University School of Law, where he was a Charles K. Burdick Scholar, and a Moot Court Board member.

Prior to his service on the Court, Justice Rivera-Soto was a Certified Mediator in the U.S. District Court for the District of New Jersey; he also was a member and chair of the District VII Ethics Committee of the Supreme Court of New Jersey; a former member of the Board of Directors of the "Please Touch" ® Museum, the children's museum of Philadelphia; a former member of the Board of Directors of the New Jersey Development Authority for Small Businesses, Minorities and Women's Enterprises; a former alternate member of the Southern Nevada Disciplinary Board of the State Bar of Nevada; and a former Instructor in Trial Advocacy at Rutgers (Camden) School of Law.

Justice Rivera-Soto's work as an Assistant United States Attorney was recognized by the Attorney General of the United States when, in 1980, he was awarded the United States Department of Justice's "Director's Award for Superior Performance as an Assistant United States Attorney." He also received commendations from the Federal Bureau of Investigation of the United States Department of Justice, the Bureau of Alcohol, Tobacco & Firearms of the United States Department of the Treasury and the United States Custom Service, for his handling of various cases. In recognition of his dedication to the welfare of his community and the highest principles of the legal profession, Justice Rivera-Soto has been elected as a Fellow of the American Bar Foundation.

Justice Rivera-Soto was born on November 10, 1953 in New York City, and grew up in Puerto Rico. He is married to the former Mary Catherine Mullaney. They have three sons, and reside in Haddonfield, New Jersey.

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Justice Helen E. Hoens

Helen E. Hoens was nominated to the Supreme Court by Gov. Jon S. Corzine on Sept. 21, 2006. She was confirmed by the Senate on Oct. 23 and sworn into office on Oct. 26, 2006.

Born in Elizabeth, New Jersey on July 31, 1954, Justice Hoens attended public schools in South Orange-Maplewood. She holds a B.A. in government from the College of William and Mary, graduating with high honors, and a J.D. from Georgetown University Law Center. While at Georgetown, she served on the Georgetown Law Journal, first as a member of the staff and then as the editor of the journal's annual volume devoted to developments in criminal procedure in the federal circuit courts. Upon graduation, she served as a law clerk to Judge John J. Gibbons during his service on the United States Court of Appeals for the Third Circuit before embarking on a career in private practice.

After her clerkship, Justice Hoens worked in private practice, first at Dewey, Ballantine and with the Law Office of Russel H. Beatie, Jr. in New York. She moved to New Jersey to practice with Pitney, Hardin and later with Lum, Hoens, Conant Danzis & Kleinberg, where her father, Charles H. Hoens Jr., was a founding partner.

Justice Hoens was appointed to the Superior Court in 1994 by Gov. Christine Todd Whitman, and reappointed by Acting Gov. Donald T. DiFrancesco in 2001. She was elevated to the Appellate Division in August, 2002 by Chief Justice Deborah T. Poritz.

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Supreme Court Justice Biographies

Hon. Leigh Ingalls Saufley
Chief Justice, Maine Supreme Judicial Court

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

Hon. Robert W. Clifford

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

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

Hon. Donald G. Alexander

Donald G. Alexander was appointed to the Maine Supreme Judicial Court in 1998 by Governor Angus S. King. He previously served on the Maine Superior Court and the Maine District Court and as a Deputy Attorney General for the State of Maine. He served in Washington, D.C. as an assistant to Maine Senator Edmund S. Muskie and as Legislative Counsel for the National League of Cities. Justice Alexander is a graduate of Bowdoin College and the University of Chicago Law School. He is the author of The Maine Jury Instruction Manual (4th. ed. 2008); and Maine Appellate Practice (3rd. ed. 2008), and a principal editor of The Maine Rules of Civil Procedure with Advisory Committee Notes and Practice Commentary (2008). He has been an adjunct faculty member at the University of Maine School of Law and has been on the faculty of the Harvard Law School Trial Advocacy Workshop since 1980. He is the Court's liaison to the Advisory Committees on the Maine Rules of Civil Procedure and Probate Procedure, the State Court Library Committee, and the Maine State Bar Association Continuing Legal Education Committee.

Hon. Jon D. Levy

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

Hon. Warren M. Silver

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

Hon. Andrew M. Mead

Andrew M. Mead attended the University of Maine and New York Law School. He has been a member of the Bangor

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law firms of Paine, Lynch & Weatherbee and Mitchell & Stearns. He is a past President of the Maine State Bar Association. He was appointed to the Maine District Court in 1990 and the Maine Superior Court in 1992. He served as Chief Justice of the Maine Superior Court from 1999 to 2001. He was appointed to the Maine Supreme Judicial Court in 2007. He has served as judicial liaison to the Maine Rules of Evidence Advisory Committee and chaired the Task Force on Electronic Court Records. He has been active in a number of court technology and jury reform initiatives. He is a member of the University of Maine adjunct faculty.

Hon. Ellen A. Gorman

Ellen A. Gorman is a 1977 graduate of Trinity College, Washington, D.C., and a 1982 graduate of the Cornell Law School. Justice Gorman practiced law as an associate with the firm of Richardson, Tyler and Troubh from 1982 until she was appointed to the Workers' Compensation Commission by then-Governor Brennan in 1986. In 1989 then-Governor McKernan appointed her to the Maine District Court, where she worked for eleven years. In 2000, then-Governor King appointed her to the Maine Superior Court, and she served as a Justice on that court until Governor Baldacci appointed her to the Maine Supreme Judicial Court on October 1, 2007.

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TESTIMONY OF MICHAEL R. DIMINO, ESQ.

Visiting Associate Professor of Law, Florida State University
Associate Professor of Law, Widener University
Member of the Bars of New York and Pennsylvania

Mr. Chairman and members of the Judiciary Committee, thank you for the opportunity to speak with you this afternoon concerning H.C.R. 5005 and H.B. 2123. In the last several years I have written articles and essays about judicial selection, including the advantages and disadvantages of various selection methods, as well as the First Amendment's application to judicial campaigns. I am currently a visiting associate professor at the Florida State University College of Law, and my permanent appointment is at the Widener University School of Law.

The means by which any society selects its leaders is of the utmost importance, and that is no less true when the leaders are judges than when they are legislators or executives. I therefore commend you for your efforts to determine whether Kansas's method of selecting its Supreme Court Justices and Court of Appeals Judges can be improved. I believe it can, and I believe that H.C.R. 5005 and H.B. 2123 represent an improvement over the current system. Accordingly, I support their adoption.

It has become a platitudinous refrain that methods for choosing public officials must balance independence and accountability. Fundamental to our democratic ideals is the notion that sovereignty rests with the people, and that public officials exercise power only with, and by virtue of, the people's consent. Government possesses power over infinite aspects of individuals' lives, and the policy choices made by government affect each of us. As such, the people of a state have a strong interest in ensuring that the officials who exercise power do so consistently with the policy preferences of the public, rather than those of a faction which may not be representative of the state as a whole. On the other hand, generations of Americans, following the lead of societies from classical antiquity, have argued that making public officials immediately accountable to the public disserves the public interest, and instead encourages policy to bend to the hasty, ill-considered opinions of temporary majorities.[1]

Debates concerning judicial selection have historically concentrated on the threats various selection systems pose to judicial independence. Judges are charged with the obligation to limit the authority of the popular majority through judicial review, and must also apply the law impartially, even when doing so benefits unpopular causes. Therefore it appears virtually axiomatic that judges will be unable to exercise that counter-majoritarian power if they must appease the majority in order to reach or stay on the bench. Because of this concern with judicial independence, the United States Constitution provides that federal judges hold their offices during "good Behaviour," and many states provide their judges with lengthy terms of office and seek other ways to minimize the threats to independence that judges might otherwise face.

But to focus on judicial independence is to miss half the story. Judges' decisions make policy. Further, judges—particularly appellate judges—exercise discretion in making those decisions. Judges often view such discretion as an invitation to pursue legal rules that achieve good policy, as the judges understand it, and even judges who attempt to avoid bringing their personal decisions to cases will never be able to separate their political opinions from their

judicial ones. Moreover, judges' judicial philosophies affect their decisions, and different judges will bring different philosophies to the bench. The inevitable result is that the identity of judges affects the policies that courts make. And if it matters which judge is selected, the manner in which that judge is selected matters as well because certain selection rules may favor certain types of candidates over others.

Independence, in other words, has a downside. An independent judge exercises policymaking discretion without constraint imposed by the people whose consent is the basis for government in a free republic. State supreme courts decide constitutional, statutory, and common-law questions, each of which provides judges with power to shape the law.

Judges give specific meaning to grand and vague constitutional phrases that specify government's form, powers, and limits—perhaps the most important issues any society must confront. And while the United States Supreme Court's interpretations of the national Constitution bind the state courts, state courts retain the authority both to interpret the United States Constitution when the Supreme Court has not yet acted and to be the authoritative interpreters of state constitutions. Whether a judge seeks to give effect to the original understanding of constitutional provisions or, instead, interprets a constitution consistently with the judge's own views of the needs of a modern society has undeniable effects on policy areas from abortion to capital punishment to the debate over the right to die, and every stage of life in between.

Statutes contain ambiguities that are left to courts to interpret, and judges often disagree on the proper approach to follow in resolving those ambiguities. For example, some judges seek to give effect to the "plain" meaning of statutory text, while others consult legislative history in an attempt to discover the intent of the legislature, and the interpretation a court gives to a statute can differ markedly depending on the choice. All judges, however, consider the policy consequences of their decisions to a greater or lesser extent, and the people of a state have an interest in ensuring that those judges view policy in a way that mirrors their own view.

Common-law decision-making involves judicial policymaking in its most obvious and undeniable form. When judges act in the absence of legislation to craft rules governing contracts, property, and torts, for example, they attempt to advance their vision of good policy. Nevertheless, reasonable people disagree about the wisdom of certain policy choices, a fact to which I am sure you can attest. Accordingly, a judge's formulation of the common law—and thus the content of the state's public policy—will depend on the judge's own view of such questions as whether certain types of contracts are unconscionable, whether a person has a property right in his genetic material, and whether liability waivers should be deemed valid. Those are essentially the same types of questions that a legislator confronts, and the public has exactly the same interest in ensuring that the policy choices made are acceptable to the voters. In making such decisions, judges should have no greater claim to independence than do legislators.

Again, our Framers' example on the federal level provides a model of how to resolve the conflict between the need for judicial independence and the risk of unrepresentative policymaking. The United States Constitution, as I have noted, allows federal judges to serve for life, unless impeached. The initial selection process, however, is a public one, with the

responsibility for judicial appointments shared between both of the so-called "political" branches. The federal appointments model permits public input while also allowing the President and Congress to check each other. The Senate's power to grant or withhold its "consent" means that the people will be able to influence the selection of judges by lobbying their senators. It also means that if a President attempts to appoint an unacceptable nominee, both he and the Senate will be responsible to the electorate for their actions.

A system without a role for the legislature, and without judicial elections that allow for the direct input of the people, risks undesirable consequences. I make no claims about Kansas's experience with its current system, but allowing the governor to appoint a judge without legislative confirmation presents the possibility that a judge with unacceptable views will be appointed without the screening—or even the publicity—that legislative hearings can provide. Certainly removing the legislature from the appointments process does not remove politics from the consideration of judicial nominees. It only obscures the political calculations of the governor, and raises the suspicions of those who distrust the motives of the members of the nominating commission.

These suspicions are more significant for Kansas than elsewhere because of the disproportionate influence the Kansas bar holds over this state's appointments process. It is human nature to use political power to one's advantage,[2] and we should hardly expect lawyers to be an exception to this rule. Lawyers' political opinions diverge from those of the public,[3] and as a result giving lawyers exceptional power in the selection of judges increases the likelihood that the judges will reflect the policy opinions of lawyers rather than the policy opinions of Kansans as a whole.

Specifically, research indicates that lawyers are socially more liberal than is the general public, a conclusion that is not surprising when one considers the official positions taken by the American Bar Association in over 1000 issues.[4] For example, the ABA has advocated in favor of abortion rights,[5] against capital punishment,[6] and in favor of gun control,[7] and has used its law-school accreditation process to pressure schools to increase the numbers of minority students, even if doing so requires schools to admit underqualified minority applicants.[8] Furthermore, lawyers not only hold unrepresentative policy preferences, but they also have an interest in using the judiciary to advance their own profession. Thus, we might worry that judges chosen disproportionately by lawyers might be inclined to give overly generous readings to constitutional and statutory rights to counsel, might regulate the profession of law in a way so as to stifle competition, or might take other opportunities to give lawyers a preferred position in the law.

You are in a much better position than I am to assess the Kansas Bar Association's lobbying and the positions it has sought to explain in its policy guide, but it is worth noting that the KBA proclaims its "involvement in legislative efforts since the association was formed in 1882,"[9] and notes that lobbying efforts intensified in 1983, "because of diminishing numbers of attorneys serving in the Kansas legislature."[10]

Overall, we should recognize that any group that is privileged in government has the capacity to use that power to its advantage. Kansans may reasonably fear that lawyers can use

their power over judicial selection to advance a point of view that reflects not the best policies for society, but rather those policies preferred by a single faction. Unfortunately, fears that the bar would misuse its power over judicial selection for partisan ends are not merely speculative. The American Bar Association's perceived bias in evaluating judicial nominees[11] caused it to lose its influence in the last administration as a screening tool for federal nominees, and the ABA's lukewarm evaluation of Supreme Court nominee Robert Bork (who had experience as a Circuit Judge, Solicitor General, and a Professor of Law at Yale) was explicable only on the basis of political disagreement.

Politics will be a consideration under any system where decisions are to be made by politicians. H.C.R. 5005 and H.B. 2123 will hardly make the process apolitical. But deciding who shall exercise power over public policy *should* be political. Confirmation hearings may be contentious, but if so, they will be contentious because the people and the people's representatives realize how important judges are to the public policy of this state. It is surely anomalous in a democratic society to argue (as Justice Six did during the consideration of a similar bill last year) that because the people have different political opinions, that they should have no voice in the selection of their leaders. As James Madison so wisely argued in urging adoption of the Federal Constitution, avoiding faction by subverting liberty adopts a cure worse than the disease.[12] Making public the inherently political process of choosing policymakers should benefit the people of Kansas by allowing them to exercise their opinions about judicial policy.

In one respect, however, the bills under consideration, in my opinion, go too far in their attempt to strip power from the bar. Under the current system, five of the nine chosen commissioners are lawyers selected by lawyers. Thus, lawyers are guaranteed a majority of the commission. Under the proposed amendments, however, not only is this guarantee taken away, but lawyers are forbidden from constituting more than a minority of three commissioners. (Apparently each of the three appointing authorities must appoint one and only one lawyer to the commission, though perhaps the act could be read so as to set only an upper limit on lawyers' presence on commissions.)[13] Even if the political leaders charged with selecting commissioners believe that lawyers can better evaluate judicial candidates, those political leaders will be forbidden from appointing more than one lawyer to the commission. In my view, the opportunity that the bar has under the current system to exercise undue influence would be solved by having commissioners selected by politically accountable officials, rather than by lawyers. No limitation on the occupation of the commissioners is necessary; it is the appointing power that is most significant.

There is no reason to fear that H.C.R. 5005 and H.B. 2123 will improperly undermine judicial independence. Under any system of judicial selection there is the risk that potential judges will seek to make a favorable impression on the appointing authority. Certainly the current system contains that risk. The benefit of judicial independence, however, comes not from the ability to appoint judges whose views are unacceptable to the people and their representatives, but rather from the freedom that sitting judges enjoy to decide cases according to the law without risking their jobs. Nothing in H.C.R. 5005 or H.B. 2123 threatens to interfere with that decisional independence. The bill makes no change at all in the system by which the public evaluates sitting judges through retention elections. If judicial independence in Kansas is

to be strengthened, the appropriate way to do so is to give judges longer terms or to eliminate retention elections entirely, not to insulate the *initial* appointment of judges from public scrutiny.

Again, thank you for the opportunity to testify. My views concerning the optimal system of judicial selection are more fully set forth in an essay recently published in the *Notre Dame Journal of Law, Ethics, and Public Policy*, which I am happy to make available to you.[14] I hope that my testimony and that essay are useful to you as you consider this most important issue.

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[1] *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).
[2] *See, e.g.*, THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed. 1961).
[3] *See* Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 842-49 (1998) (finding lawyers to be more socially liberal than the general public, but moderately conservative on economic issues); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664-67 (1985) (finding the "legal elite" to be more civil libertarian than both the public and the "opinion elite").
[4] *See* http://www.abanet.org/poladv/.
[5] *See ABA Group Opposes Curbs on Abortion Rights*, N.Y. TIMES, Feb. 14, 1990, at A23.
[6] *See* http://www.abanet.org/moratorium/why.html.
[7] *See* http://www.abanet.org/gunviol/abapolicyongunviolence/home.shtml.
[8] *See, e.g.*, Gail Heriot, *The ABA's 'Diversity' Diktat*, WALL ST. J. Apr. 28, 2008, at A19; Peter Kirsanow, *The Diversity Trump Card*, NATIONAL REVIEW ONLINE July 12, 2006, at http://article.nationalreview.com/?q=OTBmZmM3NzdmYmUzZTZhM2ViY2U3ZTljNDU5NWVmOWI=.
[9] http://www.ksbar.org/public/legislative/ (last viewed Feb. 10, 2009).
[10] http://www.ksbar.org/public/legislative/leg_policy_stat.shtml (last viewed Feb. 10, 2009).
[11] *See, e.g.*, James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Court of Appeals for Political Bias, 1989-2000*, 17 J. L. & POLS. 1 (2001).
[12] THE FEDERALIST NO. 10 at 78 (Clinton Rossiter ed. 1961).
[13] The bills provide that "[o]nly one" commissioner appointed by each appointing authority "shall be a member of the bar who resides and is licensed in Kansas." H.C.R. 5005, proposed amend. to Kan. Const. § 5(e); H.B. 2123 § 1(b).
[14] Micha el R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J. L., ETHICS, & PUB. POL'Y 451 (2008).

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Notre Dame Journal of Law, Ethics & Public Policy

Symposium on The Judiciary

Notre Dame Law School

Volume 22 Issue No. 2, 2008

ACCOUNTABILITY BEFORE THE FACT†

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Too often the debate concerning judicial-selection methods is framed as a balance between "independence" and "accountability," without a serious attempt to explain what is meant by those terms. As a result, the opposing sides in the debate focus on anecdotes illustrating the need to protect either independence or accountability, and rarely ask whether the worst of both worlds can be avoided by developing a system that preserves both an opportunity for the people to influence the policy choices made by courts and judicial freedom to decide individual cases based on the law when the result is unpopular.

This Essay argues that such a balance is possible if we abandon the notion that "independence" requires that there be no direct role for the public in judicial selection and that "accountability" requires that the public be able to express its disagreement with judicial rulings by voting the offending judges out of office. The balance suggested here has two elements.

First, judicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits.

Second, the initial selection of judges should be by election for high courts and by appointment for lower courts.[1] Public

† On March 12, 2008, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a panel discussion entitled, "Judicial Accountability: Experiments in the States." Professor Dimino's remarks have been revised for publication.

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1. Intermediate appellate courts present a quandary, for they enjoy some of the discretion that states' highest courts have, and thus make policy in those areas not decided by controlling precedent. On the other hand, because they are bound by the law established by the highest courts and because their dockets are mandatory, more of their decisions will be dictated by settled law than is the case for the highest courts. My purpose here is not to decide which side of the line mid-level courts fall on, but rather to suggest the questions relevant to such a determination by illustrating the reasons that elections are appropriate

involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.

INTRODUCTION

Choosing a method of judicial selection is about allocating governmental decision-making authority, and as such it is an application of political theory. But the political theories that motivate the choice of judicial-selection systems underlay more than just deciding between elections and appointive systems. The question of the proper degree of insulation that the judiciary should enjoy is fundamental to issues involving constitutional and statutory limits on jurisdiction; to setting the number of courts and judgeships, and allocating those courts and judgeships on the basis of geography, jurisdiction, or some other factor; to limits on the authority of courts to issue, and to ensure compliance with, affirmative injunctions; to decisions about courts' budgets and staffing; to limits on the speech of judges and judicial candidates; to the removal of judges from office; and indeed to the institution of judicial review itself.

Recognizing that judicial independence and accountability are implicated throughout these areas (and others) makes clear that it is practically impossible simply to be "for" either judicial accountability or independence. Rather, each of us, and each state, makes a determination as to the optimal degree of public involvement in the judiciary. The national Constitution, for example, establishes an appointive system that does not directly involve the people, but—especially after the Seventeenth Amendment established direct election of senators—provides an opportunity for members of the public to express their views about nominees. The Constitution also establishes "good Behaviour" tenure for all federal judges,[2] and the threat of impeachment—in all likelihood the most powerful (if unwieldy) way for

for the highest courts in states and appointments are appropriate for the lowest. My references throughout this Essay to "high" courts or "appellate" ones, therefore, should not be taken to resolve the status of the intermediate courts.

2. U.S. CONST. art. III, § 1, cl. 2.

Congress to exert its influence over judges[3]—is all but a dead letter not because of the Constitution but because of congressional practice.

Thus the national government is fairly protective of judicial independence as to both appointments and removals, and as to both constitutional requirements and unwritten rules. Similarly, the Constitution gives Congress power to influence judges and judicial decisions aside from the confirmation and impeachment processes, but norms have developed that those powers will be used only rarely. Congress may establish (and perhaps disestablish)[4] "inferior" federal courts.[5] Congress may change the number of Justices on the Supreme Court and the number sufficient to constitute a quorum.[6] Congress probably has the authority to increase the pay of only those judges it likes.[7] And, Congress can withdraw the jurisdiction of lower courts,[8] and make "Exceptions" to the appellate jurisdiction of the Supreme Court,[9] to ensure that the courts do not consider matters that Congress would prefer not to have adjudicated in a federal court.

With all these possible ways to interfere with judicial independence (or, stated differently, ways to encourage judicial accountability), it is surprising that so much of our focus concerning the state systems is on judicial selection. I think the puzzle can be explained in large part by the fact that states opting for a system of popular election uniformly permit their citizens to re-evaluate the performance of sitting judges. Thus the threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judi-

3. *Cf.* Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("'Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'" (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986))).

4. *Cf.* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (upholding the Repeal Act of 1802 which eliminated judgeships); Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13, 20–21, 31 (Michael C. Dorf ed., 2004).

5. U.S. CONST. art. I, § 1.

6. *See* 28 U.S.C. § 1 (2000) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

7. U.S. CONST. art. III, § 1 (providing that judges' compensation "shall not be *diminished* during their Continuance in Office").

8. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

9. U.S. CONST. art. III, § 2, cl. 3; *see Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869).

cial selection,[10] but from the reelections that those judges are forced to contemplate and endure if they are to remain in office.

It is therefore quite natural for advocates of greater judicial independence to focus on judicial elections, because elections not only involve the public directly in the choice of judges, but because they provide a mechanism for making sitting judges fearful of the political consequences of their decisions. In combination, then, judicial elections and reelections present the dangers to independence that jurisdiction-stripping, court-packing, etc., present in the federal model as well as the risks that judges will be chosen by the unqualified, uninterested voters who care far less about the law than about advancing their preferred policies.

But there is no reason *a priori* to link judicial elections to short, renewable terms of office. Likewise, there is no reason to think that an appointments process will be concerned solely with the qualifications of potential judges, or that the political popularity of a judge's decisions will have no impact on his or her future employment prospects. If we decouple initial selection from re-selection—separating "public input" from "accountability"—we can examine judicial independence in a more sophisticated way and protect the independence values about which we care the most while still preserving an arena for the public to influence the policies made by the judiciary.

Judicial independence helps to keep law separate from politics. Even the most cynical legal realist would acknowledge that law should and does constrain judges from deciding cases based solely on their policy preferences, or the policy preferences of their communities. If part of a judge's job is to protect minority rights against the preferences of the majority[11]—indeed, if the very reason we have a judiciary as one of the three branches of government is to enable the performance of that countermajoritarian function—then requiring judges to obtain the approval of the voters to continue in office fatally undermines that crucial function.

10. Even states that purport to have an electoral method of initial selection often see judges selected initially by appointment because appointment is the method used to fill vacancies. *See* Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13, 13 (2007) ("Virtually every state appoints some judges, whether the appointments are of interim judges who are selected to fill unexpired terms of departing judges, initial appointments of all judges, or something in between.").

11. *See, e.g.*, Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1363–65 (1997). "After all, lifetime federal judges are the ones who have enforced the VRA, school desegregation orders, and the like." *Id.* at 1363.

Yet the law is not in fact or theory completely separate from politics, and all judges possess discretion in the performance of their jobs that allows them to apply the law differently from the way other judges would. A regime providing too much judicial independence runs the risk that judges will exercise that discretion to promote their own preferred policies and in so doing subvert the democratic process.[12] Indeed, if judges are completely independent then they face no constraints at all, including constraints imposed by law itself.[13]

In short, we seek to protect the rule of law and simultaneously avoid both pure majority rule and the rule of judges. The remainder of this Essay seeks to defend two proposals for resolving the independence/accountability dilemma: providing for lengthy, non-renewable terms of judicial office, thus substantially decreasing reelections, which showcase the worst fears of independence advocates; and electing high-level judges but appointing lower-level ones.

I. ELIMINATING THE REELECTION PROBLEM

A. *Reelections' Threat to Independence*

The most significant problems with judicial elections occur not because elections are used as the initial means of choosing judges, but because sitting judges must run in elections to retain their jobs. The prospect of *re*election, not the initial election, gives rise to the "crocodile-in-the-bathtub" concern, according to which judges cannot help but be aware of the possibility that certain rulings will affect their ability to retain office.[14]

The Framers of the Federal Constitution wisely provided Article III judges with tenure during "good Behaviour," anticipating that any system of "[p]eriodical appointments, however regu-

12. *See* Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 72 (2001) ("The trade off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities.").

13. *See* Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 863 (1998) ("The question becomes, what kinds of influence do we want judges to be independent of and what kinds do we want them to yield to? Do we want them to be independent of things like case law? How about lower court judges being independent of judges of a higher court?").

14. *See* Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987) (quoting California Supreme Court Justice Otto Kaus); *see also* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994); Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

lated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence."[15] To the particular suggestion that judges have their performance evaluated in popular elections, Alexander Hamilton in *Federalist 78* responded that if such elections were held, "there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws."[16] Nothing, it seems, has changed. A lengthy tenure remains "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."[17]

Massachusetts, New Hampshire, and Rhode Island follow the national government's lead and give the judges on their courts of last resort tenure during good behavior. (Rhode Island's judges' tenure, like that of Article III judges, is potentially for life, whereas Massachusetts and New Hampshire impose a mandatory retirement age of seventy.) The other forty-seven states, however, require their supreme court justices to undergo a process of re-selection to continue in office.[18] In nine of those states, the justices are reappointed, either by the executive, the legislature, or, in Hawaii, by a judicial nominating commission. Thirty-eight states re-select their supreme-court justices by election, with twenty of those states using Missouri-Plan-style retention elections, where the justice runs unopposed and voters are asked to vote yes or no on the question whether the justice should be retained in office.[19]

In forty-seven states, then, incumbent judges know that their ability to keep their jobs depends on gaining the approval of others. This is hardly a scheme calculated to ensure that judges will apply the law; indeed, the opposite is more nearly true. Reappointments and reelections are instituted precisely so that the incumbent judges do not stray too far from the preferences of the reappointing authorities. From an independence perspective, it makes no difference whether the re-selection is done by popular election or reappointment; in both cases judges are

15. *See* THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16. *Id.*

17. *Id.* at 465.

18. *See* AM. JUDICIAL SOC'Y, JUDICIAL SELECTION IN THE STATES 5–12 (2007), *available at* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf; COUNCIL OF STATE GOV'TS, 39 THE BOOK OF THE STATES 263–70 (Keon S. Chi et al. eds., 2007); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 283 n.80 (2008).

19. *See* Charles B. Blackmar, *Missouri's Non-Partisan Court Plan from 1942–2005*, 72 MO. L. REV. 199 (2007) (discussing the history and features of the Missouri Plan).

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made answerable—accountable—for their decisions to an institution that is concerned with political results far more than with legal principle.[20]

Retention elections, though they were designed to provide some measure of independence to judges,[21] may not accomplish that objective well enough. A judge anticipating an impending retention election must be careful not to anger voters or interest groups so much that a campaign is run against his or her retention.[22] Incumbent judges must also raise money in advance of a retention election in case such a campaign is waged, and as a result some commentators have claimed that independence is sacrificed to the demands of fund-raising.[23]

As long as judges need to fear removal from office, independence will be threatened. States need not, however, give all their judges life tenure to accommodate this concern. States may reasonably conclude that allowing any government official to remain in office for a lifetime would permit the original selection of that official to have too much of a continuing effect on future generations. As times change, it may be appropriate to re-staff courts, as well as other branches of government, with new personnel better acquainted with modern legal theories and perspectives.

It would be preferable, however, to accomplish this result through setting fairly lengthy terms of office[24] and forbidding

20. Perhaps there are forty-six states in this category. Whether one counts Hawaii depends on one's faith in the political neutrality of the members of the judicial nominating commission. I have my doubts. *See* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 732–33 (2002) (discussing the impact of politics in the selection and deliberations of nominating commissioners).

21. *See, e.g.*, Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003) ("Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."); G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, *in* BENCH PRESS 52, 53 (Keith J. Bybee ed., 2007).

22. *See* Geyh, *supra* note 21, at 56–57.

23. *See id.* at 57.

24. *See* David B. Rottman et al., Nat'l Ctr. for State Courts, *Call to Action: Statement of the National Summit on Improving Judicial Selection* 8 (2002), *available at* http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf ("States with relatively short judicial terms of office should consider increasing the length of those terms."); Harold See, *An Essay on Judicial Selection: A Brief History*, *in* BENCH PRESS, *supra* note 21, at 77, 88 ("The longer the term, the greater the independence and the less the accountability of the judge; the shorter the term, the greater the accountability to the retention authority and the less the independence from that authority.").

judges from running for multiple terms.[25] If a judge cannot be appointed or elected to succeed himself, then the greatest pressure to conform judicial decisions to the popular will is lessened.[26] At the same time, by forbidding the re-selection of the same judge, turnover is ensured but the people of the state would be free to install another judge with the same judicial philosophy, if the incumbent's is to its liking.

To be sure, lengthy terms and prohibitions on serving multiple terms do not eliminate all influences that might pressure judges to decide cases differently from what the law requires. Judges still may decide cases to appease their families, editorial writers, interest groups, or their own senses of justice—a risk present regardless of the manner of selection.[27] Judges may also believe that their chances for future judicial office may depend on the political acceptability of their decisions, for even in a system eliminating reelections, judges will want to run for (or be appointed to) higher judicial office.[28] But that problem is present under any system that permits judges to move up the hierarchy. In the completely appointive federal model, Presidents will nominate judges whose decisions have been, and are likely to be, politically acceptable, and the Senate will apply the same criterion in evaluating those nominees.

Even in systems where nominations are made by, or filtered through, a commission, such an incentive is present. For example, in a system where the governor must nominate judges from a list approved by a nominating commission, and where those nominees will then be subject to confirmation by the state senate, judges will have to appeal to the desires of the governor and the senate, as well as ensure that their prior behavior has not disqualified them in the eyes of the commission. Such a system may make judges more cautious about rendering politically unpopular decisions,[29] even as such systems are recommended as ways of lessening the impact of politics in the judicial-selection process.

25. *But see* Rottman et al., *supra* note 24, at 8 ("Term limits . . . are not appropriate for judicial office.").

26. *See* See, *supra* note 24, at 88 ("Limiting a judge to a single term, whatever its length, similarly increases independence and decreases accountability, because the judge has little incentive to please a retention authority.").

27. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting) (citing "worldly ambition" as an influence on judicial decision making).

28. *See* Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 26 (1998) (statement of Circuit Judge Guido Calabresi) ("If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up."); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 12 (1995) (noting the influence on appointed judges of the desire to be appointed to higher courts).

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Any proposal for eliminating reelections must deal with judges who are appointed to fill unexpired terms.[30] If they are permitted to run for office at the end of that period, the crocodile-in-the-bathtub danger is present. If they are prohibited from running, it may be difficult to find judges who would be willing to serve for only a portion of a single term. States may, therefore, wish to draw a distinction based on the length of time the judge was able to serve before the end of the term, in the same way the Twenty-Second Amendment deals with presidential succession.[31] Thus, if the regular term of office for an elected judge is twenty years, judges who are appointed with, for example, fewer than ten years remaining in the term would be permitted to run for reelection, while judges appointed to a term of ten years or more would be prohibited from seeking another term. Under such a system, the current possibility for judges to make decisions based on their own prospects for reelection would be reduced, and yet few potential judges would be dissuaded from accepting an appointment to serve half of an unexpired term if the unexpired term is sufficiently lengthy.

So while eliminating reelections will not remove every possibility that judges will consider the political consequences of their decisions, it surely negates the political consequence of the greatest import to most elected judges.

B. *Public Involvement in Initial Judicial Selection*

Without question, it is more difficult for the public to make judges "accountable" if judges' decisions need not be defended come election time. But those who worry about rogue judges may

29. *See* ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 75–77 (1974) (reporting on the influence of politics in the deliberations of nominating commissions); JOANNE MARTIN, MERIT SELECTION COMMISSIONS 20–22 (1993) (same).

30. Similar concerns are raised by recess appointments even in systems, such as the federal one, that grant judges good-behavior tenure. Where a judge takes office before his or her permanent appointment has taken effect, there is a danger that the appointing authority will consider the judge's decisions during the period of temporary service in deciding whether to appoint the judge to a full term, with the concomitant danger that a recess appointee will seek to appeal to the appointing authority when deciding cases.

31. *See* U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.").

be given some consolation if the *initial* process of selecting judges involves a frank discussion of the judicial philosophies of the persons seeking judicial office. Public input into initial judicial selections helps ensure that judges will assume the bench only if their general approaches to judging are consonant with the public's belief about the proper judicial role, but does not pressure those judges into deciding individual cases according to public opinion. As a result, promoting public involvement in initial selection but not in the continuing evaluation of judges may prove a workable compromise between champions of independence and accountability.

Initial selections—whether by election or appointment—present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments. Gone is the crocodile-in-the-bathtub phenomenon; in its place critics of public involvement can decry only public ignorance about the candidates and the legal issues, as well as the concern that would-be judges might prejudge cases to appease powerful interests and make their appointment more likely.

To understand the different threats to independence posed by initial elections and reelections, one must separate what may be called decisional accountability from prospective accountability.[32] If individual judges are accountable to the public or to politicians for their decisions, then the capacity of the judiciary to serve as a bulwark on behalf of the law against the popular will is undermined. Decisional accountability thus seeks to extend democratic control over policy to the individual case and uses as its means the intimidation of the individual judges who make the decisions.

Prospective accountability seeks to correct a different perceived harm of the independent judiciary, and can achieve it by means drastically different from the means used to impose decisional accountability on judges. Advocates of prospective accountability understand that results in individual cases may be

32. Fellow panelist Charles Gardner Geyh deserves credit for the latter term. *See* CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE 221 (2006). I acknowledge the oxymoronic quality of the term; perhaps it would be better to speak simply in terms of prospective public influence. Beyond semantics, the idea of prospective "accountability" can be criticized as not providing much, if any, real accountability. For someone who identifies accountability as only oversight of decisions by incumbent judges, there is no room for compromise with those who favor decisional independence. I offer the idea of prospective accountability not as a means of achieving both independence and accountability, but of compromising and avoiding the worst possible results under systems providing more robust guarantees of either.

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unpopular, and that the rule of law requires that the majority will be obstructed on occasion. But accepting unpopular individual cases is far different from accepting the imposition of public policy created by judges whose views are out of step with society.[33] Where judicial decisions are not dictated by the law, but instead are the product (in whole or in part) of the judges' political or contestable judicial philosophies, judges are making policy through their decisions, according to the same criteria by which legislators make it. As such, democratic principles suggest that judicial policy-makers, like legislative ones, be subject to some public influence.

The national government provides for the courts to be prospectively accountable in this sense by giving the political branches the responsibility for judicial appointments,[34] but provides decisional independence by giving tenure and salary protection to individual judges. It is therefore unsurprising that throughout our history, as many scholars have demonstrated, presidents and congresses have shaped the law by shaping the courts.[35]

33. *See, e.g.*, WILLIAM H. REHNQUIST, THE SUPREME COURT 236 (1987) ("We want our federal courts, and particularly the Supreme Court, to be independent of popular opinion when deciding the particular cases or controversies that come before them . . . . But the manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper. When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the president, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies.").

34. *See* REHNQUIST, *supra* note 33, at 236 ("[I]t is . . . both normal and desirable for presidents to attempt to pack the Court . . . ."). Democratic presidential candidate Barack Obama has already stated his intention to choose his Supreme Court nominees on the basis of the nominees' commitment to fulfilling Obama's political views through judicial interpretation of the Constitution and laws. *See* Edward Whelan, *Obama's Constitution: The Rhetoric and the Reality*, WKLY. STANDARD, Mar. 17, 2008, at 12, 12, *available at* http://weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp ("'We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criterion by which I'll be selecting my judges.'" (quoting Sen. Barack Obama)). Of course Obama is not exceptional in his desire to achieve and entrench policy gains through the judiciary; every president has done so. Indeed, John Adams's appointments of the midnight judges in 1801 entrenched the practice in constitutional lore because it gave rise to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

35. *See generally, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS (5th ed. 2008); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005); CHRISTINE L. NEMACHECK, STRATEGIC SELECTION (2007); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES (1999); Michael R. Dimino,

Recognition of the policy-making role played by the courts has led to an increase in the scrutiny given to judicial nominees' (including lower-court nominees') philosophies by the Senate and interest groups. Thus while the federal system does not use elections to select judges, the public has become increasingly involved in the process in a manner that may be seen as balancing the independence that judges have acquired for themselves once they assume the bench.[36]

States should be able to achieve the same balance, and doing so through initial elections may be an appropriate way to do so. States may reasonably conclude, as their predecessors in the Jacksonian era did, that elections can be a positive force in helping the judiciary achieve independence from the political elites who would otherwise control the appointments process.[37] Similarly, states may reasonably be wary of the potential influence of the organized bar and other interest groups in a system using nominating commissions in the appointments process. Elections do, of course, have the potential of advantaging other interests—political bosses and candidates with name recognition or money, for example—but they provide some opportunity for the people to check those influences, and to do so before the judges assume office. Retention elections, by contrast, occur after the judges have taken the bench, thus raising problems of decisional accountability, even if they otherwise allow the public to object to the choices made by the nominating commissions and political officials involved in the appointments process.[38]

Without such a popular check on elites' judicial appointments, there is an increased risk that the judges will decide cases

Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 284 (2005) ("[I]t is undeniable . . . that the attitudes of the judges forecast their decisions on the bench. And if the average voter does not understand this confluence of legal realism and political science, one can be sure that Presidents and Senators do." (footnotes omitted)).

36. *See* GEYH, *supra* note 32, at 171–222, 254–55.

37. *See* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207–19 (1993).

38. Retention elections typically do not give the public this opportunity. Because retention elections are uncontested, there is no opponent to point to the deficiencies of the incumbent. It is rare that interest groups will pick up the slack, as they did in the famous 1986 California retention elections that ousted Chief Justice Bird and her colleagues, and advocate for the defeat of judges seeking retention. Of course, that is exactly the point of having retention elections rather than more competitive, and more democratically effective, alternatives.

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on the basis of a philosophy not shared by most of the people.[39] The point here is not that those judges will violate the law, or even that they will consciously shape the law consistent with their policy preferences, but rather that judges decide cases predictably based on their judicial philosophies, and that a wide range of outcomes is consistent with judges' obligation to decide cases faithfully. There is a tremendous difference between a Brandeis and a Van Devanter, between a Douglas and a Frankfurter, and between a Brennan and a Rehnquist. One may believe that each of those Justices faithfully applied the law as he understood it, and yet their jurisprudential philosophies yielded starkly disparate, and predictable, votes in individual cases. Within the wide range of judges who would faithfully interpret the law, surely the public has a legitimate interest in encouraging the appointment of one over another. Elections provide one means for states to provide this aspect of prospective accountability.

Some proponents of judicial independence maintain that permitting the public to influence even the initial choice of judges creates problems in that it causes judges to prejudge cases and/or causes them to be beholden to special interests that assist the judge in gaining the appointment. As I've written at length elsewhere, however, judges have views about cases whether or not the public is permitted to know those views,[40] and interest groups play a significant role in judicial appointments, as well as in elections.[41]

In judging, as in everyday life, it is rhetorically beneficial to claim "open-mindedness." Sophisticated defenders of judicial independence, who understand the weakness of arguing that judges must be independent because they merely apply law and do not decide cases based on their own policy views, instead claim that independence is necessary to ensure fairness to litigants.[42] In the view of these commentators, parties appearing before a judge should not have to go through the motions of

39. *See* TRIBE, *supra* note 35, at xi ("[T]hose who interpret and enforce the Constitution simply cannot avoid choosing among competing social and political visions, and . . . those choices will reflect *our* values . . . only if we peer closely enough, and probe deeply enough, into the outlooks of those whom our Presidents name to sit on the Supreme Court.").

40. *See* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 340–42 (2003).

41. *See* Dimino, *supra* note 35, at 289–94.

42. *See* Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 447 (2008).

making legal argument to convince somebody who has already made up his mind.

A realistic assessment of the judicial process, however, would recognize that judges often sit on cases presenting legal issues on which the judge has made up his mind. We should want this to be the case. Judges spend their careers, both before assuming the bench and while in office, thinking about legal issues.[43] Surely they not only have general thoughts concerning legal topics but have firm views on some legal questions. The judge who has assumed the bench after spending a career in a prosecutor's or a public defender's office should have a firm view as to the correctness of *Miranda v. Arizona*[44] and *Mapp v. Ohio*.[45] The civil-rights attorney-turned-judge should have a firm view on *Brown v. Board of Education*.[46] And every lawyer should have a firm view on the correctness of *Marbury v. Madison*'s conclusion that federal courts have the power of judicial review.[47] Do we really want a judge to be "impartial"—in the sense of open to persuasion—on the question whether a person can be convicted of treason on the testimony of fewer than two witnesses?[48] And do we think that appointing judges will make judges impartial in that sense? Surely not.

Justices Brennan,[49] Marshall,[50] and Blackmun[51] committed themselves to reversing every capital sentence presented to them, regardless of precedent or the facts of any individual case. That commitment in death-penalty cases is perhaps the most famous example of judicial closed-mindedness, but it is hardly unique. Judges regularly issue opinions in which they announce their reasons for reaching a decision in a case, and in the process explain how the law would be applied in other situations not presented

43. *See* Laird v. Tatum, 409 U.S. 824, 835 (1972) (mem.) (recognizing that by the time most judges ascend to the bench they have "formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution").

44. Miranda v. Arizona, 384 U.S. 436 (1966).

45. Mapp v. Ohio, 367 U.S. 643 (1961).

46. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

47. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803).

48. *See* U.S. CONST. art. III, § 3, cl. 1; *Marbury*, 5 U.S. (1 Cranch) at 179 (arguing that judicial review requires adherence to the provisions of the Constitution and explaining that, in the context of the treason question, "the language of the constitution [sic] is addressed especially to the courts . . . [and] prescribes, directly for them, a rule of evidence not to be departed from").

49. *See* Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

50. *See id.* at 358–60 (Marshall, J., concurring).

51. *See* Callins v. Collins, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting) (denying Petition for Certiorari).

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in the case at bar.[52] Statements made extra-judicially—be it in a commencement address, a campaign speech, or a confirmation hearing—could not possibly evince any more of a commitment than Justices Brennan, Marshall, and Blackmun made, and might be considerably more equivocal. If those Justices were "impartial" when they participated in death-penalty cases, then surely elections can co-exist with the requisite impartiality.[53]

In addition, it is worth remembering that whatever "impartial" means, litigants are guaranteed a judge who is actually impartial, and not just a judge whose predispositions are unknown. Thus, a judge who is inclined to view cases in line with the positions of chambers of commerce or trial lawyers' associations will (or will not) be "partial" regardless of whether the candidate makes campaign statements or accepts contributions that would associate himself with those groups.

Elections are potentially problematic from an impartiality perspective only if the campaign process makes it *more difficult* to reconsider statements one has made during the campaign, as compared to the effect on the judge of other statements that may have indicated his views on legal issues. Justice Stevens cited the possibility for campaign statements to have this effect when he argued in dissent in *Republican Party of Minnesota v. White* that judicial candidates could constitutionally be prohibited from speaking their views on disputed legal or political issues: "Once elected, he may feel free to disregard his campaign statements, . . . but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him*."[54] Even if one thinks that judges will be faithful to such announcements for fear of electoral retribution,[55] the effect can occur only in a regime providing for *reelections*. Without the looming threat of a vote, one's campaign statements are no more binding than are any other statements the judge has made about legal issues.

52. *See* Laurence H. Tribe, *Foreword* to PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES 13, 18 (1992).

53. *See* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 745 (2002) (making the same point with regard to Justice Scalia's participation in abortion cases).

54. Republican Party of Minn. v. White, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting).

55. The majority did not. *See id.* at 780 (opinion of the Court) ("[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.").

Likewise, campaign contributions are alleged to be influential not only because the judge might feel indebted to the contributor, but because the judge would fear that a similar contribution to the judge's reelection campaign would be forthcoming only if the judge's decisions are to the contributor's liking. Eliminating reelections lessens the potentially pernicious influence of campaign contributions. Further, if campaign financing causes a problem of impartiality, there are alternatives short of eliminating elections. Public financing systems, as seen in North Carolina and as recommended in Wisconsin, would accomplish the goal.

Thus, regardless of the system for selecting judges, those judges will (and should) prejudge issues before those issues are presented in actual cases, and judges who successfully assume the bench will always be indebted to the politicians and interest groups who facilitated the selection, whether the selection comes as the result of a popular election or an appointment. More fundamentally, however, one might question whether the harm of excluding the public from the policy-making process—prospectively, in the case of the judiciary—exceeds whatever harm might be caused by including them. Those who seek to minimize public influence in judicial selection need to demonstrate why open-mindedness as to legal questions that should be open and shut is such an important goal, and why—in an age of legal realism and empirical study of judicial behavior—judicial policy making should be immune from public influence. Bald assertions of "due-process" rights[56] will not suffice.[57]

Appointments by public officials who themselves are decisionally accountable provide some of this prospective accountability, as we see in the national government. One may doubt,

56. *See, e.g.*, *In re Bybee*, 716 N.E.2d 957, 959–60 (Ind. 1999) (per curiam) ("We firmly believe that the ability of judges to provide litigants due process and due course of law is directly and unavoidably affected by the way in which candidates campaign for judicial office."); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123 (1999); Max Minzner, *Gagged But Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 228–31 (1999); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1060 (1996); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 189 (1996); *see also* Ackerson v. Ky. Judicial Ret. & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (characterizing speech by judicial candidates as raising concerns about "fundamental fairness and impartiality").

57. *See* Brown v. Doe, 2 F.3d 1236, 1248–49 (2d Cir. 1993); Chemerinsky, *supra* note 53, at 743–45; Dimino, *supra* note 40, at 333 nn.215–16, 338–46.

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however, whether appointments provide the same opportunity for public input on the state level. Because state judges are not given the same media attention as are federal nominees, especially nominees to the Supreme Court, it is possible for state officials to appoint judges with relatively extreme philosophies and not trigger the kind of interest-group reaction that would accompany a similar appointment to the federal courts. Furthermore, because legislators are rarely elected based on their *judicial* philosophies, it appears that judicial elections provide much more of an opportunity for the public to focus on judges and make known their desires for the appropriate judicial role than does a process of action by the political branches in which those officials act as proxies for the public.

II. DIFFERENT SELECTION SYSTEMS FOR DIFFERENT COURTS

States commonly select judges on different courts by different means. Ten states,[58] out of the thirty-nine that hold some elections for judges, select other judges by appointment.[59] Curiously, however, states employing both elective and appointive systems uniformly appoint judges serving on high courts, and reserve elections for low-level ones. This approach is exactly backwards.

Elections are at their worst when applied to trial courts. The electorate is ill-informed about the candidates, and pressure to rule for a particular party is greatest for trial courts because of the publicity surrounding a trial, and because a trial takes place soon after the incident giving rise to it. More importantly, if a trial court caves to political pressure, it is more likely to violate a clear command of the law than would an appellate court that reaches a decision based in part on political calculations because trial courts typically have less discretion than do appellate courts.

One might think that holding elections for low-level courts would enable voters to have a greater ability to become informed about the candidates. Small districts mean that voters have a better chance of being personally acquainted with the candidates,[60] and insofar as judicial decisions in local matters should be reflec-

58. Plus Maryland, which appoints its trial-court judges and then holds contested elections for subsequent terms, and appoints its appellate judges under the Missouri Plan.

59. *See* COUNCIL OF STATE GOV'TS, *supra* note 18, at 263–70. The figure includes appellate judges and general-jurisdiction trial judges, and it ignores the often varied methods states use to select judges of courts with limited jurisdiction.

60. *See* Larry T. Aspin & William K. Hall, *The Friends and Neighbors Effect in Judicial Retention Elections*, 40 W. POL. Q. 703, 707 (1987) (reporting that reten-

tive of the community, it might make sense to permit the community to have input.

As it actually happens, however, voters do not know who the candidates are in these elections, and there is little reason for them to become informed. The more routine and less discretionary the business of the court, the less difference it makes who is selected. Further, even where the choice of judge affects the outcome of litigation, voters will rarely have reason to believe those outcomes will have a material effect on the voters' lives. As if that were not enough reason for voters to remain rationally ignorant about the candidates, there are often so many judgeships on a ballot that becoming knowledgeable about the candidates would take an unreasonable amount of time.[61]

Further, because trial courts apply law that is more likely to be settled than is the law applied by appellate courts, trial courts have less freedom to accommodate the desires of the electorate without breaking the law. Judges need to rule in unpopular ways. Applying a principle of law to the benefit of an unpopular party, or to the detriment of a popular one, is a fundamental requirement of the judicial function. Reelections, however, make such a choice doubly difficult because the judge will be hampered not only by his own feelings about the case but by electoral consequences as well.

Some have argued that the actual, potential, or perceived influence of elections on judicial decisions should lead us to eliminate all judicial elections, if not as a requirement of due process, then as a matter of wise policy.[62] And certainly judges at all levels have law that binds, or is supposed to bind, them no matter what the judges' or the public's preferences are. Nevertheless, the differences between trial courts' responsibilities and those of appellate courts—particularly the highest courts of the states—are significant.

It is those high courts whose decisions impact the most people and set policy to be applied by the rest of the judicial hierarchy. Further, it is often the high courts for whom the law has not provided a clear result in the case under review. Therefore, pub-

tion-election voters in judges' home counties are more likely to vote than are out-of-county voters).

61. *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 81 (1999) ("There is also some evidence that voters fail to differentiate among judges on the same ballot. For example, judges in the same district received very similar proportions of affirmative votes."); Reddick, *supra* note 20, at 735 (citing William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 346 (1987)).

62. *See, e.g.*, Geyh, *supra* note 21, at 58–72.

lic involvement in judicial policy might be able to help shape the law in a manner consistent with society's goals rather than with the judges'.

State high courts are accountable within the judiciary to only the Supreme Court of the United States, and even there only as to matters of federal law.[63] No decisional law of the state binds state supreme courts, for they can overrule even their own past decisions, and they have the discretion to reach different conclusions than federal district courts and courts of appeals as to matters of federal law. To be sure, statutory law and precedent from the U.S. Supreme Court can place considerable constraints on judges of state supreme courts (as, incidentally, state courts' decisions place constraints on the Supreme Court),[64] but where such courts' dockets are discretionary, it is unlikely that they will take a case unless reasonable jurists could disagree as to the meaning of the law. Thus, the most sympathetic case for judicial independence—the judge who is punished at the polls for performing his job in the only way faithful to the law—is rarely present when considering elections for state supreme courts.

State supreme courts are even more clearly able to exercise their discretion in making policy than is the Supreme Court of the United States. No one would seriously dispute the proposition that the members of that Court make policy when they give effect to the broad terms in the Constitution and federal statutes.[65] State supreme courts have similar authority in interpreting state constitutions and statutes.[66]

63. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 466–541 (5th ed. 2003).

64. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature or by its highest court in a decision is not a matter of federal concern."); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (limiting the U.S. Supreme Court's power to reverse the decisions of any state's highest court on matters of state law).

65. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (describing the Supreme Court as a "political institution"); Dimino, *supra* note 35, at 277–78 ("Anyone who has been the least bit attuned to the development of public policy over the last fifty years is well aware that massive changes in our nation's approach to problems involving race, criminal justice, family relations and sexual intimacy, tort liability, religion, education, and elections, just to name a few areas, have come about through the actions of courts." (footnotes omitted)).

66. *See* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular." (citation omitted)).

Whereas, however, in the federal courts, "with a qualification so small it does not bear mentioning, there is no such thing as common law,"[67] state courts regularly apply the common law to fields—contracts, property, and torts—having significant impacts on citizens' daily lives. Except where the state legislatures have acted to strip the courts of common-law authority, state courts retain the power, not just to interpret the law made by other branches of government, but to make the law themselves. It has even been suggested that state courts should take a greater, more activist, role in construing legislation because their experience with the common law has accustomed them to shaping the law.[68]

This greater policy-making authority held by state supreme courts makes it all the more vital that their actions be subject to some popular control.[69] The justification for independence is to ensure the ability to apply the law; the justification for all elections—legislative and executive, as well as judicial—is to ensure that lawmakers have the requisite connection to the sovereign authority in a democratic republic: the people.[70]

Voters in today's judicial elections do not know much about any of the candidates, including those running for seats on high courts. Nevertheless, because there are few seats on states' highest courts, the number of elections and candidates will be small. Accordingly, it will be possible for voters to become informed. Particularly if the ballot is not crowded with lower-court races, voters would be able to focus their attention on the small number of high-court candidates.

Furthermore, the current ignorance of voters may be due in large part to limitations on the speech of judicial candidates. In 2002, in *Republican Party of Minnesota v. White*,[71] the Supreme Court declared unconstitutional the most restrictive of these regulations, the "announce clause," which prohibited judicial candidates from announcing their views on disputed legal or political

67. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 13 (Amy Gutmann ed., 1997).

68. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 18–34 (1995).

69. *Cf.* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999). Peretti argues that "value-voting and political motive [are] both necessary and legitimate ingredients in constitutional decisionmaking . . . ." *Id.* at 77.

70. *Cf.* U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 15, at 468 ("[T]he power of the people is superior to both [the judicial and the legislative power] . . . .").

71. *White*, 536 U.S. 765.

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issues. However, several other restrictions, whose constitutionality has been challenged in lower courts, remain on the books. Some of those restrictions prohibit candidates from making "pledges or promises of conduct in office"[72] and from making statements that "commit or appear to commit the candidate" to "issues that are likely to come before the court."[73] If elections are defective because of the ignorance of voters, such ignorance is not necessarily the voters' fault. States may or may not decide that elections are an appropriate method of judicial selection. But it straw-mans the argument to complain about the voters' inability to select good candidates when the voting scheme itself makes it difficult for voters to become informed.

Appointments display the opposite set of advantages and disadvantages. Removing the public from the direct involvement in judicial selection can permit trial judges the freedom to render unpopular rulings in individual cases, but removing the public from the selection of high-court judges invites policy making by officials who hold views the public does not support. Limiting elections to high-courts, however, capitalizes on the comparative advantage of appointments in permitting elites to identify qualified potential judges unknown to the general public, while also taking advantage of elections' comparative advantage in permitting the public to influence the institutions most involved in policy making.

CONCLUSION

Defenders of judicial independence concede that, "[i]nsofar as judges abuse their independence by implementing their political or class agendas instead of adhering to the law, it would seem that the time has come to rethink, in a fundamental way, the need for their independence,"[74] though they deny the truth of the statement's major premise. Still, such concessions do not go far enough.

Such statements imply a false dichotomy between "adhering to the law" and "implementing political or class agendas," and

72. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000).

73. *Id.* at Canon 5A(3)(d)(ii).

74. GEYH, *supra* note 32, at 263; *see also id.* at 279 ("If, as postrealists insist, independent judges ignore the rule of law and implement their own policy predilections, judicial independence loses its raison d'être and simply liberates unelected judicial elites to trump the majority's political preferences with their own."); *id.* at 281 ("If we ultimately conclude that judges employ law as a shill to conceal nakedly political decision making of a sort best reserved for Congress or the people, then insulating such decision making from the influence of Congress or the people becomes largely indefensible . . . .").

therefore do not address that vast area of appellate judging in which the correct answer is not clear, and judges with different political inclinations will reach different results though each judge is "adhering to the law." The public has an interest in shaping those results, and selecting appellate judges initially by election is one way of satisfying that interest without unduly undermining the decisional independence that underlies judicial review and the rule of law.

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Legislative Testimony
Before the House Judiciary Committee
Rep. Lance Kinzer, Chairman
Feb. 12, 2009

MR. CHAIRMAN AND MEMBERS OF THE HOUSE COMMITTEE ON THE JUDICIARY:

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 5005 and HB 2123, not on behalf of KU, but on my own as a concerned citizen.

I began my scholarly research and writing on judicial selection and retention in the 1990's and have increasingly focused on the topic in the last two years. In 2007 and 2008, I 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 5005 would accomplish these goals.

I have attached a copy of my paper, *Selection to the Kansas Supreme Court*, and four shorter pieces I wrote on the subject.

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.

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 5005 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. There is no public record of who voted which way. This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. By contrast, senate confirmation votes are public. By adding senate confirmation to the judicial selection process, HCR 5005 would reduce the secrecy of the process and increase accountability to the public.

Further increasing public accountability, HCR 5005 would have publicly-elected officials appoint members of the Nominating Commission and allow the governor to either appoint one of the Commission's three nominees or request that the Commission submit three new nominees. This reform would shift responsibility from the commissioners to the governor and thus allow the public to hold accountable those who exercise responsibility. At the same time, however, HCR 5005 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 5005 strikes a thoughtful, moderate balance between the extremes of populism and elitism.

III. Possible Counterarguments

I expect that opponents of HCR 5005 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 senate-confirmation states at selecting meritorious justices. Calling the current system "merit selection" is propagandistic rhetoric, rather than an accurate statement with factual support.

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 5005 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." But the most recent person appointed to the Kansas Supreme Court was a personal friend of, and campaign contributor to, the governor who appointed him. And nine of the previous 11 people appointed belonged to the same political party as the governor who appointed them. These are highly partisan outcomes from a system advertised as "non-partisan."

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 5005 would make the Senate the check on the governor's power and that check would be exercised in a public vote.

C. Retention Elections Do Not Provide Meaningful Accountability

Defenders of our State's current bar-dominated process claim that democratic accountability to the public is provided through retention elections. In fact, however, a system of retention elections makes it extremely hard to remove a judge. These "elections" lack rival candidates and thus rarely include any public debate over the direction of the courts. In fact, a retention election is nearly always a rubber stamp, and no Kansas justice has ever lost one.

Retention elections are nearly always rubber stamps, not just in Kansas, but in the other states that use them as well. Professor Brian Fitzpatrick points out that, nationwide, sitting judges win retention over 98% of the time.[1] This rubber-stamp aspect is intentional. As Professor Charles Geyh notes, "it is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."[2]

Professor Michael Dimino concludes that "retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."[3] In other words, the lawyer groups who designed and

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[1] Brian T. Fitzpatrick, Election as Appointment: The Tennessee Plan Reconsidered, 75 Tenn. L. Rev. 473, 495 (2008). Professor Fitzpatrick goes on to say:

> By contrast, judges who run for reelection in states that use contested elections are defeated much more often. One comprehensive study of state supreme court races between 1980 and 2000 showed that justices running for reelection in states that use partisan elections were defeated nearly 23% of the time-a full thirteen times as often as justices running in retention referenda over the same period. As the author of that study has noted, in states that use contested elections, "supreme court justices face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House."

Id. at 495-96.

[2] Charles Gardner Geyh, Why Judicial Elections Stink, 64 Ohio St. L.J. 43, 55 (2003).

[3] Michael R. Dimino, The Futile Quest for a System of Judicial "Merit" Selection, 67 Alb. L. Rev. 803, 811 (2004).

pushed for retention elections did so to create the appearance, without the reality, of judicial accountability to the public.

With Kansas justices so entrenched once they are on the court, this makes the process for initially placing them there all the more decisive.

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 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. 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 5005 would give the governor such power so the "triple play" story is irrelevant to the issue now before your Committee.

F. Judicial Independence Would Not Be Weakened by HCR 5005

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 5005 would change only judicial selection, not judicial retention, and thus has no effect on judicial independence.

IV. Conclusion

For the reasons stated above, I urge you to support HCR 5005. 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 2123 as well.

Thank you very much for your time and attention.

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THE KANSAS
JOURNAL OF LAW
& PUBLIC POLICY

Volume XVII Number 3

Spring 2008

Selection to the Kansas Supreme Court

Professor Stephen J. Ware

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SELECTION TO THE KANSAS SUPREME COURT

*Stephen J. Ware**

Kansas is the only state in the union that gives the members of its bar majority control over the selection of state supreme court justices. The bar consequently may have more control over the judiciary in Kansas than in any other state. This process for selecting justices to the Kansas Supreme Court is described by the organized bar as a "merit," rather than political, process. Other observers, however, emphasize that the process has a political side as well. This paper surveys debate about possible reforms to the Kansas Supreme Court selection process. These reforms would reduce the amount of control exercised by the bar and establish a more public system of checks and balances.

I. BAR CONTROL

The Supreme Court Nominating Commission is at the center of judicial selection in Kansas.[1] When there is a vacancy on the Kansas Supreme Court, the Nominating Commission assesses applicants and submits its three favorites to the Governor.[2] The Governor must pick one of the three nominees and that

* © Stephen J. Ware. Professor of Law, University of Kansas. For excellent research assistance, I thank Chris Steadham (who primarily prepared Appendix A), Beth Dorsey (who primarily prepared Appendix B), and Cheri Whiteside. I also appreciate helpful comments on a draft of this paper from Steve McAllister and Lance Kinzer. Finally, I thank the Federalist Society for commissioning this paper. The author is responsible for all views expressed herein.

1. KAN. CONST. art. 3 § 5. *See also* KAN. STAT. ANN. §§ 20-119 to -125 (2006).
2. The Kansas Constitution provides that:

> (a) Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.
>
> (b) In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees.

KAN. CONST. art. 3 § 5(a), (b).

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person is thereby appointed a justice on the Kansas Supreme Court,[3] without any further checks on the power of the Commission. Therefore, the Commission is the gatekeeper to the Kansas Supreme Court. The bar (lawyers licensed to practice in the state) has majority control over this gatekeeper. The Commission consists of nine members, five selected by the bar and four selected by the Governor.[4]

No other state in the union gives its bar majority control over its supreme court nominating commission. Kansas stands alone at one extreme on the continuum from more to less bar control of supreme court selection. Closest to Kansas on this continuum are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority.[5] In these eight states, members of the commission not selected by the bar are selected in a variety of ways. Six of them include a judge (and a seventh includes two judges) on the nominating commission. In six of these eight states, as in Kansas, all the non-lawyer members of the commission are selected by the governor, while in two of these states the governor's selections are subject to confirmation by the legislature.

3. If the Governor does not pick one of the three, which has never happened, the duty to pick one of the three falls to the Chief Justice of the Supreme Court. *Id.*

4. The Kansas Constitution provides that:

> The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

KAN. CONST. art. 3 § 5(e). As Kansas currently has four congressional districts, the Commission currently has nine members. The term of office for each member of the commission is "for as many years as there are, at the time of their election or appointment, congressional districts in the state." KAN. STAT. ANN. § 20-125.

5. *See* ALASKA CONST. art. IV, §§ 5, 8 (commission consists of 7 members: chief justice, three lawyers appointed for six-year terms by the governing body of the organized bar, three non-lawyers appointed for six-year terms by the governor subject to confirmation by legislature); IND. CONST. of 1851, art. VII, §§ 9–10 (1970); IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (7 members: chief justice; 3 lawyers, 1 from each court of appeals district, elected by members of the bar association in each district; 3 nonlawyers, 1 from each court of appeals district, appointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962); IOWA CODE §§ 46.1–.2, .15 (2006) (15 members: chief justice; 7 lawyers elected by members of bar association, 7 nonlawyers appointed by governor and confirmed by senate); MO. CONST. of 1945, art. V, § 25(a)-(d) (1976); MO. SUP. CT. R. 10.03 (7 members: 1 supreme court judge chosen by members of court; 3 lawyers elected by members of bar; 3 nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972); NEB. REV. STAT. ANN. §§ 24-801–24-812 (LexisNexis 2007) (9 members: chief judge, 4 lawyers elected by members of bar association, 4 nonlawyers appointed by governor); OKLA. CONST. art. VII-B, § 3 (13 members: 6 lawyers elected by members of bar, 6 nonlawyers appointed by governor and 1 nonlawyer elected by other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (7 members: 3 lawyers appointed by president of bar, 2 circuit judges elected by judicial conference, and 2 nonlawyers appointed by governor); WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-1-102 (2007) (7 members: chief justice, 3 lawyers elected by members of bar, 3 nonlawyers appointed by governor).

In sum, nine states allow the bar to select some of the commission's members and Kansas is the only state in which the bar selects a majority of the commission. By contrast, forty one states either give the bar no official power in the initial[6] selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. For example, in Colorado the bar has no role in selecting the nominating commission.[7] In three states, the bar's role is limited to merely suggesting names for a minority of the commission and those suggested do not become commissioners unless approved by the governor and/or legislature.[8]

Fifteen states divide the power to appoint supreme court justices among several publicly-elected officials rather than concentrating this power in the governor. In two of these states justices are appointed by the legislature.[9] In thirteen of these states (ten with a nominating commission[10]) the governor

6. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Aug. 16, 2007). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

7. COLO. CONST. art. VI, §§ 20, 24 (15 voting members: 7 lawyers appointed through majority action of governor, attorney general, and chief justice, 8 nonlawyers appointed by governor).

8. *See* ARIZ. CONST. art. VI, § 36 (16 members: chief justice, 5 lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, 10 nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. of 1968 art. V, § 11 (1998); FLA. STAT. ANN. § 43.291 (LexisNexis 2007) (9 members: 4 lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, 5 other members appointed by governor with at least 2 being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (17 members: speakers of senate and house each appoint 6 lawyers, 12 total, from lists submitted by Tennessee Bar Association (2), Tennessee Defense Lawyers Association (1), Tennessee Trial Lawyers Association (3), Tennessee District Attorneys General Conference (3), and Tennessee Association for Criminal Defense Lawyers (3); the speakers also each appoint 1 lawyer not nominated by an organization, each appoint 1 nonlawyer, and jointly appoint a third nonlawyer).

9. These states are: South Carolina and Virginia. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Oct. 6, 2007). South Carolina uses a nominating commission. S.C. CONST. art. V, § 27; S.C. CODE ANN. § 2-19-10 (2006) (10 members appointed by speaker of house or president of senate, General Assembly may reject all the commission's nominees, but cannot elect a candidate who has not been nominated by commission).

10. *See* CAL. GOV'T CODE § 12011.5(b) (West 2007) (commission's "membership . . . shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Sections 6013.4 and 6013.5 of the Business and Professions Code"); CONN. GEN. STAT. § 51-44a (2007) (12 members: 3 lawyers appointed by governor, 3 nonlawyers appointed by governor, 3 lawyers, 1 appointed by each senate president, house majority and minority leaders, and 3 nonlawyers, one appointed by each of house speaker, senate majority and minority leaders); Del. Exec. Order No. 4 (Jan. 5, 2001) (9 members: 8 appointed by governor (4 lawyers and 4 nonlawyers) and 1 appointed by president of bar association, with consent of governor); HAW. CONST. art. VI, §§ 3-4 (9 members: 2 appointed by governor, 2 by senate president, 2 by house speaker, 1 by chief justice, 2 by state bar, no more than 4 members may be lawyers); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) (17 members, 12 appointed by governor, 5 by president of bar association); Mass. Exec. Order No. 477 (Jan. 12, 2007) (21 members, all appointed by

nominates justices but the governor's nominee does not join the court unless confirmed by the legislature[11] or other publicly-elected officials.[12] Finally, twenty-two states elect their supreme court justices.[13] The various methods of

governor); N.Y. CONST. art. VI, § 2 (12 members: 4 appointed by governor, 4 by chief judge, 4 by leaders of legislature); R.I. GEN. LAWS § 8-16.1-2 (2006) (9 members: 3 lawyers and 1 nonlawyer appointed by governor, governor also appoints 5 additional members from lists submitted by leaders of legislature); UTAH CODE ANN. § 20A-12-102 (2007) (7 members: chief justice or designee of chief justice, 6 members appointed by governor, 2 lawyers appointed by governor from list submitted by state bar; no more than 4 lawyers total); VT. STAT. ANN. tit. 4, §§ 71, 601, 603 (2007) (11 members: 2 nonlawyers appointed by governor; house and senate each select 3 members, 2 nonlawyers and 1 lawyer; and 3 lawyers elected by members of bar).

11. *See* CONN. CONST. art. V, § 2 (legislature); DEL. CONST. of 1897 art. IV, § 3 (1983) (senate); HAW. CONST. art. VI, § 3(senate); ME. CONST. art. V, Pt. 1, § 8 (senate); MD. CONST. art. II, § 10 (senate); N.J. CONST. art. VI, § VI, Para. 1 (senate); N.Y. CONST. art. VI, § 2, Para. e (senate); R.I. CONST. art. X, § 4 (house and senate); UTAH CONST. art. VIII, § 8 (senate); VT. CONST. § 32 (senate).

12. Massachusetts and New Hampshire require confirmation by the governor's council, which in Massachusetts consists of the lieutenant governor and eight persons elected biennially, MASS. CONST. Pt. 2, Ch. 2, § 1, art. 9; *Id.* Amend. XVI, and in New Hampshire consists of one person elected from each county biennially. N.H. CONST. Pt. 2, art. 46, 60-61. California's system is unique and experience under it exemplifies the possible consequences of subordinating the nominating commission (and thus the bar) to publicly elected officials. "Although the California Constitution provides that judges of the Supreme Court and Court of Appeal are to be elected for a twelve-year term (CAL. CONST. art. 6, sec. 16, subd. (a)), the practice is that they are appointed by the Governor to fill unexpired terms, and then must go through a non-contested retention election." Stephen B. Presser et al., *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 365 (2002). *See also* Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 646-47 (2002); CAL. CONST. art. VI, § 16 (retention elections). Under this practice, the governor's nominee is confirmed by a three-person commission made up of the chief justice, the state attorney general, and whoever is the most senior presiding justice of the various district Court of Appeals. CAL. CONST. art. VI, § 7. Before this commission can approve the nominee, the governor must submit the nominee to the Judicial Nominees Evaluation (JNE) Commission, an agency of the State Bar of California. CAL. GOV'T CODE § 12011.5(a) (West 2007); CAL. ST. B. R.P. 2(2.72). Until 1996, no governor had ever nominated an individual ranked unqualified by the JNE. In that year,

> Governor Pete Wilson, for the first time in JNE's history, disregarded a "not qualified" rating and appointed to the California Supreme Court a remarkable African-American woman, Janice Brown. Wilson had previously appointed Brown to the Court of Appeal with JNE rating her "qualified" for that position. Moreover, she had previously served as Wilson's Legal Affairs Secretary; unlike other candidates, Wilson was personally familiar with Brown's legal abilities and qualifications. Brown's appointment to the California Supreme Court despite JNE's opposition created a furor because she is an outspoken and eloquent conservative. JNE's "not qualified" rating was widely perceived as motivated by political or ideological considerations.
>
> Wilson defied JNE twice more as governor, appointing to the Superior Court and the Court of Appeal candidates he believed to be well-qualified, even though they were rated "not qualified" by JNE.

Presser et al., *supra*, at 372. In 2003, President Bush appointed Janice Brown to the United States Court of Appeals for the District of Columbia. *See* 151 CONG. REC. S 6208, 6217 (daily ed. June 8, 2005). The Senate voted fifty-six to forty-three in favor of her confirmation. 151 CONG. REC. S 6208, 6218 (daily ed. June 8, 2005).

13. Seven states use partisan elections: Alabama, Illinois, Louisiana (uses a blanket primary

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selecting state supreme court justices are summarized in Table 1, which follows.

Table 1

Bar Control of Supreme Court Selection

High Bar Control						Low Bar Control
Nom'n Comm'n majority selected by bar	Nom'n Comm'n near majority selected by bar	Nom'n Comm'n w/ no or little role for bar	Legislative Appointment	Governor's Nominee Confirmed	Non-Partisan Elections	Partisan Elections
Kansas	Alaska Indiana Iowa Missouri Oklahoma Nebraska South Dakota Wyoming	Arizona Colorado Florida Tennessee	South Carolina Virginia	California Connecticut Delaware Hawaii Maine Maryland Massachusetts New Hampshire New Jersey New York Rhode Island Utah Vermont	Arkansas Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada North Carolina North Dakota Ohio Oregon Washington Wisconsin	Alabama Illinois Louisiana New Mexico Pennsylvania Texas West Virginia

To recap, more than four-fifths of the states either give the bar no official power in the initial selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. These states generally select their justices through:

(1) appointment by the legislature,

(2) confirmation of the governor's nominees by the legislature,[14]

or

(3) elections in which a lawyer's vote is worth no more than any other citizen's vote.

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where all candidates appear with party labels on the ballot and the top two vote getters compete in the general election), New Mexico, Pennsylvania (if more than one seat is available all candidates run at large and the top two vote getters fill the open seats), Texas, and West Virginia. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Oct. 6, 2007). Fifteen states use (purportedly) non-partisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan (non-partisan general election, but partisan nomination), Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio (non-partisan general election, but partisan nomination), Oregon, Washington, and Wisconsin. *See id.* With respect to Michigan and Ohio, *see also* Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DE PAUL L. REV. 423, 456-60 (2007).

14. Or other publicly-elected officials.

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Less than one-fifth of states allow the bar to select members of a nominating commission that has the power to ensure that one of its initial nominees becomes a justice.[15] And Kansas alone allows the bar to select a majority of such a commission.

II. DOES SECRECY YIELD MERIT?

While the President nominates federal judges, these judges are not confirmed without a majority vote of the United States Senate[16] and these votes on the confirmation of federal judges have long been public.[17] In contrast, the votes of the Kansas Supreme Court Nominating Commission are secret, as are the Commission's interviews of applicants.[18] The public can learn of the pool of applicants and the three chosen by the Commission, but cannot discover which commissioners voted for or against which applicants.[19] By statute, the Commission "may act only by the concurrence of a majority of its members."[20] But no statute requires that the votes of the Commission be made public.[21]

15. The importance of this power was recently demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. *See* Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id.* By contrast, the commission lacks this power to ensure that one of its nominees becomes a justice where appointment requires confirmation by the legislature of other publicly-elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

16. U.S. CONST. art. II, §2.

17. U.S. CONST. art. I, § 5 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.") "Until 1929 the practice was to consider all nominations in closed executive session unless the Senate, by a two-thirds vote taken in closed session, ordered the debate to be open." Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988). *See also* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY IN THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 253-55 (1953).

18. Laura Scott, *Keep Politics Out of the Selection of Judges*, KANS. CITY STAR, Feb. 11, 2008, at B7. "That's troubling, as these are the top positions in the judiciary and the people picked for them make decisions that impact many lives." *Id.*

19. Research for this paper found no evidence of any dissenting votes on the Commission or of any disagreement on the Commission at all.

20. KAN. STAT. ANN. § 20-123.

21. A 1982 opinion by the Kansas Attorney General concluded "the Supreme Court Nominating Commission may conduct its meeting in full public view, however, the legislature is without authority to require that meetings of the Commission be open or closed. Nor may the legislature require the Commission to meet in a particular place." XVI Op. Att'y Gen. Kan. 95 (1982), 1982 WL 187743. A recent survey of judicial nominating commissions lists Kansas among the "five states [that] have no written rules about whether or not commission deliberations

Defenders of this largely-secret system describe it as "non-partisan" or "merit" selection,[22] and contend that it selects applicants based on their merits rather than their politics.[23] There is, however, a remarkable pattern of governors appointing to the Commission members of the governor's political party. Research for this paper examined the twenty-year period from 1987 to 2007. During this period, twenty-two people appointed by the governor served on the Commission. In all twenty-two cases, the governor appointed a member of the governor's party.[24] This is depicted in Table 2, which follows.

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will be confidential, and [the] seven states [that] have no written rules that govern whether commission voting will be confidential." Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commission*, 34 FORDHAM URB. L.J. 163, 184 & n.118 (2007).

22. *See, e.g.*, Paul T. Davis, *The Time for Merit Selection Will Come*, 70 J. KAN. B. ASSOC. 5 (2001) ("For the past two years, the Kansas Bar Association has been leading the effort for the passage of a constitutional amendment providing for statewide, non-partisan merit selection of district court judges."); Fred Logan, *Kansas Should be Served by an Independent Judiciary*, 70 J. KAN. B. ASSOC. 3 (2001) ("The Kansas Commission on Judicial Qualifications took the rare step of endorsing merit selection of judges."). This terminology is used nationally by bar associations and other lawyers' groups. *See, e.g.*, Alfred P. Carlton, Jr., *Justice In Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, July 2003 (a portion of which is reproduced as Appendix C); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges*, http://www.ajs.org/js/ms_descrip.pdf (last visited Oct. 6, 2007).

23. *See, e.g., Minutes of the House Federal and State Affairs Committee: Hearing on HCR – 5008 Before the H. Fed. and State Affairs Comm.*, (Kan. 2007) (statement of Richard C. Hite, Chair, Supreme Court Nominating Commission) ("Almost fifty years ago the citizens of this State mandated by constitutional amendment that election of Supreme Court Justices should be taken out of the political arena and based solely on merit."); F. James Robinson Jr., Op-ed, *Don't Put Politics Back into Selection of Justices*, WICHITA EAGLE, Feb. 21, 2007, at 7A ("Merit selection is a process that uses a nonpartisan commission of lawyers and nonlawyers to investigate, evaluate and occasionally recruit applicants for judgeships. Applicants are chosen on the basis of their intellectual and technical abilities and not on the basis of their political or social connections."); John Hanna, *Father Wants Justices Confirmed; Senate Nixes Penalty Fix*, HAYS DAILY NEWS, Feb. 22, 2005 ("Retired Supreme Court Justice Fred Six said the current system has 'banished politics from the judicial playing field.'"); Editorial, *Keep Judges Exempt From Elections*, KAN. CITY STAR, May 21, 2006 (current system achieves "[t]he separation of judges from the political process."). Members of the Commission say that politics plays no role in their deliberations. "'We never talk about politics in those meetings. It just doesn't come up,' said Richard Hite, chairman of the nominating commission." James Carlson, *Method for Choosing High Court Justices Would Change With Resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. *See also* David Klepper, *Judge Applicants Face Panel*, KAN. CITY STAR, May 23, 2005, at B1 ("The nominating commission - consisting of nine attorneys and lay persons - tries to take the politics out of the process. Questions of party loyalty or views on issues such as abortion are never asked, according to Hite. 'We ignore everything except merit,' Hite said. 'The object is to find the best judge, period.'); Chris Grenz, *Critics Question Democratic Majority on High Court*, HUTCHINSON NEWS, Aug. 9, 2005 ("Dodge City attorney David J. Rebein, president-elect of the Kansas Bar Association and a member of the nominating commission, said the current selection system was put in place specifically to filter out politics. "At the nominating commission level, it doesn't even come up," Rebein said. "It is by design strictly merit based.").

24. *See infra* Appendix A (listing party of non-lawyer commissioners appointed by Democratic governors in 1979-86, 1991-94 and 2003-07 and by Republican governors in 1987-90

Table 2

Governor's Appointments to

Kansas Supreme Court Nominating Commission, 1987 – 2007

Governor's Party	Republican Commissioners	Democratic Commissioners
Republican	8	0
Democrat	0	14

In addition to consistently partisan appointments to the Commission, there is a strikingly partisan record of appointments to the Supreme Court itself. During the twenty-year period from 1987 to 2007, eleven new justices were appointed to the court.[25] Nine of the eleven justices belonged to the same political party as the governor who appointed them.[26] In one of the other two cases the governor could not appoint a justice from his party because none of the three individuals submitted to the governor belonged to that party.[27] In other words, in nine of the ten cases in which the governor could pick a member of the governor's party, the governor did so. So the governor's role—in this allegedly "non-partisan" process—has been quite partisan, although not invariably so.[28] And in one of the last eleven cases, the Commission forced the governor to select an individual who did not belong to the governor's party.[29] This data on the appointment of justices is depicted in Table 3, which follows.

and 1995-2002.) By contrast, research for this paper was not able to identify the party affiliation of all the lawyer members of the Commission. Of those lawyer members for whom party affiliation was available, there were seven Democrats, thirteen Republicans and zero Independents or members of third parties. *See id.* This translates into 35% Democrats, 65% Republicans and 0% Independents or members of third parties. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006).

25. *See infra* Appendix A.

26. *Id.*

27. *Id.* (Justice Luckert).

28. This is not a fluke of Kansas. According to scholars assessing judicial selection around the country, "Few deny that the Governor, although limited in his or her choice, applies political criteria in judging the three nominees submitted by the nominating commission. Assuming that the three are nearly equal in terms of qualifications, the one most politically attractive receives the Governor's nod." CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 131 (1997).

29. *See infra* Appendix A (Justice Luckert).

Table 3
Governor's Appointments to Kansas Supreme Court, 1987 – 2007

	Governor appointed justice from governor's party	Governor appointed justice not from governor's party
At least one of Commission's nominees in governor's party	9	1
None of nominees in governor's party	0	1

III. THE DEBATE OVER REFORM

There is a nationwide debate over whether "non-partisan," "merit" selection of judges should be reformed to achieve two goals: first, to reduce the amount of control exercised by the bar, and, second, to subject the political side of the judicial selection process to a more public system of checks and balances.[30] This paper provides a brief history of selection to the Kansas Supreme Court before discussing possible reforms.

A. The 1958 Kansas Plan

Until 1958, Kansans elected their supreme court justices. The establishment of the Kansas Supreme Court Nominating Commission in 1958 was a reaction to events that had occurred after the most recently preceding general election.

30. *See, e.g.*, Editorial, *Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10; *Blunt Trauma*, *supra* note 15. The same process currently used to select justices for the Kansas Supreme Court is also currently used to select all judges on the Kansas Court of Appeals. *See* KAN. STAT. ANN. §20-3004 (2006). In most of the state's judicial districts, a similar process is used to select district judges. *See generally* Stacie L. Sanders, Note, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?*, 34 WASHBURN L. J. 573 (1995). Accordingly, the case for reforming this process applies to all these courts but it applies most strongly to the Kansas Supreme Court simply because it is the state's highest court and lower courts follow its precedents.

> A resolution for the submission of a constitutional amendment which would adopt the commission plan [for the selection of supreme court justices] was introduced in 1953, but defeated in the house judiciary committee. Again proposed in 1955, the resolution was defeated in the senate judiciary committee. However, subsequent events were to lead to the adoption of the commission plan for the selection of supreme court justices: The intensive lobbying efforts of the Kansas Bar Association; and public outcry over the infamous "triple play" of 1956.
>
> The "triple play" involved Chief Justice of Kansas Supreme Court Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. In 1956, Governor Hall was defeated in the Republican Primary by Warren Shaw, who then lost the general election to Democrat George Docking. In December of that year, Chief Justice Smith, who was seriously ill, forwarded his resignation to Governor Hall. Hall then immediately resigned his post of Governor in favor of Lieutenant Governor McCuish, who prematurely returned from a Newton Hospital to make his first and only official act of his 11 day tenure as Governor: The appointment of Hall to the supreme court. Such a result would have been avoided under the commission plan, as the nominating commission would have determined which candidates to send to the governor for appointment, rather than allowing the governor to appoint replacement justices in between elections.
>
> The legislature submitted a proposal to amend the constitution to adopt the commission plan for the selection of supreme court justices only, and this amendment was passed by a wide margin in the 1958 general election.[31]

In short, the current Commission system was rejected in 1953 and 1955 but—after the "triple play" of 1956—was passed in the next general election. The "intensive lobbying efforts of the Kansas Bar Association" combined with the "triple play" to give Kansas its current supreme court selection process.

The lesson of the "triple play" is that governors should not have absolute power over the selection of supreme court justices. "Power tends to corrupt, and absolute power corrupts absolutely."[32] The Framers of the United States Constitution were acutely aware of this risk and their masterful achievement was designing a system of government in which power was divided and constrained by a system of checks and balances.[33] In appointing justices to the

31. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASSOC. 32, 34 (2000) (citations omitted).

32. Letter from Lord Acton to Bishop Mandell Creighton (1887), *see* http://www.phrases.org.uk/meanings/288200.html (last visited Mar. 14, 2007).

33. *See generally* THE FEDERALIST NOS. 47, 48, 49, 50, 51 (James Madison) (Clinton Rossiter ed., 1999) (discussing and explaining the need for separation of powers and checks and balances).

United States Supreme Court, the president's power is checked by the power of the United States Senate. The Constitution requires a majority vote of the Senate in order to confirm a justice to the United States Supreme Court.[34] By contrast, at the time of the "triple play" the Kansas Constitution lacked this check on the Governor's power to appoint a justice to the Kansas Supreme Court.

Anger over the "triple play" prompted the addition of a check on the governor's power to select justices. This new check on the governor's power was given, not to the Kansas Senate, but to the bar (lawyers licensed to practice in the state). Rather than following the United States Constitution to make the Legislature the check on the Executive's power, the 1958 change made the bar the check on the Executive's power.[35]

B. Is The Bar an Interest Group or "Faction"?

Lawyers, because of their professional expertise and interest in the judiciary, are well-suited to recognizing which candidates for a judgeship are especially knowledgeable and skilled lawyers. But lawyers assessing applicants for a judgeship are also human beings. Can we be confident that all the lawyers on a nominating commission will be willing and able to put aside completely all their personal views in favor of some non-political conception of "merit"? Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very political, but that their politics—rather than being the politics of the citizenry as a whole—are "a somewhat subterranean politics of bar and bench involving little popular control."[36]

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34. U.S. CONST. art II, § 2.

35. Technically, of course, it is the Commission rather than the bar that is the check on the governor. But the governor appoints four of the nine commissioners so, except insofar as they are holdovers appointed by a previous governor of a different party, those four are unlikely to serve as much of a check on the governor. The check on the governor, if it comes from the Commission at all, is more likely to come from the five commissioners elected by the bar. *See supra* Part II, Table 2 (showing, from 1987 to 2007, all fourteen of the commissioners appointed by Democratic governors were Democrats and all eight of the commissioners appointed by Republican governors were Republicans).

36. HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998). Judicial selection through a nominating commission was first adopted in Missouri and is often called "the Missouri Plan." The classic study of the first twenty-five years of this process in Missouri is a book by Richard A. Watson & Rondal G. Downing, THE POLITICS OF THE BENCH AND THE BAR (1969). A textbook summarizes their findings as follows:

> [F]ar from taking judicial selection out of politics, the Missouri Plan actually tended to replace Politics, wherein the judge faces popular election (or selection by a popularly elected official), with a somewhat subterranean politics of bar and bench involving little popular control. There is, then, a sense in which merit selection does operate to enhance the weight of professional influence in the selection process (one of its stated goals) in that lawyers and judges are given a direct, indeed official, role in the nominating process. On close examination, however, one finds raw political considerations masquerading as professionalism

> The conclusion is inescapable: "merit" selection has little or no merit, if by merit we mean that nonpolitical (that is, professional) considerations dominate the selection process.
>
> . . .
>
> Not only is there little evidence of the superiority of judges selected by the "merit" system (although there is some evidence to the contrary), but also there is little to show that judicial selection mechanisms make any difference at all. . . .
>
> . . .
>
> Where are we then? If the lay, the professional, and even the political inputs built into the Missouri Plan[37], do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The answer is, not much. In a thorough examination of the Missouri Plan undertaken by Henry Glick, other avenues of analysis were pursued, but the results in no instance reveal redeeming support for the claims made for merit selection. Why, then does bar, bench, and general public support for the plan continue, and why is the plan being adopted in more and more states? The specific reasons are many, but they ultimately boil down to an aggrandizement of national and state bar associations.
>
> The legal profession desires a larger voice in judicial selection for the same reason that other interest groups do—to advance their cause through judicial policymaking. "Merit" selection gives them that added leverage. All the better if they can sell their old line of increased political influence over the courts by using the attractive, but phony, label of "neutral professionalism."[38]

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via attorney representation of the socioeconomic interests of their clients. STUMPF & PAUL, *supra*, at 142.

37. Judicial selection through a nominating commission was first adopted in Missouri and is often called "the Missouri Plan."

38. STUMPF & PAUL, *supra* note 36, at 142-47. *See also* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002) (citation omitted) ("This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges . . . . Finally, there are no significant, systematic differences between merit-selected judges and other judges."); HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 41 (1991) ("The primary appeal of the merit plan for judicial selection rests with the implication that it is a nonpartisan mechanism. Additionally, proponents claim that judges of a higher 'quality' are more likely to reach the bench via this system than any other. However, experience with the merit plan indicates that it is a very political one, with state and local bar politics substituting for public politics.").

Practicing lawyers and judges confirm the scholars' conclusion. *See* Robert L. Brown, *From Whence Cometh our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. REV. 313, 321 (1998) ("Even in states which use the Missouri Plan, nominating commissions are subject to considerable lobbying by single-issue groups and political parties in the development of a slate of judicial candidates. So is the governor once the slate is prepared and presented. It is politics, but politics of a different stripe."); Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20, 24 (1996) ("Merit selection does not take

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Critics of "merit" selection point out that lawyers comprise an interest group just like other interest groups. Bar associations aggressively lobby for the interests of their lawyer-members. While they may articulate reasons why the policies that favor lawyers also serve the public interest, bar associations have repeatedly advocated policies that favor lawyers and that have been viewed by others as harming the public as a whole.[39] The selection of supreme court justices through a process controlled by the bar is just one example of this form of advocacy.[40] Relatedly, members of the Kansas Supreme Court Nominating Commission could be lobbied and influenced by some of that lobbying.[41]

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politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole.").

39. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 69 (2004) ("Bar efforts to restrain lawyers' competitive practices have inflated the costs and reduced the accessibility of legal assistance. Although the courts have increasingly curtailed these efforts through constitutional rulings, the bar's regulatory structure has remained overly responsive to professional interests at the expense of the pubic."); *id.* at 87 ("Giving qualified nonlawyers a greater role in providing routine legal assistance is likely to have a . . . positive effect, but the organized bar is pushing hard in the opposite direction."); Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 994 (2004) (with respect to access to justice for people of modest means, "Bar associations have behaved more like rent-seeking interest groups than the self-policing, public-minded regulatory bodies they purport to be; state legislatures and state supreme courts have too long caved to patently self-serving claims by bar associations for insulation from direct public regulation . . . ."); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003) (with respect to accreditation of law schools, American Bar Association lobbies for a set of rules that "forces one style of law training, at Rolls-Royce prices" which reduces the supply of lawyers); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L. Rev. 965, 967 (1997) ("some [legal] ethics rules can indeed be understood as serving the interest of the organized bar at the expense of social wealth."); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 567 (1994) ("the organized bar, beginning in the 1930s, negotiated treaties with organized groups of competitors that had the effect of dividing the market for services in areas reserved for lawyers, on the one hand, and accountants, architects, claims adjusters, collection agencies, liability insurance companies, lawbook publishers, professional engineers, realtors, title companies, trust companies, and social workers, on the other. The growth of the consumer movement and the evolution of federal antitrust law brought an end to this market division strategy.") *id.* at 575 (discussing organized bar's opposition to group legal service arrangements).

40. The American Bar Association has lobbied for judges selected by nominating commissions since 1937. STUMPF & PAUL, *supra* note 36 at 138. *See also infra* Appendix C, JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASS'N COMMISSION ON THE 21ST CENTURY JUDICIARY (2003).

41. *See, e.g.*, Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 100 (2007).

> The commission needs to be open to, and receptive of, external input. Rules of conduct should help reduce political control, not eliminate public input. Nevertheless, a code of ethics must address the external pressures that may exert themselves upon the commissioners. Political pressure may come from individuals, political parties, and industry and special interest groups that exist within the constituency. Commissioners should receive information from

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The Framers of the United States Constitution recognized a danger from interest groups, or "factions" as they were then called[42] The Federalist Papers propose several cures for the "mischiefs of faction."[43] The most famous is the system of "checks and balances," which divides power and sets factions against one another, ensuring that none can gain control for itself.[44] The question is whether such a system is in place in Kansas: are the critics correct that the process for judicial selection gives too much control to a single faction? The executive branch's power to appoint members of the judicial branch is checked, not by the legislative branch, but by a nine-person commission in which a majority are selected by the bar.

C. Reduce Bar Control of the Nominating Commission?

Several possible reforms would reduce the control a single faction, the bar, has over the process of selecting justices to the Kansas Supreme Court. One such reform would simply reduce the portion of the Commission selected by the bar. The majority of the twenty-four states with supreme court nominating commissions allow the bar to select less than one-third of the commission's members.[45] Kansas could move toward the mainstream of states by, for instance, allowing the Speaker of the House and President of the Senate

> constituents, whether those constituents speak individually or collectively through organizations. Such information, however, should be properly channeled to the commission as an entity and not to individual commissioners by way of surreptitious meetings or ex parte communications.

Id. at 100-01. In Kansas, House Speaker Melvin Neufeld said the bar played too large a role and the system needs to be reformed so a Governor's nominee to the high court faces Senate confirmation. *See* Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL-JOURNAL, Jan. 6, 2007, at A1. Neufeld said, "That setup that we now have has evolved to a good-old-boy club." *Id.* A "good-old-boy club," with its associations of exclusivity and privilege, is an apt description of how the Commission looks to many of those who are not members of the bar. This is a shame because of the good faith and hard work exhibited by those the bar elects to the Commission. But when a single interest group controls an important governmental process -- and exercises that control in a largely secret manner -- outsiders can be excused for being suspicious and resentful. Courts have held such interest-group control unconstitutional when the interest group in question were not lawyers. *See* Senator Susan Wagle, *Confirm Justices*, WICHITA EAGLE, Mar. 6, 2005, at 15A ("The nominating committee is controlled by a majority of attorneys, the very individuals who appear before the courts seeking favor. In a similar situation in 1993, the federal courts declared the process by which Kansas selected its secretary of agriculture unconstitutional. The secretary used to be selected by the farm groups that the secretary regulated. The Legislature changed the position to one selected by the governor and subject to the Senate confirmation process.").

42. *See* THE FEDERALIST No. 9 (Alexander Hamilton), No.10 (James Madison) (Clinton Rossiter ed., 1999).

43. THE FEDERALIST No. 10, (James Madison), *supra*, note 42.

44. *See* THE FEDERALIST No. 51 (James Madison), *supra* note 42.

45. The thirteen states allowing the bar to select less than one-third are Arizona, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New York, Rhode Island, South Carolina, Tennessee, Utah, and Vermont, *see supra* notes 8 & 10, while the eleven states allowing the bar to select more than one-third are: Alaska, California, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, and Wyoming. *See supra* notes 4-5 and 8.

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to select two commissioners each, while the bar and Governor select three and two commissioners, respectively. In addition to moving Kansas toward the mainstream of states with respect to bar control, this reform would also bring Kansas in line with the ten states in which the legislature selects some of the commissioners or has confirmation power over those the governor selects.[46] According to Professor (and former judge) Joseph Colquitt, allowing the legislature to select some of the commissioners "diverts the power from the governor, who usually will be charged with appointing judges from the slate nominated by the commission. Placing the power to appoint or elect commissioners in hands other than the appointing authority for judges better addresses both democratic ideals and commission-independence concerns."[47]

A reform to allow the Kansas Legislature to appoint members of the Kansas Supreme Court Nominating Commission would reduce the bar's control over the Kansas Supreme Court selection process. But, it would not open up the process by exposing the commissioners' votes to the public. It is possible to require that the votes of the Commission be made public—so everyone can learn which commissioners voted for or against which applicants—but most judicial nominating commissions around the country vote in secret.[48] Other ways to expose the political side of the judicial selection process include judicial elections and senate confirmation of judicial nominees. These are discussed next.

D. Electing Supreme Court Justices

Kansans elected supreme court justices prior to 1958 and a recent proposal in the Legislature sought to revive this process.[49] While electing supreme court justices reduces bar control, it also has many drawbacks. These include:

> the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge's dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers

46. These states are: Alaska, Arizona, Connecticut, Hawaii, Iowa, New York, Rhode Island, South Carolina, Tennessee and Vermont. *See supra* notes 5, 8, and 10.

47. Colquitt, *supra* note 41, at 94-95.

48. "Most commissions vote by secret ballot in closed, executive session. . . . In a few jurisdictions, a non-binding vote is done in closed, executive session and then conducted again in public." AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, 25 (2d ed. 2004) http://www.ajs.org/selection/docs/JNC_Handbk-Ch2.pdf (citations omitted) (citing, for the latter proposition, Section 8 of the New Mexico Rules Governing Judicial Nominating Commissions).

49. Sarah Kessinger, *Proposal calls for electing judges to high court*, HUTCHINSON NEWS, Feb. 12, 2005. That proposal was House Concurrent Resolution No. 5012 (2005), introduced by Representative Lynne Oharah, and hearings were held before the House Committee on Federal and State Affairs on March 17, 2005. No action was taken.

> who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.[50]

The appearance of impropriety and threat to judicial independence are exacerbated by the fact that judicial campaign contributions tend to come from those who seek favorable decisions from the court. As Professor Paul Carrington explains:

> Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust. . . . There have been celebrated occasions . . . when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.[51]

The Chief Justice of the Texas Supreme Court similarly asked, "when a winning litigant has contributed thousands of dollars to the judge's campaign, how do you ever persuade the losing party that only the facts of the case were considered?"[52]

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50. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 276 (2002).

51. Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91-92 (1998) (citations omitted).

52. Presser et al., *supra* note 12, at 378 (quoting Thomas R. Phillips). A distinction should be drawn

> when the campaign contributor is not a single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy. A single contributor may seek only victories in cases in which the contributor appears as a party or lawyer. In contrast, an interest group may have a broad policy agenda, such as protecting the environment or deregulating the economy. Such an interest group may contribute to the campaigns of judges who share its political philosophy, just as it may contribute to the campaigns of like-minded candidates for other public offices. If such an interest group succeeds, it affects the results in many cases in which the winning parties and lawyers are not members of the interest group. In short, the interest group succeeds, not by buying justice in individual cases, but by buying policy that influences a range of cases.

Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 653-654 (1999), *reprinted in*, 30 CAP. U. L. REV. 583 (2002). The possibility of contributors "buying justice" in individual cases is the primary concern about judicial elections. The possibility of contributors "buying policy" over a range of cases is a secondary concern and one that raises more nuanced issues. No plausible system of judicial selection can be completely insulated from the efforts of interest groups to influence policy. Even the federal system of judicial appointment with life tenure is subject to these efforts as interest

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E. Senate Confirmation of Supreme Court Justices

Proposals to elect Kansas Supreme Court justices have received less support in recent years than proposals to require Senate confirmation of them. In 2005, Senators Derek Schmidt and Susan Wagle proposed a constitutional amendment that would have kept the Supreme Court Nominating Commission but, after the governor picked one of the three names submitted by the Commission, that person would be appointed to the Supreme Court only with consent of the State Senate.[53] This proposal is similar to the law in the ten states that have both a supreme court nominating commission and confirmation by the legislature or other publicly-elected officials.[54]

Under this proposal, if the Senate did not confirm the governor's nominee then the governor would pick one of the other two names submitted by the Commission. If the Senate did not confirm any of the three individuals then the Commission would submit three additional names to the governor and the process would continue until a nominee received the consent of the Senate. In 2005, this proposal passed the Senate Judiciary Committee on a 6-4 vote,[55] but did not go to a vote in the Senate.[56] In 2006, it did go to a vote in the Senate. A 22-17 majority of senators voted for it, but that was still five votes short of the two-thirds necessary for a constitutional amendment.[57]

In both 2006 and 2007, Representative Lance Kinzer proposed abolition of the Supreme Court Nominating Commission. Instead, justices would be nominated by the governor and appointed to the Supreme Court after

groups contribute to the presidential and senatorial campaigns of candidates likely to appoint and confirm the judges expected to advance the interest group's preferred policy positions. The difference between the federal system and a system of electing judges is that in the federal system interest-group influence over judge-made policy is indirect because it operates through the president and senators and these intermediaries campaign on a range of issues besides judicial selection. *See id.* By contrast, judicial selection is the only issue in judicial campaigns so interest-group influence over judge-made policy is more direct in a system of elected judges. *See infra* text accompanying notes 77-78 (contrasting political theory behind judicial elections with that behind federal system of judicial selection).

53. *See* S. Con. Res. 1606 (Kan. 2005). *See also* David Klepper, *Nomination Process Scrutinized*, KAN. CITY STAR, Feb. 10, 2005, at B3.

54. *See supra* notes 10-12 and accompanying text.

55. Steve Painter, *Senators Seek Say in Judge Selection: A Proposed Constitutional Amendment Would Change the Way Kansas Picks Its Supreme Court Justices*, WICHITA EAGLE, Mar. 20, 2005, at 1B.

56. Steve Painter, *Topeka Judge To Join High Court: The Governor's Choice Wins Praise From Legislators*, WICHITA EAGLE, July 23, 2005, at 1A.

57. *See* KAN. CONST. art. XIV, §§ 1-2. An amendment to the constitution can originate in either house. It must then be approved by two-thirds of the members of each house, and then at the next or through a special election the majority of voters must approve. A revision can also occur through constitutional convention to revise all or part of the document. Each house must approve this by a two-thirds vote. At the following election the majority of voters must approve the convention. At the next (or a special) election, delegates are elected from each district. After meeting and reaching consensus, the proposals of the convention are submitted to the voters for majority approval. *See id.*

confirmation by the Senate.[58] This proposal is similar to the process used in three states and at the federal level.[59] This proposal was the subject of committee hearings,[60] but did not receive a vote of the full House.[61]

The push for Senate confirmation came shortly after two controversial Kansas Supreme Court decisions, one on school finance and the other on the death penalty.[62] This timing led many people to view the push for Senate confirmation as, to use the words of Senator John Vratil, "an overreaction to our discontent with two decisions."[63] According to this view, the process for selecting justices should not be amended just because many people disagree with a couple of the court's decisions. As Senator Vratil said, "We need to take a much longer viewpoint and not just react in knee-jerk fashion to a couple of decisions that are unpopular."[64]

So the question is, when taking the long view, did the Framers of the United States Constitution get it right? They created three co-equal branches of government (executive, legislative and judicial) and a system of checks and balances that has stood the test of time longer than any other written constitution in human history.[65] A cardinal virtue of the United States Constitution is that, at crucial points, each branch is checked by both of the other two branches. For example, a member of the judicial branch is nominated by the executive and confirmed by the legislature.[66] These checks come from elected officials, responsible to the public as a whole, not a single interest group or "faction." Also, these checks take the form of public votes. As a result, citizens can hold their president and senators accountable for these important decisions on election day.[67] By contrast, the Kansas Supreme Court

58. H.R. Con. Res. 5033 (Kan. 2006); H.R. Con. Res. 5008 (Kan. 2007).

59. These states are Maine, New Hampshire and New Jersey. *See supra* notes 10-12.

60. James Carlson, *Method for Choosing High Court Justices Would Change with Resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. The Feb. 8, 2006 hearing on H.R. Con. Res. 5033 was before the House Judiciary Committee. *See infra* note 68. The Feb. 13, 2007 hearing on H.R. Con. Res. 5008 was before the House Federal and State Affairs Committee. *See infra* note 70.

61. A motion to favorably report it out of the House Judiciary Committee failed by a vote of ten to eight on March 23, 2006.

62. *See generally* John Hanna, *'Triple Play' Should Guide Legislators*, HAYS DAILY NEWS, Feb. 14, 2005 ("The proposal to modify justices' selection is a response to recent court decisions striking down the state's death penalty law and ordering legislators to improve education funding. Some Republicans complain the court now has an activist streak and believe Senate confirmation of members would make it more accountable.").

63. Carl Manning, *Proposed Amendment to Require Senate Confirmation of Justices Shot Down*, HAYS DAILY NEWS, Mar. 10, 2006 (quoting Senator John Vratil).

64. Hanna, *supra* note 62.

65. *See, e.g.*, David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 811 (1986).

66. *See supra* note 16 and accompanying text.

67. *Id.* In addition, the United States Constitution promotes accountability by placing the appointment responsibility solely on the president, the individual in whom executive power is vested. By contrast, Kansas currently spreads that responsibility among the governor and the nine-member Commission. As John McGinnis explains:

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Nominating Commission's votes are secret. Consequently, even the few privileged citizens entitled to vote for commissioners cannot hold them individually accountable for these important decisions.[68]

IV. OPPOSITION TO SENATE CONFIRMATION

Officials of the Kansas Bar Association defend Kansas' current system of Supreme Court selection and resist reform.[69] In addition to arguing (as discussed above) that the current system emphasizes merit rather than politics,[70] they have argued that Senate confirmation would be a "circus."[71]

> The principal concern of the Framers regarding the Appointment Clause, as in many of the other separation of powers provisions 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.

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

68. *See supra* notes 18-21 and accompanying text.

69. *See, e.g., Hearing on S. Con. Res.* 1606 *Before the S. Judiciary Comm.* (Kan. 2005) (statements by Jack Focht, Past President of the Kan. Bar Ass'n, on Feb. 21, 2005); *Hearing on H. Con. Res.* 5033 *Before the H. Judiciary Comm.* (Kan. 2006) (statements by Richard F. Hayse, Past President of the Kan. Bar Ass'n, on Feb. 8, 2006); *Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Richard Hayse on Feb. 13, 2007). *See also* Tim Carpenter, *Senators Want to Have Say Under Plan, Justices Would Require Senate Confirmation*, TOPEKA CAPITAL-JOURNAL, Feb. 10, 2005 at 1C ("Gov. Kathleen Sebelius said there was no reason to alter the appointment process. 'I think that the system that we've had in place for a number of years has worked extremely well,' she said. 'I think the system works.'"); Klepper, *supra* note 53 (responding to a proposal for Senate confirmation, "Supreme Court spokesman Ron Keefover said the court is happy with the current method of selection.").

70. *See supra* notes 22-29 and accompanying text.

71. *See, e.g., Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Richard F. Hayse, Past President of the Kan. Bar. Ass'n, on Feb. 13, 2007). *See also* Editorial, *Senate right to retain status quo*, MANHATTAN MERCURY, Mar. 12, 2006 at C8 (quoting Senator John Vratil, "'Is the circus that masquerades as the confirmation process in the United States Senate a process we want to emulate?'"); John D. Montgomery, Editorial, *No problem*, HAYS DAILY NEWS, Feb. 11, 2005 ("So, would a state Supreme Court selection process mirroring the federal process be better in Kansas? Maybe not. Consider how political judicial confirmation is in Washington. Extremely political. Do we want that in Kansas?"); *Infra* Appendix C, ("The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach."). Also, some opponents of senate confirmation express concern that the Kansas Legislature, unlike the United States Congress, is a part-time legislature. *See, e.g., Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Retired Justice Fred N. Six on Feb. 13, 2007). Several states with senate confirmation, however, have part time legislatures. *See* National Conference of State Legislatures, http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm (last visited Oct. 4, 2007) (listing Maine, Rhode Island, Utah and Vermont as part-time). If a vacancy on the Kansas Supreme Court occurred when the Kansas Legislature was not in session then a special session could be called or the seat could simply remain vacant until the Legislature's regular session.

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One commentator went further and wrote:

> It's not hard to imagine a scenario, similar to what takes place in the U.S. Senate, where state senators, with liberal and conservative litmus tests, end up politicizing the confirmation hearings and the final vote on a nominee.
>
> However, the consequences of this battle in Kansas may be unlike the national level. A Kansas justice, wounded by his or her confirmation battle, will be ripe for an acrimonious retention vote. Ideologically motivated groups, who lost their battles in the state Senate, might go gunning for that justice in the ballot box. At the national level, U.S. Supreme Court justices don't face a retention vote. Thus, time has a chance to heal the wounds inflicted by their confirmation hearings.[72]

Is this war-like vision of battling senators and wounded justices likely to occur if Kansas adopts senate confirmation? To assess that, one can look to the experience of the twelve states that have senate confirmation or confirmation by a similar popularly-elected body.[73] Research for this paper examined the last two votes for initial supreme court confirmation in each of these twelve states.[74] 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.[75] In only two of these twenty four cases was there more than a single dissenting vote.[76] These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus, let alone a war.

The opposite concern about senate confirmation is that it is merely a rubber stamp so governors routinely appoint whoever they want. There are indications, however, that—rather than acting as a rubber stamp—senate confirmation may be a deterrent. Governors know that senate confirmation of controversial nominees may be difficult,[77] so governors consider, in advance,

72. Joseph A. Aistrup, *Supreme Court Confirmation Amendment*, HAYS DAILY NEWS, Feb. 28, 2005.

73. Ten of these twelve states have supreme court nominating commissions. *See supra* notes 10-12 and accompanying text. For discussion on California's unique system, see *supra* note 12.

74. *See infra* Appendix B. The votes presented in Appendix B are for the state's highest court regardless of whether or not it is named the supreme court. The votes examined are the last two votes for *initial* supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1.

75. Seventeen of the twenty-four votes were unanimous and two were effectively unanimous because they were voice votes with no tally recorded.

76. *See infra* Appendix B.

77. The Founders recognized that Senate confirmation would deter the executive from controversial nominees. As Alexander Hamilton wrote, "The necessity of [Senate] concurrence would have a powerful though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of

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the wishes of the senate in deciding who to nominate.[78] Of course, whether this generalization is accurate or not, ultimate responsibility for the tenor of the senate confirmation process rests on the senators themselves. Similarly, ultimate responsibility for the outcome of the senate confirmation process—whether a nominee is confirmed or not—also rests with the senators who are accountable to the citizens on election day.

In short, senate confirmation makes judicial selection accountable to the people. It does so without judicial elections, which embody the passion for direct democracy prevalent in the Jacksonian era.[79] Rather, senate confirmation exemplifies the republicanism of our Nation's Founders. The Framers of the United States Constitution devised a system of indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities.[80] Senate confirmation strives to make judicial selection accountable to the people while protecting the judiciary against the possibility that the people may act rashly.

V. JUDICIAL INDEPENDENCE

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.[81] By contrast, bar groups have not charged that Senate confirmation of federal judges reduces the independence of federal

unfit characters . . . ." THE FEDERALIST No. 76 (Alexander Hamilton), *supra* note 42.

78. In addition to deterring controversial nominations, the requirement of senate confirmation may also lead executives to withdraw controversial nominations. Some suggest this is what led President Bush to withdraw Harriet Miers' nomination to the Supreme Court. *See, e.g.*, John Cochran, *A Troubled Nomination Implodes*, CQ WKLY, Oct. 29, 2005. Similarly, in Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. At least one commentator attributes the withdrawal in part to the prospect of a "grilling," (i.e., "rough" questioning,) before the state senate. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1.

79. "In the early nineteenth century, states switched to the election of judges in a fervor of Jacksonian democracy." DANIEL BECKER & MALIA REDDICK, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES 20 (2003), *available at* http://www.ajs.org/js/jsreform.pdf. *See also* STUMPF & PAUL, *supra* note 36, at 134-35; JUDICIAL REFORM IN THE STATES 4-5 (Anthony Champagne & Judith Haydel eds., 1993).

80. *See* THE FEDERALIST No. 10, at 49-52 (James Madison) (Clinton Rossiter ed. 1999) (for Madison's classic distinction between republics and democracies). The Framers "understood that despotism of the many could be as dangerous to government and to individual liberty as despotism of the few, and they designed their democracy to ensure against both evils. The Framers' fear of majority faction is evident: their constitution is countermajoritarian in numerous respects. The document clearly is founded in part on permitting and expecting the populace to speak through its elected representatives. By the same token, the Constitution is shot through with provisions that in effect might defeat the decisions of a popular majority." Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 619-20 (1993) (footnotes omitted).

81. *See, e.g.*, Memorandum from Jim Robinson to House Committee on the Judiciary (Feb. 6, 2005), *available at* http://www.kadc.org/Testimony/Robinson_JudicialSelection.pdf ("Senate confirmation introduces a political element into the selection process that diminishes judicial independence.").

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courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure.[82] By contrast, judges who are subject to reelection or reappointment 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.[83]

The current system of judicial retention for the Kansas Supreme Court is as follows. When first appointed, a justice holds office for a short initial term.[84] To remain on the bench, a justice must stand for retention at the next general election which occurs after one year in office and, if retained in that election, must stand for retention every six years thereafter.[85] In these retention elections, the justice does not face an opposing candidate; instead, the voters' choose simply to retain or reject that particular justice.[86] A justice must retire at the end of the term during which the justice reaches the age of 70.[87]

This system of judicial *retention* is perfectly compatible with a judicial *selection* process that includes senate confirmation. Three states combine retention elections with initial selection through confirmation by the senate or other publicly-elected officials.[88] Accordingly, supporters of senate

82. U.S. CONST. art. III, § 1 ("during good behaviour").

83. "Life tenure acts to insulate justices from political pressure because, short of the drastic and difficult step of impeachment, justices cannot be removed from the Court for making unpopular decisions. Nonrenewable terms insulate justices in the same way." James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1127 (2004) (referring to the United States Supreme Court) (footnote omitted). "Appointing justices to renewable terms, however, would move the Court in the direction of a legislative body and undermine judicial independence." *Id. See also* Presser et al., *supra note* 12, at 369-70; Behrens & Silverman, *supra* note 50, at 305 ("Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence.") (footnote omitted); Lee Epstein, et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 12 (2001) ("[W]hile the U.S. Framers gave federal jurists life tenure presumably to maximize judicial independence, other nations opted for renewable terms presumably to maximize accountability.").

84. KAN. CONST. art. 3 § 5(c) (A new justice "shall hold office for an initial term ending on the second Monday in January following the first general election that occurs after the expiration of twelve months in office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any justice of the supreme court may file in the office of the secretary of state a declaration of candidacy for election to succeed himself.").

85. KAN. CONST. art. 3 §§ 2, 5(c).

86. *Id.*

87. KAN. STAT. ANN. § 20-2608(a) (2006) ("Any judge upon reaching age 75 shall retire, except that any duly elected or appointed justice of the supreme court shall retire upon reaching age 70. Upon retiring, each such judge as described in this subsection shall receive retirement annuities as provided in K.S.A. 20-2610 and amendments thereto, except, that when any justice of the supreme court attains the age of 70, such judge may, if such judge desires, finish serving the term during which such judge attains the age of 70.").

88. These states are California, Maryland and Utah. *See* CAL. CONST. art. VI, § 16 (retention election every 12 years), MD. CONST. art. IV, § 5A (retention election every 10 years),

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confirmation in Kansas argue that there is no need to change our state's system of judicial retention.[89] The balance Kansas has struck between judicial independence and judicial accountability is quite reasonable and well within the national mainstream.[90] If, however, greater judicial independence was desired, Kansas could extend the length of a justice's term (the time between retention elections) or even abolish retention elections altogether so justices could serve until reaching the mandatory retirement age. On the other hand, if greater judicial accountability was desired then Kansas could reduce the length of a justice's term.

VI. CONCLUSION

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. To move Kansas from this extreme position toward the mainstream, several possible reforms have been debated in recent years. The least ambitious reform would merely change the composition of the Kansas Supreme Court Nominating Commission. Rather than allowing the bar to select a majority of the Commission's members, some of those members could, instead, be selected by the Kansas Legislature. While this would reduce the amount of control the bar has over the judicial selection process, it would not open up the process by exposing the commissioners' votes to the public. Other states open the judicial selection process to the public by using judicial elections or senate confirmation of judicial nominees. Proposals to elect supreme court justices have received little support in Kansas in recent years. By contrast, proposals to institute senate confirmation have received significant support in the Kansas Legislature. Senate confirmation would both reduce the amount of control the bar has over the judicial selection process and open up that process to a more public system of checks and balances. The worry that senate confirmation in Kansas would be a political "circus" or a "battle" finds little support in the experience of the many states that use senate

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UTAH CONST. art. VIII, § 9 (retention elections every ten years).

89. H.R. Con. Res. 5033 (Kan. 2006) and H.R. Con. Res. 5008 (Kan. 2007), which would move to the federal system of senate confirmation without a nominating commission, making no change to judicial retention except to eliminate the use of masculine pronouns.

90. *See, e.g.*, Behrens & Silverman, *supra* note 50.

> Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence. The public's desire for accountability, however, necessitates some checks on appointed judges. Few states opt for a lifetime appointment system because the people or the political establishment want to be able to remove judges who lose sight of society's values. For this reason, most states with appointive systems set a full term of between four and twelve years.
>
> Those states that use merit selection provide for nonpartisan retention elections that usually occur within one to two years of appointment and after each full term.

Id. at 305 (footnotes omitted).

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confirmation. In short, senate confirmation of Kansas Supreme Justices is a reform worthy of serious consideration.

Appendix A[91]

Kansas Supreme Court Appointments, 1987 - 2007

Allegrucci, Donald L., (D[92]) Pittsburg, appointed vice Schroeder, Jan. 12, 1987 to Jan. 8, 2007.

- Governor John Carlin (D) [8 Jan 1979 – 12 Jan 1987]
- Supreme Court Nominating Commission:
  - Robert C. Foulston [Chair, 1985 – 1992][93]
  - Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
  - Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Morris D. Hildreth [Fifth District Lawyer, 1977 – 1987][94]
  - Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D[95])
  - Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D[96])
  - Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[97])
  - John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[98])
  - Kenneth D. Buchele [Fifth District Non-Lawyer, 1982 – 1987] (D[99])
- Co-Nominees:
  - William Cook (D[100])
  - Jerry Gill Elliott (U[101])

Six, Frederick N., (R[102]) Lawrence, appointed vice Prager, Sept. 1, 1988 to Jan. 13, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]
- Supreme Court Nominating Commission:

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[91] Unless noted otherwise, all party affiliations are derived from the Kansas VoterView database available at the Kansas Secretary of State website, https://myvoteinfo.voteks.org/.
[92] Chris Grenz, *Critics Question Democratic Majority on High Court*, HUTCHINSON NEWS, Aug. 9, 2005.
[93] Deceased. No party affiliation available.
[94] Deceased. No party affiliation available.
[95] GOV. CARLIN RECORDS, BOX 59-1-2-19.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Carlin Picks Allegrucci for Court*, WICHITA EAGLE, Dec. 25, 1986, at 1A.
[101] *Id.*
[102] *Two Judges, Lawyer Nominated for Position on State High Court*, WICHITA EAGLE, July 8, 1988, at 4D.

- Robert C. Foulston [Chair, 1985 – 1992][103]
- Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
- Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
- John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
- Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
- Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
- Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D[104])
- Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D[105])
- Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[106])
- John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[107])
- Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)

- Co-Nominees:
  - Bob Abbott (R[108])
  - Charles Henson (R[109])

Abbott, Bob, (R[110]) Junction City, appointed vice Miller, Sept. 1, 1990 to June 6, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]
- Supreme Court Nominating Commission:
  - Robert C. Foulston [Chair, 1985 – 1992][111]
  - Selby S. Soward [First District Lawyer, 1988 – 1991][112]
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
  - Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
  - Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
  - Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[113])

[103] Deceased. No party affiliation available.
[104] GOV. CARLIN RECORDS, BOX 59-1-2-19.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Two Judges*, *supra* note 102, at 4D.
[109] *Id.*
[110] *Id.*
[111] Deceased. No party affiliation available.
[112] Deceased. No party affiliation available.
[113] GOV. CARLIN RECORDS, BOX 59-1-2-19.

- John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[114])
- Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)

- Co-Nominees:
  - Joseph Pierron Jr. (R[115])
  - Elwaine Pomeroy (R[116])

Davis, Robert E., (D[117]) Topeka, appointed vice Herd, Jan. 11, 1993—.

- Governor Joan Finney (D) [14 Jan 1991 – 9 Jan 1995]
- Supreme Court Nominating Commission:
  - Jack E. Dalton [Chair, 1992 – 1993] (R)
  - Constance M. Achterberg [First District Lawyer, 1992 – 1993] (R)
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
  - Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
  - Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
  - Emmett J. Tucker, Jr. [Third District Non-Lawyer, 1990 – 1993] (R)
  - Evangeline S. Chavez [Fourth District Non-Lawyer, 1991 – 1993] (D)
  - Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
  - Kay Royse (D[118])
  - Franklin Theis (D[119])

Larson, Edward, (R) Hays, appointed vice Holmes, Sept. 1, 1995 to Sept. 4, 2002.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Lynn R. Johnson [Chair, 1993 – 2001] (D)
  - Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)

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[114] Id.
[115] *Owen Case Given to Second Judge*, HUTCHINSON NEWS, Nov. 7, 1989.
[116] STATE OF KANSAS LEGISLATIVE DIRECTORY OF THE SEVENTIETH LEGISLATURE 1983 REGULAR SESSION.
[117] Grenz, *supra* note 92.
[118] Al Polczinski, *Weigand Fights Rich-Guy Image*, WICHITA EAGLE, May 25, 1990, at 3D.
[119] *Finney Fills Spot on State's High Court*, WICHITA EAGLE, Dec. 15, 1992, at 3D.

- Patrick D. McAnany [Third District Lawyer, 1993 – 1995] (R)
- Arden J. Bradshaw [Fourth District Lawyer, 1993 – 1997] (D)
- Carolyn Bird [First District Non-Lawyer, 1993 – 1998] (D)
- Edwin Watson [Second District Non-Lawyer, 1993 – 1995] (D[120])
- John Strick, Jr. [Third District Non-Lawyer, 1993 – 1996] (D)
- Pat Lehman [Fourth District Non-Lawyer, 1993 – 1997] (D[121])

- Co-Nominees:
  - Robert J. Lewis Jr. (R)
  - Steve A. Leben (D)

Nuss, Lawton R., (R[122]) Salina, appointed vice Larson, Sept. 4, 2002—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Marla Luckert (D[123])
  - Warren M. McCamish (R)

[120] Telephone Interview by Christopher Steadham with Linda Chalfant, Atchison County, Kansas Clerk's Office (Aug. 16, 2007).
[121] Kansas Democratic Party, Announcing the Kansas Democratic Party Speakers Bureau, http://www.ksdp.org/node/1210 (last visited Aug. 16, 2007).
[122] Grenz, *supra* note 92.
[123] *Id.*

Luckert, Marla J., (D[124]) Topeka, appointed vice Six, Jan. 13, 2003—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[125])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - David L. Stutzman (U[126])
  - Stephen D. Hill (D[127])

Gernon, Robert L., (R[128]) Topeka, appointed vice Lockett, Jan. 13, 2003 to March 30, 2005.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[129])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)

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[124] *Id.*
[125] *Id.*
[126] Jim McLean, *Appointed: Governor Tabs Shawnee County District Court Judge to Replace Retiring Justice Six*, TOPEKA CAPITAL–JOURNAL, Nov. 21, 2002, at A1.
[127] *Id.*
[128] *Hayden to Pick Appeals Judge*, WICHITA EAGLE, Oct. 31, 1987, at 15A.
[129] Grenz, *supra* note 92.

- Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)

- Co-Nominees:
  - Warren M. McCamish (R)
  - David L. Stutzman (U[130])

Beier, Carol A., (D[131]) Wichita, appointed vice Abbott, Sept. 5, 2003—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[132])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Steve A. Leben (D)
  - Patrick D. McAnany (R)

Rosen, Eric S., (D[133]) Topeka, appointed vice Gernon, Nov. 18, 2005—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[134])
  - Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)

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[130] McLean, *supra* note 126.
[131] Grenz, *supra* note 92.
[132] *Id.*
[133] *Id.*
[134] *Id.*

- Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
- Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
- Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)

- Co-Nominees:
  - Robert Fairchild (R[135])
  - Martha Coffman (D[136])

Johnson, Lee A., (R[137]) Caldwell, appointed vice Allegrucci, Jan. 8, 2007—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - Kerry E. McQueen [First District Lawyer, 2006 – 2010] (R)
  - Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Janet A. Juhnke [First District Non-Lawyer, 2006 – 2010] (D)
  - Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
  - Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
  - David N. Farnsworth [Fourth District Non-Lawyer, 2005 – 2009] (D)
- Co-Nominees:
  - Robert Fairchild (R[138])
  - Tom Malone (D[139])

[135] Chris Moon, *Local Judge a Finalist*, TOPEKA CAPITAL – JOURNAL, May 25, 2005, at B1.
[136] *Id.*
[137] Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL – JOURNAL, Jan. 6, 2007, at 1A.
[138] Moon, *supra* note 135.
[139] Nickie Flynn, *GOP Rivals for Judgeship are Old Allies*, WICHITA EAGLE, July 31, 1992, at 3D.

Appendix B

Most Recent State Supreme Court Confirmation Votes[140]

State	Nominee	Governor	Confirm	Vote tally
CT[141]	Justice Peter T. Zarella	John G. Rowland	Y	(Senate:35-1; House: 136-0, 14 absent or not voting)
CT	Chief Justice Chase T. Rogers	M. Jodi Rell	Y	(Senate: 33-0, 3 absent or not voting; House: 149-0, 2 absent or not voting)
DE[142]	Justice Jack Jacobs	Ruth Ann Minner	Y	(19-0, 2 absent or not voting)
DE	Justice Henry DuPont Ridgely	Ruth Ann Minner	Y	(21-0)
HI[143]	Justice James E. Duffy	Linda Lingle	Y	(25-0)
HI	Justice Simeon R. Acoba Jr.	Benjamin Cayetano	Y	(25-0)
MA[144]	Justice Robert J. Cordy	Paul Cellucci	Y	(8-0, vacancy on the Council at the time)
MA	Justice Judith Cowin	Paul Celluci	Y	(9-0)
MD[145]	Justice Clayton Greene Jr.	Robert Ehrlich	Y	(45-0, 2 absent)
MD	Justice Lynne Battaglia	Parris N. Glendening	Y	(40-3, 4 absent)
ME[146]	Justice Andrew M. Mead	John Baldacci	Y	(33-0, with 2 members absent; 13-0, in judiciary committee)
ME	Justice Warren M. Silver	John E. Baldacci	Y	(30-0, with 5

140. This Appendix reports the two most recent supreme court confirmation votes prior to August 1, 2007 in the states that have such votes. The votes reported are for the state's highest court regardless of whether or not it is named "the supreme court." The votes reported are the last two votes for initial supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee asked to have his name withdrawn. See *supra* note 74 (citing Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1).

141. Interview by Beth Dorsey with Legislative Library, Conn. Gen. Assembly (Aug. 14, 2007), *available at* www.cga.ct.gov/.

142. Interview by Beth Dorsey with Bernard Brady, Sec'y of the Senate, Del. Gen. Assembly (Aug. 16, 2007).

143. Interview by Beth Dorsey with Pub. Access Room, Haw. State Legislature (Aug. 16, 2007).

144. Email from Ethan Tavan, Constituent Services Aide, Office of the Governor, Mass. to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

145. Letter from Marilyn McManus, Dept. of Legislative Serv., Office of Policy Analysis, Md. Gen. Assembly to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 16, 2007).

146. Email from Mark Knierim, Reference Librarian, Me. State Law and Legislative Reference Library to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

				members absent; 12-0, with 1 absent in judiciary committee)
NH[147]	Justice Gary E. Hicks	John Lynch	Y	(5-0)
NH	Justice Richard E. Galway	Craig Benson	Y	(5-0)
NJ[148]	Justice Helen E. Hoens	Jon S. Corzine	Y	(35-0, 2 members did not vote)
NJ[149]	Chief Justice Stuart Rabner	Jon S. Corzine	Y	(36-1, dissenting vote Senator Nia Gill)
NY[150]	Justice Eugene F. Pigott, Jr.	George E. Pataki	Y	(no tally available - confirmed by voice vote)
NY	Justice Theodore T. Jones	Eliot Spitzer	Y	(no tally available – confirmed by voice vote)
RI[151]	Justice P. Robinson III	Donald L. Carcieri	Y	(House: 65-5, 5 absent or not voting; Senate: 37-0, 1 absent or not voting)
RI	Justice Paul A. Suttell	Donald L. Carcieri	Y	(House: 65-0, 10 absent or not voting; Senate: 30-0, 8 absent or not voting)
UT[152]	Justice Jill N. Parrish	Michael O. Leavitt	Y	(28-0, 1 absent)
UT	Justice Ronald E. Nehring	Michael O. Leavitt	Y	(27-1, 1 absent)
VT[153]	Justice Brian L. Burgess	James H. Douglas	Y	(29-0, 1 absent or not voting)
VT	Chief Justice Paul L. Reiber	James H. Douglas	Y	(27-0, 3 absent or not voting)

147. Email from Raymond S. Burton, Member of the N.H. Executive Council to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 4, 2007).

148. Email from James G. Wilson, Assistant Legislative Counsel, Office of Legislative Services, N.J. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 7, 2007).

149. Email from Legislative and Info. and Bill Room, Office of Legislative Services, N.J. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

150. Interview by Beth Dorsey with Legislative Journal Room, N.Y. Assembly (Aug. 25, 2007). Interview by Beth Dorsey with Liz Carr, N.Y. Governor's Office (Sept. 12, 2007).

151. Interview by Beth Dorsey with R.I. Legislative Library, R.I. State Legislature (Aug. 15, 2007).

152. Interview by Beth Dorsey with Shelley Day, Legislative Info. Liaison, Utah State Legislature Research Library and Information Center (Aug. 24, 2003). *See also* http://le.utah.gov/.

153. Email from Michael Chernick, Legislative Council, Vt. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 15, 2007).

Appendix C

Pages 70-73 of:

JUSTICE IN JEOPARDY

REPORT OF THE

AMERICAN BAR ASSOCIATION

COMMISSION ON THE 21ST CENTURY

JUDICIARY

July 2003

Alfred P. Carlton, Jr.

American Bar Association President, 2002-2003

THE RECOMMENDATIONS OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY WERE APPROVED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES IN AUGUST 2003. THE COMMENTARY CONTAINED HEREIN DOES NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE ABA. ONLY THE TEXT OF THE RECOMMENDATIONS HAS BEEN FORMALLY APPROVED BY THE ABA HOUSE OF DELEGATES AS OFFICIAL POLICY (SEE APPENDIX A). THE REPORT, ALTHOUGH UNOFFICIAL, SERVES AS A USEFUL EXPLANATION OF THE RECOMMENDATIONS.

I. The Preferred System of Judicial Selection

•The Commission recommends, as the preferred system of state court judicial selection, a commission-based appointive system with the following components:

•The Commission recommends that the governor appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, nonpartisan, diverse deliberative body or commission.

•The Commission recommends that judicial appointees serve a single, lengthy term of at least 15 years or until a specified age and not be subject to a reselection process.[154] Judges so appointed should be entitled to retirement benefits upon completion of judicial service.

•The Commission recommends that judges not otherwise subject to reselection, nonetheless, remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

The American Bar Association has long supported appointive-based or so-called "merit selection" systems for the selection of state judges, and in the Commission's view, rightly so, for several reasons. First, the administration of justice should not turn on the outcome of popularity contests. If we accept the enduring principles identified in the first section of this report, then a good judge is a competent and conscientious lawyer with a judicial temperament who is independent enough to uphold the law impartially without regard to whether the results will be politically popular with voters. Second, initial appointment reduces the corrosive influence of money in judicial selection by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges. Some argue that in appointive systems, campaign contributions are simply redirected from judicial candidates to the appointing governors, but that is an important difference because it is the money that flows directly from contributors to judicial candidates that gives rise to a perception of dependence. Third, the escalating cost of running judicial campaigns operates to exclude from the pool of viable candidates those of limited financial means who lack access to contributors with significant financial resources. The potential impact of this development on efforts to diversify the bench is especially troublesome. Fourth, the prospect of soliciting contributions from special interests and being

154. The American Bar Association House of Delegates adopted a recommendation stating, "Judicial appointees should serve until a specified age."

publicly pressured to take positions on issues they must later decide as judges threatens to discourage many capable and qualified people from seeking judicial office. For these and other reasons upon which the ABA has relied in the past, the Commission believes that judges should initially be selected by appointment.

Consistent with an earlier recommendation in this Report, the Commission likewise recommends that an independent deliberative body evaluate the qualifications of all judicial aspirants and that candidates eligible for nomination to judicial office be limited to those who have been approved by such a body. In grounding its support for appointive judiciaries on the principle that the viability of a would-be judge's candidacy should not turn on her or his political popularity, the Commission does not mean to suggest that appointive systems are apolitical. Any method of judicial selection will inevitably be political because judges decide issues of intense social, cultural, economic, and political interest to the public and the other branches of government. In this inherently political environment, however, the requirement that independent commissions review the qualifications of and approve all would-be judges provides a safety net to assure that all nominees possess the baseline capabilities, credentials, and temperament needed to be excellent judges.

Despite the occasional tendency to regard "politics" as a bad word, at its root, politics refers to the process by which citizens govern themselves. In that regard, it is not only inevitable but also perhaps even desirable that judicial selection have a "political" aspect to ensure that would-be judges are acceptable to the people they serve. Because judges, by virtue of their need to remain independent and impartial, serve a role in government that is fundamentally different from that of other public officials, the Commission has recommended against the use of elections as a means to ensure public acceptability.

The Commission did, however, consider another possibility: legislative confirmation of gubernatorial appointments. Requiring that judges be approved by an independent commission and *both* political branches of government could conceivably increase public confidence in the judges at the point of initial selection and serve as a form of prospective accountability that reduces the need for resorting to more problematic reselection processes later. A majority of the Commission ultimately decided, however, not to recommend legislative confirmation as a component of its preferred selection system. The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach.

The last of the Commission's recommendations with respect to the selection system it regards as optimal is that states not employ

reselection processes. Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. When nonincumbents run for judicial office in contested elections, the threat that elections pose to their future independence and impartiality—though extant—is limited. Granted, nonincumbent candidates can be made to appear beholden either to their contributors, to positions they took on the campaign trail, or more generally to the electoral majority responsible for selecting them. But unlike incumbent judges, first-time judicial office seekers are not at risk of being removed from office because they made rulings of law that did not sit well with voters.

A similar point can be made with respect to judges initially selected by appointment. The process by which those candidates are first chosen may be partisan and political, and some judges may feel a lingering allegiance to whoever appointed them. But they are not put in danger of losing jobs they currently hold on account of judicial decisions made in those positions.

In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is, in turn, undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.

The problems with reselection may be most common in contested reelection campaigns but are at risk of occurring in any reselection process—electoral or otherwise. Thus, for example, the issue arises in states that delegate the task of judicial reselection to legislatures, whose enactments judges are to interpret and, if unconstitutional, invalidate. For that reason, the Commission recommends against resort to reselection processes.

While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has remained flexible as to the optimal length of a judge's term of office. Most states that appoint judges without the possibility of subsequent reselection cap judicial terms at a specified age. States could also set judicial terms at a fixed number of years. In either case, however, it is important that states take pains to preserve judicial retirement benefits because judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their

retirement benefits vest.

If states opt for a single term, it is important that the term be of considerable length—at least fifteen or more years—for several reasons. First, there are obvious advantages that flow from experience on the bench that will be lost if judges are confined to short terms of office. Second, the most qualified candidates for judge will often be lawyers with very successful private practices that they may be reluctant to abandon if they are obligated to return to practice after only a few years on the bench. Third, to the extent that lawyers view judicial service as the culmination of their legal careers and not simply as a temporary detour from private practice, short terms may discourage younger lawyers from seeking judicial office. Fourth, insofar as judges are obligated to reenter the job market at the conclusion of their judicial service, their independence from prospective employers who appear before them as lawyers and litigants in the waning years of their judicial terms may become a concern.

In earlier recommendations, the Commission urged that systems of judicial discipline be actively enforced and that regular and comprehensive judicial evaluation programs be instituted. These recommendations are critically important to ensuring accountability in a system that does not rely on reselection processes. All states have procedures for judicial removal, typically including but not limited to those subsumed by the disciplinary process.

The Commission believes that judges must be removable for cause to preserve the institutional legitimacy of the courts. It is beyond the scope of this report to describe in detail the nature and extent of "for cause" removal. By way of general guidance, however, the Commission points to the enduring principles discussed in the first part of this report. An overriding goal of our system of justice is to uphold the rule of law. Judges should never be subject to removal for upholding the law as they construe it to be written, even when they are in error, for then the judge's decision-making independence—so essential to safeguarding the rule of law in the long run—will be undermined. On the other hand, we do not want judges who are so independent that they are utterly unaccountable to the rule of law they have sworn to uphold. Thus, judges who disregard the rule of law altogether by taking bribes or committing other crimes that undermine public confidence in the courts should be removed. One could reach a similar conclusion with respect to judges who, despite the best efforts of nominating commissions to weed out unqualified candidates, manifest an utter lack of the competence, character, or temperament requisite to upholding the law impartially.

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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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LJWorld.com

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.

Originally published at: http://www2.ljworld.com/news/2007/dec/08/professor_questions_judge_selection/

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Posted on Fri, Jan. 23, 2009

STEPHEN J. WARE: OPEN UP PROCESS OF PICKING JUSTICES

BY STEPHEN J. WARE

Gov. Kathleen Sebelius recently appointed Dan Biles to the Kansas Supreme Court, showing once more what an unusually secretive and clubby process our state uses to select its highest judges.

Biles is the law partner of the Kansas Democratic Party's chairman, and the governor is, of course, a Democrat. Sebelius said that she and Biles have been friends for more than three decades, and he has made campaign contributions to her.

Importantly, Biles is a member of the former Kansas Trial Lawyers Association, now called the Kansas Association for Justice. Sebelius used to be state director of that group of lawyers who most aggressively push to increase lawsuits and expand liability.

People can decide for themselves whether that is the direction they want for Kansas courts, but what is unusual about Kansas is how little the people's views matter. All the power in selecting the justices of the Supreme Court belongs to the governor and the bar (the state's lawyers). So if the governor and bar want to push the state's courts in a particular direction, there are no checks and balances in the judicial-selection process to stop them.

After Kansas justices have gained the advantages of incumbency, they are subject to retention elections. But these "elections" lack rival candidates and thus rarely include any public debate over the direction of the courts. In fact, a retention election is nearly always a rubber stamp, and no Kansas justice has ever lost one. With these judges so entrenched once they are on the court, the process for initially selecting them is all the more decisive.

Kansas is unusual in limiting Supreme Court selection to the governor and the bar. By contrast, when a federal judge is nominated, a Senate confirmation process allows citizens and their representatives to learn about the nominee and play more of a role in selecting judges.

Many states around the country use that process, too. But in Kansas the governor and the bar get all the power, and they exercise that power through a commission's secret vote. There is no public record of who voted which way.

This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. In this closed process, a small group of insiders (members of the Kansas bar) have an extremely high level of control. In fact, Kansas is the only state in which the bar selects a majority of the Supreme Court nominating commission. Why does the division of power between lawyers and nonlawyers lean further toward the lawyers in Kansas than in any of the other 49 states?

The Kansas bar defends this with the claim that the bar keeps judicial selection from being "political." But when the process results in a governor appointing one of her own friends and campaign contributors, you have to wonder what kind of politics goes on behind closed doors or at trial lawyers' cocktail parties.

Politics are inevitable when it comes to picking judges. The question is whether the politics will remain largely confined to the bar or become more open to the public and its elected representatives.

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

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77-APR JKSBA 6
77-APR J. Kan. B.A. 6
(Cite as: 77-APR J. Kan. B.A. 6)

Journal of the Kansas Bar Association
April, 2008

Item of Interest

*6 JUDICIAL SELECTION POINT

Professor Stephen Ware
University of Kansas School of Law

Thanks to the Journal of the Kansas Bar Association for giving me an opportunity to respond to Kansas Bar Association President Linda Parks' criticism of my paper on the Kansas Supreme Court selection process. The paper is available at www.fed-soc.org/publications/pubID.441/pub_detail.asp and I hope Kansas lawyers will read it themselves, rather than rely on Parks' characterization of it.

Parks inaccurately accuses me of saying that "those who support the current process are 'good ol' boy lawyers." What I actually wrote is quite different. I first noted that the phrase "good old boy club" was previously used by Melvin Neufeld, speaker of the Kansas House of Representatives, who said, "That setup that we now have has evolved to a good-old-boy club." Commenting on Neufeld's statement, I wrote:

A "good-old-boy club," with its associations of exclusivity and privilege, is an apt description of how the [Supreme Court Nominating] Commission looks to many of those who are not members of the bar. This is a shame because of the good faith and hard work exhibited by those the bar elects to the Commission. But when a single interest group controls an important governmental process -- and exercises that control in a largely-secret manner -- outsiders can be excused for being suspicious and resentful.

I later added:

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.

"Good ol' boys' club" could, if taken literally, mean a group of older males. And this would be an accurate generalization about those the bar elects to the Commission. But of course the usual meaning of "good ol' boys club" is a group of people who have common interests and who look out for each other, rather than being open to outsiders. And this also accurately describes the bar's role in the Supreme Court selection process.

How many members of the Kansas Supreme Court were appointed to the Court despite the opposition of the bar? I have yet to hear a single example given. We can easily imagine the appointment of justices opposed by the Kansas Contractors Association or the Kansas Bankers Association but it's hard to imagine a justice opposed by the Kansas Bar Association. The bar is the interest group with a privileged position in the selection process.

Sure, lawyers tend to be more knowledgeable than contractors or bankers about judicial candidates so there's a

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case for giving lawyers disproportionate power in the selection of judges. But lawyers -- when they act in concert -- are an interest group, just like contractors or bankers are when they act in concert. And, as the framers of the U.S. Constitution recognized, it is dangerous to concentrate power in a single group, or "faction" as they called it.

Kansas concentrates more power in the bar than any other state when it comes to judicial selection. Kansas is the only state that gives its bar majority control over its Supreme Court Nominating Commission. So those who defend our state's current process are taking quite an extreme position. When Kansas lawyers defend this process, they're saying -- in effect -- "I favor a process that gives me more power than people like me have in any of the other 49 states." That doesn't sound like the Kansas lawyers I know and respect.

The many Kansas lawyers I know and respect are reasonable, public-spirited people who would be reluctant to take more power for themselves than that held by lawyers in any other state. Some of these Kansas lawyers tell me privately that they agree with my views but cannot say so publicly because, as a wise lawyer once told me, "judges tend to favor whatever judicial selection process selected them." So I know I cannot expect many lawyers who practice in our state's courts to publicly criticize the process that selected the judges who sit on those courts.

But I'm a law professor, not a practicing lawyer, so I have the freedom to advocate reform publicly. Indeed, I believe my tenure at a state university obligates me to serve our state by working to improve its legal system, even if doing so requires me to challenge the special powers of a group of people towards whom I am quite fond personally.

I welcome dialogue and debate about our state's judicial selection process and can be reached at ware@ku.edu.

END OF DOCUMENT

10-49

Eric R. Yost
JUDGE

(316) 660-5612
eyost@dc18.org

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
525 N. MAIN
WICHITA, KANSAS
67203

February 6, 2009

Hon. Lance Kinzer
Chairman, House Judiciary Committee
Kansas House of Representatives
Topeka, Kansas 66612

Re: HCR 5005

Dear Chairman Kinzer,

Thank you for the opportunity to express our views regarding the current judicial selection system in Kansas. I apologize for not being with you in person, but our dockets are such that we were unable to travel to Topeka.

Without getting into the specifics of HCR 5005, we would like to express our belief that the current nominating commission system should be reviewed. Although we have no criticism of the individuals who have been appointed to the supreme court and court of appeals, all of whom are well qualified and are doing an excellent job, we do believe that the selection process needs to be made more inclusive. Specifically, we think we need to reach outside the bar association for a majority of the commission members. As you know, the current system requires that a majority of the commission be attorneys. As much respect as we have for members of our own profession, we don't think that one of three co-equal branches of government ought to be controlled in such a manner by such a small group of people.

We would also like to endorse, as a general concept, the notion that the other branches of government be involved in the selection process, such as exists with the federal judiciary. No one can argue with a straight face that federal judges are not independent, but the system that produces them is completely controlled by the other branches. It seems to me that allowing the other branches in Kansas some voice in the selection process (above and beyond the governor's small role currently) would be

House Judiciary
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appropriate.

Last, we understand that those who oppose changing our current system of judicial selection are concerned about less than qualified people being appointed. Your committee might also consider changing the role of the commission in a small, but important way: have the commission decide which of the applicants are qualified, whether that's three people or thirty, and then let the governor appoint from that larger pool.

These are just some thoughts. Good luck in your deliberations.

Eric R. Yost	Jeffrey E. Goering
District Judge	District Judge

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HOUSE JUDICIARY COMMITTEE
Hearing on HCR 5005 and HB 2123
February 12, 2009, 3:30 PM
Hearing Room 143-N

Submission of Justice Fred N. Six (Retired)
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 – 2009, (Commission created by the Legislature in 2006 House Substitute for SB 337, K.S.A. 20-3201, *et seq.*)

COMMENTS IN OPPOSITION TO HCR 5005 and HB 2123
[References to HCR 5005 May Also Relate to HB 2123]

1. The Birth of Kansas Merit Selection -- "The Triple Play of 1957" -- Politics, the Supreme Court, and Governor Fred Hall's "Why Not Me?" 52 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., in 1964 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 5005 NOT A SINGLE MEMBER OF THE NOMINATING COMMISSION WOULD BE INDEPENDENT OF THE POLITIC

House Judiciary
Date 2-12-09
Attachment # 12

2. **HCR 5005, a Radical Change in a Basic Institution, Our Supreme Court.**

Anyone who urges radical changes in basis 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 HCR 5005 have not even attempted to provide evidence that our present system does not work well.

3. **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.

4. **HCR 5005 Will Discourage Judges and Lawyers in Kansas from Becoming Nominees for Consideration as Members of the Supreme Court.**

Under HCR 5005, 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.

5. **HCR 5005 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.

6. **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.

7. **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. ["Judicial Selection in the States," American Judicature Society, Attachment No.1, and "Judicial Merit Selection: Current Status," American Judicature Society, Attachment No. 2]

8. **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 50 Years. HCR 5005 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**

Kansas is joined by twenty-three other states and the District of Columbia in adopting merit selection, *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.

See, the American Judicature Society's website, http://www.ajs.org/ajs/, (Attachments No. 1 & 2).

9. **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. Art III, Sec I of the United States Constitution authorizes federal judges to "hold office during good behavior." Removal is by impeachment.

Art II, Sec 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.

10. The Kansas Tradition, a Citizen Legislature. In the Confirmation Process, What is the Staff Employee Situation for Each Member of the Kansas Senate?

HCR 5005 requires Senate confirmation.

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

The United States Constitution, Art II, Sec 2 (powers of the President) requires a presidential judicial appointment to be made "with the advice and consent" of the Senate. The federal Senate Judiciary Committee has approximately 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?

11. HCR 5005 Suspends a Justice Designate "In Air" Waiting for a Regular Legislative Session and Senate Confirmation.

The following justices, no longer on the Court, have served on the Kansas Supreme Court. The date after each name represents the date of a "Vacancy Occurring" (HCR 5005, Page 1, Line 22).

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), Allegrucci (1-8-07), and McFarland (1-13-09).

A total of 17 justices have left office in the 33 years since Justice Frontron's appointment. Of the 17, only six, or 35 percent, (Schroeder, Herd, Lockett, Six, Allegrucci, and McFarland) vacated a position on the bench at the end of their final six-year term, when the Legislature was in session. Sixty-five percent left office when the Legislature was not in session.

Assuming HCR 5005 had been in place, the Court's work would be unnecessarily impacted by the shadow of a justice designate suspended "in air" waiting for a Senate confirmation hearing. Who would be interested in the position under these circumstances? Only eight persons submitted their names for Supreme Court consideration upon the retirement of Chief Justice McFarland.

12. 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 Missouri Nominating Commission, "Appellate Judicial Commission" [Chief Justice Laura Denvir Stith is Chair of the Nominating Commission] and Governor Matt Blunt 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 members of the Missouri Bar. [Mo. Const. of 1945, Art. V, Sec 25(a)-(d) (1976). Mo. Sup. Ct. R. 10.03 specifies a seven member nominating commission: One Supreme Court judge chosen by members of the Court, three lawyers elected by members of the Bar, and three nonlawyers appointed by the Governor.]

The independence of the KSCNC is guaranteed by our Constitution. Kan. Const., Art. 3, Sec. 5, removes the opportunity for a claim of Supreme Court influence in the selection process to arise.

Composition of State Supreme Court Nominating Commissions
The Tally, by State, [Attachments Nos. 1 & 2]
L=lawyer, NL=Nonlawyer, E=Either, and J=Judge.

Compiled by the American Judicature Society
The Opperman Center at Drake University
2700 University Avenue
Des Moines, Iowa 50311
Phone: (800) 626-4089 or (515) 271-2281

According to AJS:

A] The list of states where members of the Bar, excluding judge members, comprise a majority.

Six in Addition to Kansas

Delaware [5L, 4NL, 0J] The Governor appoints four lawyers, the state Bar president appoints the fifth lawyer.

Florida [6L, 3E, 0J] The Governor appoints all members, but four of the lawyers are chosen from lists submitted by the state Bar.

New Hampshire [6L, 5NL,] All members appointed by the Governor.

New Mexico [8L, 3NL, 3J] Four lawyers are appointed jointly by the state Bar president and the judge members. The remaining members are chosen by the Governor, the Speaker of the House, and the President Pro Tempore of the Senate. The dean of the state law school serves as chair.

South Dakota [3L, 2NL, 2J] The state Bar president, rather than Bar members, chooses the lawyer members.

Tennessee [12L, 3NL, 0J] Lawyer members are chosen by the Speakers of the House and Senate **from lists submitted by various Bar and lawyer organizations.**

B] The list of states where members of the Bar, including judges, comprise a majority.

Six in Number

Alaska, Indiana, Iowa, Missouri, Nebraska, and Wyoming. (To fill interim vacancies, two additional states, Idaho and Nevada, use nominating commissions on which members of the Bar, including judges, comprise a majority.)

C] The list of states and the District of Columbia where there CAN be a majority of members of the Bar, some positions may be held by members of the Bar or by nonlawyers.

Seven in Number

The District of Columbia, Maryland, Massachusetts, Minnesota, New York, Rhode Island, and Utah.

In summary, there are 21 States, in addition to Kansas, in which members of the Bar either are a majority or could be a majority.

The American Judicature Society contact information and website have been included so that members of the committee may analyze nominating commission composition at each member's convenience.

13. HCR 5005 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 per cent 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. [Governor Graves' 2003 appointment of Justice Marla J. Luckert and Governor Sebelius' appointment last year of Justice Lee Johnson.]

The Kansas Senate has always been controlled by Republicans. The HCR 5005 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?

14. HRC 5005, an Invitation to a Constitutional Crisis, "Hamstringing" the Supreme Court's Ability to Function.

Kan. Const., Art 3, Sec 2, requires that the Supreme Court shall consist of not less than seven justices. All cases shall be heard by not fewer than four justices sitting. Concurrence of not less than four is necessary for decision. **HCR 5005 is a messenger of confusion.**

A] (1) The Governor has unlimited panel rejection powers [page 1, lines 36-38]
(2) A second panel must contain new names, as must a third, fourth, or fifth, etc.

B] The current "fail safe" role of the Chief Justice in the event the Governor refuses to appoint is stricken. [Page 1, Lines 41-45.]

No cloture, no finality.
HCR 5005 is laced with ambiguity and uncertainty.

C] No time limit on the Governor to appoint. The current 60-day window has been stricken [page 1, Line 42.]

D] The vacancy remains open until the next regular session of the Legislature. [Page 2, Lines 9, 10], thus "hamstringing" the Supreme Court.

E] Goodbye to the sole practioner's and the small firm Kansas lawyer's professional dream of being on the Kansas Appellate Bench.

The shrinking law practice:

a) Assume an appellate court vacancy in May or June, what client would wish to engage a "lame duck" lawyer as counsel, knowing that the lawyer would be leaving the practice in six or seven months?

b) What practicing lawyer would submit his or her name for Supreme Court consideration to the Nominating Commission knowing that, even if successful, the lawyer will be "hung out to dry" for six or seven months watching a law practice dwindle as the lawyer waits to face Senate confirmation.

c) Under HCR 5005, all future appellate vacancies would probably be filled, if the Supreme Court and Court of Appeals are functioning, by government employees or sitting judges. The economics of professional survival will "freeze out" the practicing Bar.

F] If the Governor's appointee is not confirmed, the process starts all over again, thus unduly "hamstringing" the ability of the Supreme Court to carry out its constitutional function.

15. HB 2123, Why Put "Rookies" on the Playing Field? A Second Separate Nominating Commission? An Unnecessary Duplication for the Court of Appeals.

Duplication is costly. Experience gained by members of the current commission is lost in advancing the selection of future members of the Court of Appeals. The current nominating commission has functioned efficiently since 1977, the date of the creation of the Court of Appeals. In the past 32 years the Nominating Commission has submitted 30 panels to the Governor resulting in 30 appointments to the Kansas Court of Appeals. No one has questioned the efficiency of the Nominating Commission or of its staff.

16. HCR 5005 Does Not Support the Independence of the Judiciary.

Why Restructure the Nominating Commission? Why Give the Governor Unlimited Authority to Reject the Nominating Commission's Recommendations? Why Impose the Senate Consent Requirement in 2009 After Nearly a Half Century of Merit Selection for Supreme Court Justices, Thus Crippling Merit Selection?

HCR 5005 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 **8,775** published opinions through 02/06/09 (These opinions appear in the *Kansas Reports* 192 Kan. through 288 Kan.).

The Kansas Court of Appeals, since its creation in 1977, has issued **3,660** published opinions through 02/02/09 (1 Kan. App. 2nd through 40 Kan. App. 2nd).

This represents a total of **12,235** published merit selection opinions. Both courts have written hundreds of unpublished opinions as well.

Marsh and *Montoy*, two published opinions, vs. **12,233** other published opinions, and HCR 5005 and its earlier counterparts surface in 2005, 2006, 2007, and 2008 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

"Summary of Initial Selection Methods"

Merit Selection[1]	Gubernatorial (G) or Legislative (L) Appointment	Partisan Election	Non-Partisan Election	Combined Merit Selection and Other Methods[2]
Alaska	California (G)	Alabama	Arkansas	Arizona
Colorado	Maine (G)	Illinois	Georgia	Florida
Connecticut	New Jersey (G)	Louisiana	Idaho	Indiana
Delaware	Virginia (L)	Ohio[2]	Kentucky	Kansas
District of Columbia	South Carolina (L)[2]	Pennsylvania	Michigan[2]	Missouri
Hawaii		Texas	Minnesota	New York
Iowa		West Virginia	Mississippi	Oklahoma
Maryland			Montana	South Dakota
Massachusetts			Nevada	Tennessee
Nebraska			North Carolina	
New Hampshire			North Dakota	
New Mexico			Oregon	
Rhode Island			Washington	
Utah			Wisconsin	
Vermont				
Wyoming				

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

2. See attached chart for details.

Judicial Merit Selection: Current Status

Table 1: Characteristics of merit selection plans: Scope of the plans

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Alabama						
Baldwin County	1999	Circuit Court District Court	CA	Interim	1	5: 1L; 3N; 1J
Jefferson County[1]	1950	Circuit Court	CA	Interim	1	5: 2L; 2N; 1J
Madison County	1974, revised 1996	Circuit Court District Court	CA	Interim	1	9: 2L; 6N; 1J
Mobile County	1982	Circuit Court District Court	CA	Interim	1	5: 2L; 2N; 1J
Talladega County	1996	Circuit Court District Court	CA	Interim	1	5: 1L; 3N; 1J
Tuscaloosa County	1990, revised 2002	Circuit Court District Court	CA	Interim	1	9: 5L; 3NL; 1J
Alaska	1959	Supreme Court	C	Initial and Interim	1	7: 3L; 3N; 1J
	1959	Superior Court	C	Initial and Interim		
	1980, amended 1985	Court of Appeals	S	Initial and Interim		
	1959	District Courts and Magistrates	S	Initial and Interim		
Arizona	1974, amended 1992	Supreme Court Court of Appeals	C	Initial and Interim	1	16: 5L, 10NL, 1J
		Maricopa County Superior Court	C	Initial and Interim	1	
		Pima County Superior Court	C	Initial and Interim	1	
Colorado	1967	Supreme Court Court of Appeals	C	Initial and Interim	1	14: 6L, 7NL, 1J
		District Court	C	Initial and Interim	22	8: 1J; at least 4NL; no more than 3L[2]
		County Court Denver Juvenile Court Denver Probate Court	S	Initial and Interim		
Connecticut	1986	Supreme Court Appellate Court Superior Court	C	Initial and Interim	1	12: 6L, 6NL, 0J
Delaware	1977; revised 1978, 1985, 2001	All Courts, including Magistrates	EO	Initial and Interim	1	9: 5L, 4NL, 0J
D.C.	1973, amended 1977, 1984, 1986, 1996	Court of Appeals Superior Court	HR	Initial and Interim	1	7: 2NL, 2L, 2E, 1J
Florida	1972; amended 1976, 1984, 1996, 1998	Supreme Court	C	Initial and Interim	1	9: 6L, 3E, 0J
		District Court of Appeal	C	Initial and Interim	5	
		Circuit Court County Court	C	Interim	20	
Georgia	1972 to present	Supreme Court Court of Appeals Superior Court State Court	EO	Interim	1	18

Table 1: Characteristics of merit selection plans: Scope of the plans

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Hawaii	1959, amended 1978, 1994	Supreme Court Intermediate Court of Appeals Circuit Court District Court[3]	C	Initial, Interim, and Retention	1	9: 4L, 5NL, 0J
Idaho	1967; amended 1985, 1990	Supreme Court Court of Appeals District Court	S	Interim Interim Interim	1	7:2L, 3NL, 2J
Indiana	1960, amended 1970	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 1J, 3L, 3NL
	1985	Tax Court	S	Initial and Interim		
Allen County	1983	Superior Court	S	Interim	1	7: 3L, 3NL, 1J
Lake County	1973	Superior Court	S	Initial and Interim	1	9: 4L, 4NL, 1J[4]
St. Joseph County	1973	Superior Court	S	Initial and Interim	1	7: 3L, 3NL, 1J
Iowa	1962, 1963; amended 1976, 1983	Supreme Court	C	Initial and Interim	1	15: 7L, 7NL, 1J[5]
	1962, 1963; amended 1976, 1983	Court of Appeals	S	Initial and Interim		
	1962,1963; amended 1976, 1983	District Court	C	Initial and Interim	14	11: 5L, 5NL, 1J[5]
	1983, amended 1986	District Associate Judges[5]	S	Initial and Interim	99	6: 2L, 3NL, 1J
	1983; amended 1989, 1990, 1998	Magistrate Judges[6]	S	Initial and Interim		
Kansas	1972	Supreme Court	C	Initial and Interim	1	9: 5L, 4NL, 0J
	1975	Court of Appeals	S	Initial and Interim		
	1972	District Court (optional)	C	Initial and Interim	17	# of L's / NL's varies according to judicial district;[7] 1J
Kentucky	1976	Supreme Court Court of Appeals	C	Interim	1	7: 2L, 4NL, 1J
		Circuit Court District Court	C	Interim	56	
Maryland	1970, revised 1974, 1979, 1982, 1987,	Court of Appeals Court of Special Appeals	EO	Initial and Interim	1	17
	1988, 1991, 1995, 1999, 2003, 2007	District Court Circuit Court	EO	Initial and Interim	16	9
Massachusetts	1970 to present	Appeals Court Trial Court	EO	Initial and Interim	1	21
Minnesota	1983, revised 1990, 1992	District Court Workers' Compensation Court of Appeals	S	Interim	1	13: up to 8L, at least 5NL, 0J[8]

Table 1: Characteristics of merit selection plans: Scope of the plans

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Missouri	1940, revised 1976	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 3L, 3NL, 1J
City of St. Louis	1940, revised 1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	5: 2L, 2NL, 1J
Jackson County	1940, revised 1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	
St. Louis County	1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	
Clay & Platte Counties	1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	2	
Montana	1973, amended 1977, 1979, 1987, 1991, 1992	Supreme Court District Court	C	Interim	1	7: 2L, 4NL, 1J
	1991	Worker's Compensation Judge	S	Initial and Interim		
	1987	Chief Water Judge	S	Initial and Interim		
Nebraska	1962, amended 1972	Supreme Court	C	Initial and Interim	7	9: 4L, 4NL, 1J
		Court of Appeals	S	Initial and Interim	6	
		District Court	C	Initial and Interim	12	
		County Court	S	Initial and Interim	4[9]	
		Juvenile Court	S	Initial and Interim	3	
		Worker's Compensation Court	S	Initial and Interim	1	
Nevada	1976	Supreme Court	C	Interim	1	7:3L, 3NL, 1J
		District Court			1[10]	9:4L, 4NL, 1J
New Hampshire	2000, 2005	Supreme Court Superior Court District Court Probate Court	EO	Initial and Interim	1	11: 6L, 5NL
New Mexico	1988	Supreme Court Court of Appeals	C	Initial and Interim	1	14: 8L, 3NL, 3J[11]
	1988	District Court	C	Initial and Interim	13	14: 8L, 3NL, 3J[11]
		Metropolitan Court (Bernalillo County)	C	Initial and Interim	1	14: 8L, 3NL, 3J[11]
New York	1977	Court of Appeals	C	Initial and Interim	1	12: 4L, 4NL, 4E, 0J
	1975 to present	Appellate Div. of the Supreme Court	EO	Initial and Interim	4	13
		Supreme Court		Interim		
		Court of Claims	EO	Initial and Interim	1	13
		County Court Surrogate's Court Family Court	EO	Interim	4	14
New York City	1978 to present	Criminal Court Family Court	EO	Initial and Interim	1	19
		Civil Court		Interim		
North Dakota	1976; amended 1998	Supreme Court	C	Interim	1	6: 3L/J, 3NL
		District Court			1	9: 3L/J, 3NL, 3E[12]
Oklahoma	1967	Supreme Court Court of Criminal Appeals	C	Initial and Interim	1	13: 6L, 7NL, 0J
	1987, amended 1996	Court of Civil Appeals	S	Initial and Interim		
	1980, amended 2001	District Court	S	Interim		
	1977	Workers' Compensation Court	S	Initial and Interim		

Table 1: Characteristics of merit selection plans: Scope of the plans

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Rhode Island	1994	Supreme Court Superior Court Family Court District Court Worker's Compensation Court Administrative Adjudication Court	C	Initial and Interim	1	9: 4L, 4NL, 1E 0J
South Dakota	1980	Supreme Court Circuit Court	C	Initial and Interim Interim	1	7: 3L, 2NL, 2J
Tennessee	1971; amended 1974, 1986, 1994, 1999, 2001	Supreme Court Court of Criminal Appeals Court of Appeals	S	Initial and Interim	1	15: 12L, 3NL, 0J
	1994	Trial Courts	S	Interim		
Utah	1967, amended 1985, 1992, 1994	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 2L, 3NL, 2E
		District Court Juvenile Court	C	Initial and Interim	8	7: 2L, 3NL, 2E
Vermont	1967; amended 1969, 1971, 1975, 1979, 1985	Supreme Court Superior Court District Court	C	Initial and Interim	1	11: 3L, 6NL, 2E
Wyoming	1973	Supreme Court District Court Circuit Court	C	Initial and Interim	1	7: 3L, 3NL, 1J[13]

C = Constitutional
S = Statutory
EO = Executive Order
HR = Home Rule

L = Lawyer
NL = Non-lawyer
E = Either Lawyer or Non-lawyer
J = Judge

1. **Alabama (Jefferson County).** The Jefferson County Commission nominates candidates for vacancies in the Birmingham Division only.

2. **Colorado.** In judicial districts with populations greater than 35,000, there must be three lawyer and four non-lawyer members. In judicial districts with populations of 35,000 or less, there must be at least four non-lawyer members; a majority vote of the governor, the attorney general, and the chief justice determines how many of the remaining three members must be lawyers.

3. **Hawaii.** The chief justice makes appointments to the district courts.

4. **Indiana (Lake County).** Two lawyer and two non-lawyer members must be men; two lawyer and two non-lawyer members must be women; at least one lawyer and one non-lawyer member must be a minority.

5. **Iowa.** The mandatory ratio of lawyers to non-lawyers is not specified; traditionally, the governor appoints only non-lawyers and the bar elects only lawyers. No more than a simple majority of members appointed by the governor may be of the same gender, and the bar must alternate between electing male and female members.

6. **Iowa.** District judges appoint district associate judges from lists of nominees recommended by the county magistrate appointing commission. The county magistrate appointing commission appoints magistrates.

7. **Kansas.** The number of commission members varies with the number of counties in each judicial district; however, there must be an equal number of lawyers and non-lawyers on each commission.

8. **Minnesota.** There are nine commission members who serve "at-large" to fill any district court or workers' compensation court of appeals vacancies. In addition, there are four commission members—two lawyers and two non-lawyers—appointed from the district in which the vacancy exists.

9. **Nebraska.** The district court judicial nominating commissions also nominate county court judges, except in Districts 1, 3, 4, and 10, in which there are separate county and district judicial nominating commissions.

10. **Nevada.** Nominations for district court vacancies are made by temporary commissions that are assembled as each vacancy occurs and exist only until nominations have been submitted to the governor. These temporary commissions consist of members of the permanent commission and one lawyer and one non-lawyer resident of the judicial district in which the vacancy occurs.

Table 1: Characteristics of merit selection plans: Scope of the plans

11. **New Mexico.** The president of the state bar and the judges on the commission are authorized to make the minimum number of additional appointments of members of the state bar as is necessary for equal representation on the commission of the two largest political parties.

12. **North Dakota.** When a vacancy occurs on the district court, the governor, chief judge, and president of the state bar each appoint an additional temporary member, who may or may not be a lawyer, from the judicial district in which the vacancy occurs; these members serve until the vacancy is filled.

13. **Wyoming.** When a vacancy occurs on a district or circuit court, and that district or county is not represented on the commission, one lawyer and one non-lawyer from that district or county are appointed as temporary, nonvoting advisors to the commission.

Table 2: Composition of nominating commission

State/Court	Term of service	Chair appointed/elected by	Lawyers appointed/elected by	Non-lawyers appointed/elected by	Judges appointed/elected by
Alabama					
Baldwin County	6 years	Judge serves ex officio	Baldwin County Bar Association	Baldwin County Commission/ Baldwin County Mayor's Association/ Baldwin County legislative delegation	Presiding circuit judge serves
Jefferson County	6 years	No regular chair	Birmingham Bar Association	Jefferson County legislative delegation	Birmingham circuit court judges
Madison County	6 years	Judge serves ex officio	Madison County Bar Association	Madison County legislative delegation	Madison County circuit court judges
Mobile County	6 years	N/I	Mobile County Bar Association	Mobile County legislative delegation	Mobile County circuit court judges
Talladega County	4 years	Judge serves ex officio	Not appointed or elected	Talladega County legislative delegation	Presiding circuit judge serves ex officio
Tuscaloosa County	6 years	Commission members	Tuscaloosa County Bar Association	Tuscaloosa County legislative delegation	Presiding circuit judge serves ex officio
Alaska					
Supreme Court	6 years	Chief justice serves ex officio	State bar association	Governor/ State legislature	Chief justice serves ex officio
Arizona					
Supreme Court and Court of Appeals	4 years	Chief justice serves ex officio	State bar association/ Governor/ Senate	Governor/ Senate	Chief justice serves ex officio
Maricopa County Superior Court and Pima County Superior Court	4 years	Chief justice serves ex officio	State bar association/ Governor/ Senate	Nominating commission/ Governor/Senate[1]	Chief justice serves ex officio
Colorado					
Supreme Court and Court of Appeals	6 years	Chief justice serves ex officio	Governor/ Attorney general/ Chief justice	Governor	Chief justice serves ex officio
District Court, County Court, Juvenile Court of Denver and Probate Court of Denver County	6 years	Supreme court justice serves ex officio	Governor/ Attorney general/ Chief justice	Governor	Supreme court justice serves ex officio
Connecticut					
Supreme Court, Appellate Court and Superior Court	3 years	Commission members[2]	Governor	Legislative leaders	N/A
Delaware					
All Courts, including Magistrates	3 years	Governor	Governor/ State bar president	Governor	N/A
D.C.					
All Courts	6 years[3]	Commission members	President/ Mayor/ Board of governors of DC bar	President/ Mayor/ DC city council	Chief judge of the US District Court for DC
Florida					
Supreme Court, District Court of Appeal, Circuit Court, County Court	4 years	Commission members	Board of governors of Florida bar/ Governor[4]	Governor	N/A

Table 2: Composition of nominating commission

State/Court	Term of service	Chair appointed/elected by	Lawyers appointed/elected by	Non-lawyers appointed/elected by	Judges appointed/elected by
Georgia					
Supreme Court, Court of Appeals, Superior Court, and State Court	At Governor's discretion	Governor	Governor	Governor	N/A
Hawaii					
Supreme Court, Intermediate Court of Appeals, Circuit Court and District Court	6 years	Commission members	State bar association/ Governor/ Senate president/ Speaker of the house/ Chief justice	Governor/ Chief justice/ Senate president/ Speaker of the house	N/A
Idaho					
Supreme Court, Court of Appeals and District Court	6 years	Chief justice serves	Board of commissioners of the state bar with senate consent	Governor with senate consent	State bar with senate consent/ Chief justice serves
Indiana					
Supreme Court, Court of Appeals and Tax Court	3 years	Chief justice serves ex officio	State bar members in each district	Governor	Chief justice serves ex officio
Allen County Superior Court	4 years	Chief justice serves ex officio (or designee on the court of appeals or supreme court)	Lawyers residing in Allen County	Governor	Chief justice serves ex officio (or designee on the court of appeals or supreme court)
Lake County Superior Court and County Court	4 years	Chief justice serves ex officio (or designee on the court of appeals or supreme court)	Lawyers residing in Lake County	County board of commissioners	Chief justice serves ex officio (or designee on the court of appeals or supreme court)
St Joseph County Superior Court	4 years	Chief justice serves ex officio	Lawyers residing or practicing law in St. Joseph County	Selection committee[5]	Chief justice serves ex officio
Iowa					
Supreme Court and Court of Appeals	6 years	Senior supreme court justice serves ex officio	Resident members of the bar from each congressional district	Governor	Senior supreme court justice serves ex officio
District Court	6 years	Senior district court judge serves ex officio	Resident members of the bar of each judicial election district	Governor	Senior district court judge serves ex officio
District Associate Judges and Magistrate Judges	6 years	N/I	Attorneys in the county	County board of supervisors	Chief judge of the judicial district serves ex officio
Kansas					
Supreme Court and Court of Appeals	4 years	Lawyers residing in and licensed in Kansas	Lawyers of each congressional district	Governor	N/A
District Court	4 years	Supreme court justice serves ex officio	Lawyers of the judicial district	Board of county commissioners	Supreme court justice serves ex officio
Kentucky					
Supreme Court and Court of Appeals	4 years	Chief justice serves ex officio	State bar	Governor	Chief justice serves ex officio
Circuit Court and District Court	4 years	Chief justice serves ex officio	Local members of the state bar	Governor	Chief justice serves ex officio

Table 2: Composition of nominating commission

State/Court	Term of service	Chair appointed/elected by	Lawyers appointed/elected by	Non-lawyers appointed/elected by	Judges appointed/elected by
Maryland					
Court of Appeals and Court of Special Appeals	Coextensive with governor	Governor	State bar association/ Governor	Governor	N/A
District Court and Circuit Court	Coextensive with governor	Governor	State bar association/ Governor	Governor	N/A
Massachusetts					
Appeals Court and Trial Court	At governor's discretion	Governor	Governor	Governor	N/A
Minnesota					
District Court and Workers' Compensation Court of Appeals	At governor's discretion/ 4 years	Governor	Governor/ Supreme court justices	Governor/ Supreme court justices	Governor/ Supreme court justices
Missouri					
Supreme Court and Court of Appeals	6 years	Commission members	Lawyers residing in each court of appeals district	Governor	Supreme court justice serves ex officio
Circuit Courts	6 years	Commission members	Lawyers residing in the judicial circuit	Governor	Chief judge of court of appeals serves ex officio
Montana					
Supreme Court, District Court, Worker's Compensation Judge and Chief Water Judge	4 years	Commission members	Supreme court	Governor	District court judges
Nebraska					
Supreme Court, Court of Appeals, District Court, County Court, Juvenile Court, Worker's Compensation Court	4 years	Supreme court justice serves ex officio	Lawyers residing in judicial election districts	Governor	Supreme court justice serves ex officio
Nevada					
Supreme Court	4 years	Commission members	State bar	Governor	Chief justice serves ex officio
District Court	Until nominations given to governor	Commission members	State bar	Governor	Chief justice serves ex officio
New Hampshire					
Supreme Court, Superior Court, District Court, Probate Court	Up to 3 years	Governor	Governor	Governor	N/A

Table 2: Composition of nominating commission

State/Court	Term of service	Chair appointed/elected by	Lawyers appointed/elected by	Non-lawyers appointed/elected by	Judges appointed/elected by
New Mexico					
Supreme Court & Court of Appeals	N/I	Dean of the University of New Mexico School of Law serves ex officio	Judges on committee and state bar president/ Governor/ Speaker of the house/ Senate president	Governor/ Speaker of the house/ Senate president	Chief justice of the supreme court/ Chief judge of the court of appeals
District Court	N/I	Dean of the University of New Mexico School of Law serves ex officio	Judges on committee and state bar president/ Governor/ Speaker of the house/ Senate president	Governor/ Speaker of the house/ Senate president	Chief justice of the supreme court/ Chief judge of the court of appeals/ Chief judge of the district court
Metropolitan Court	N/I	Dean of the University of New Mexico School of Law serves ex officio	Judges on committee and state bar president/ Governor/ Speaker of the house/ Senate president	Governor/ Speaker of the house/ Senate president	Chief justice of the supreme court/ Chief judge of the court of appeals/Chief judge of the metropolitan court
New York					
Court of Appeals	4 years	Commission members	Governor/ Chief judge of court of appeals/ Legislative leaders	Governor/ Chief judge of court of appeals/ Legislative leaders	N/A
Appellate Division of the Supreme Court, Supreme Court	3 years	Governor	Governor/ Judicial and legislative leaders/ Attorney general/ State bar association	Governor/ Judicial and legislative leaders/ Attorney general/ State bar association	N/A
Court of Claims	3 years	Governor	Governor/ Chairs of departmental committees serve ex officio[6]	Governor/ Chairs of departmental committees serve ex officio[6]	N/A
County Court, Surrogate's Court, and Family Court (outside of NYC)	3 years	Chair of departmental screening committee serves ex officio[6]	County executive	County executive	N/A
New York City Criminal Court, Family Court, and Civil Court	2 years	Mayor	Mayor/ Presiding judges/ Law school deans	Mayor/ Presiding judges/ Law school deans	N/A
North Dakota					
Supreme Court and District Court	3 years	Governor	Governor/ Chief judge/ State bar president	Governor/ Chief judge/ State bar president	Governor/ Chief judge/ State bar president
Oklahoma					
Supreme Court, Court of Criminal Appeals, Court of Civil Appeals, District Court, Workers' Compensation Court	6 years	Commission members	Lawyers from each congressional district	Governor/ Commission members	N/A
Rhode Island					
Supreme Court, Superior Court, Family Court, District Court, Worker's Compensation Court, Administrative Adjudication Court	4 years	Governor	Governor/ Legislative leadership[7]	Governor/ Legislative leadership[7]	N/A

Table 2: Composition of nominating commission

State/Court	Term of service	Chair appointed/elected by	Lawyers appointed/elected by	Non-lawyers appointed/elected by	Judges appointed/elected by
South Dakota					
Supreme Court and Circuit Court	4 years	Commission members	State bar president	Governor	Judicial conference
Tennessee					
Supreme Court, Court of Criminal Appeals, Court of Appeals, Trial Courts	2-6 years	Commission members	Speaker of the senate/ Speaker of the house[8]	Speaker of the senate/ Speaker of the house	N/A
Utah					
Supreme Court and Court of Appeals	4 years	Governor	Governor	Governor	Supreme court chief justice serves ex officio
District Court and Juvenile Court	4 years	Governor	Governor	Governor	Supreme court chief justice serves ex officio
Vermont					
Supreme Court, Superior Court and District Court	2 years	Commission members	Vermont lawyers/ Legislature	Governor/ Legislature	N/A
Wyoming					
Supreme Court, District Court and Circuit Court	4 years	Chief justice serves ex-officio	State bar	Governor	N/A

1. **Arizona.** Maricopa and Pima Counties are each divided into five supervisory districts. Each district has a seven member nominating committee for the purpose of recommending prospective non-lawyer members of the superior court nominating commission to the senate.

2. **Connecticut.** The commission members elect the chair from among the six lawyer members appointed by the governor.

3. **D.C.** All members serve six year terms, except the member appointed by the president, who serves a five year term.

4. **Florida.** The board of governors of the Florida bar submits three recommended nominees for each position. The governor may reject all of the nominees and request a new list of nominees.

5. **Indiana (St. Joseph County).** The non-lawyer members are appointed by a selection committee consisting of the judges of the St. Joseph circuit court, the president of the board of St. Joseph County commissioners, and the mayors in each of the two most populous cities in St. Joseph County.

6. **New York.** The departmental screening committees identify nominees for the supreme court.

7. **Rhode Island.** The governor appoints three lawyers and one non-lawyer of his or her choice. The governor also appoints five additional commission members, one from each of the following lists: a list of at least three lawyers submitted by the speaker of the house; a list of at least three lawyers and/or non-lawyers submitted by the senate majority leader; a list of four non-lawyers submitted jointly by the speaker and the senate majority leader; a list of at least three non-lawyers submitted by the minority leader of the house; and a list of at least three non-lawyers submitted by the minority leader of the senate.

8. **Tennessee.** Lawyers are appointed from lists submitted by the Tennessee Bar Association, the Tennessee Defense Lawyers Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers.

HOUSE JUDICIARY COMMITTEE

Hearing on HCR 5005 and HB 2123
February 12, 2009

Submission of Richard C. Hite
Chair, Supreme Court Nominating Commission
100 North Broadway, Ste. 950
Wichita, Kansas 67202
316-265-7741

COMMENTS IN OPPOSITION TO HCR 5005 AND HB 2123

My name is Richard C. Hite. I am a native Kansan. I was admitted to the Kansas bar in 1953 following my graduation from Washburn Law School. I served in the United States Air Force as a Judge Advocate from 1953 until 1956. I have practiced law in Wichita since 1957. Since July 2001 I have served as Chair of the Kansas Supreme Court Nominating Commission. During that time the Commission has submitted to the Governor seven panels of nominees to fill positions on the Kansas Supreme Court and eight panels of nominees to fill positions on the Kansas Court of Appeals.

The Present Method of Selecting Appellate Judges Is Working Well and Should Not Be Changed

The Commission has a constitutional mandate to nominate persons for appellate positions on a non-partisan merit basis. The Commission has taken this charge literally and seriously. Nominees are selected solely on the basis of integrity, character, ability and judicial temperament. There are absolutely no political considerations. Usually, the Commission is unaware of the political affiliation, if any, of applicants. To put it another way, the Commission strives to place the Governor in a position so that she, or he, cannot make a mistake and that a highly qualified individual will be appointed regardless of which nominee is selected.

There have been suggestions by proponents of HCR 5005 and HB 2123 that the lawyer members of the Commission dominate the nomination process and that the non-lawyer members have little or no input. I can assure you that is not the case. Without exception the members of the Commission work with mutual respect for the opinions of other members. The lawyer members value the common sense and practical approach of the non-lawyer members. The non-lawyer members value the insight of the lawyer members into the professional qualifications of the applicants. Final decisions about nominees have always been made by cordial consensus.

Some proponents of HCR 5005 and HB 2123 suggest that the present method of selection of nominees is controlled by "the bar." The implication is that "the bar" has some sinister and selfish purpose in selection of appellate judges. Nothing could be farther from the truth. The bar is

composed of lawyers who take positions on the opposite sides of every conceivable legal issue. We have prosecutors and criminal defense attorneys. We have plaintiffs' attorneys and defense attorneys. And so on. An overwhelming majority of lawyers want appellate judges to be selected on a non-partisan merit basis. They want assurance that their clients will receive fair impartial hearings. Above all, they want to be confident that their adversaries do not have an advantage.

A primary function of the Commission is to evaluate the ability and competence of lawyers who apply to be appellate judges. It is not surprising that the Constitution assigned this task to a Commission on which lawyers constitute a majority. It has been the rule, rather than the exception, in this state to appoint members of the same profession to evaluate professional ability and competence of professionals. The State Board of Healing Arts has eleven medical members and three representatives of the general public. K.S.A. 65-2813. The State Board of Accountancy is comprised of five accountants and two representatives of the general public. K.S.A. 1-201. The Kansas Dental Board consists of six dentists, two dental hygienists and one representative of the general public. K.S.A. 74-1404. The State Board of Mortuary Arts has three members who must have embalmer's licenses and two members who represent the general public. K.S.A. 74-1701a. The State Board of Barbering has four members who are barbers and one representative of the general public. K.S.A. 74-1805a. Many other state boards are similarly constituted.

There is considerable evidence that the citizens of Kansas believe the present method of selecting appellate judges is working well. All appellate judges are required to stand for retention election at the first general election after their appointment and every six years thereafter. According to the collective memory of members of the Commission and judicial administration staff, there has never been organized opposition to the retention of any appellate judge appointed under the present system. There has never been a significant negative vote against the retention of an appellate judge. Opponents of the non-partisan merit selection have forced elections in Shawnee County and Johnson County in attempts to require election of district court judges. Both attempts failed. This can only be construed as support for the present non-partisan merit selection system we presently have.

Adoption of HCR 2005 and HB 2123 Would Create Serious Problems

I concur with Justice Six's comments about the adverse consequences which would result from adoption of the method of selecting appellate judges which is outlined in HCR 2005 and HB 2123.

The appointment of the nominating commissions would be politicized in contravention of the expressed desire of Kansas citizens. The establishment of two nominating commissions would be wasteful and counterproductive. The present Commission has benefitted from interviewing individuals who have applied for positions on both the Court of Appeals and the Supreme Court. The Commission has encouraged individuals who were not successful in quests for nomination to the Supreme Court to apply for a position on the Court of Appeals.

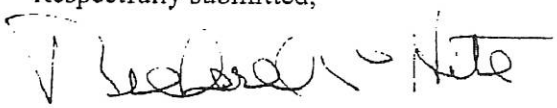
The selection process envisioned by HCR 2005 and HB 2123 has the potential for indefinite delay in filling a vacancy, or vacancies, on the appellate courts. There is no deadline for the Governor to make an appointment. A Governor with a strong desire to control the nomination process could repeatedly refuse to appoint anyone who is nominated until the Nominating Commission nominated someone who met with the Governor's approval. If the Senate was not in

session at the time of a gubernatorial appointment, there would be a delay, possibly of many months, before a confirmation hearing could be held. If the Senate did not confirm an appointment, the whole process would start again.

I can give you absolute assurance that the selection process in HCR 2005 and HB 2123 would prevent many qualified lawyers and district court judges from applying for appellate court positions. A lawyer in private practice who was nominated for an appellate court position would have his or her practice adversely affected immediately without knowing, for possibly a very long time, whether he or she would be appointed and confirmed. Further, members of the Commission have been told by a number of well qualified applicants that they would not endure confirmation hearings. This attitude is largely based on the disgraceful Congressional judicial confirmation hearings in which appointees have been subjected to aggressive interrogation about both legal and social beliefs for the obvious purpose of influencing how the appointee might rule on a given issue.

On behalf of the Nominating Commission I urge you to reject HCR 2005 and HB 2123.

Respectfully submitted,



Richard C. Hite

Robert C. Casad
John H. and John M. Kane Professor of Law Emeritus
The University of Kansas School of Law

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 two 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 37 ½ years of my tenure as an active professor, 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 Judge Spencer Gard of a three 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. 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.

A lifetime of studying about courts and their processes has made it very clear to me that good government depends upon a strong and effective court system. Achieving such a 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 method, but who are also fair-minded, not driven by 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 who has spent most of his adult life thinking, teaching and writing about courts and court systems: I appear in support of our nonpartisan merit system of judicial selection that has served us so well for 50 years. That means, of course, that I oppose these radical proposals to re-politicize that system: to replace it with a selection system driven by partisan politics

It is clear that the proponents of these radical changes do not place much value on the principle of separation of powers and the need for an independent judiciary. These proposals would make the judiciary almost totally subservient to the legislature. Two-thirds of the membership of the proposed nominating commission would be named by members of the legislature. And if that were not enough, the proposal requires that anyone designated as a judge by the governor and the nominating commission must be confirmed by the senate. If the senate is not in session when the designation is made, the position remains vacant until the senate can get together in regular session and confirm or reject the appointment. Such a system would seriously impair the effectiveness of the appellate courts.

Anyone who urges such 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. These proposals fail on both points. The proponents of HRC 5005 and HB 2123 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 of checks and balances as it stands, the legislature already 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 give the legislature even more power over the courts. On 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. Professor Ware has been quoted as saying that Kansas is the only state giving lawyers a majority on the nominating committee. If he said that, he was simply mistaken. Ware's own article acknowledges that, in Alaska, Missouri, Iowa, Nebraska, South Dakota and Wyoming lawyers also comprise a majority of the nominating commission. To that list, we can also add the District of Columbia.

The lawyer and non-lawyer 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. It is logical that lawyers should be heavily represented on the nominating commissions. 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. These radical proposals before you today apparently do not recognize the need for any lawyers at all among the nominating commission members. The proposal says that not more than a third of the members of the nominating commission can be a lawyer. It does not say that any one must be a lawyer. In any event, however, the proposal would let politicians select the lawyers, not the lawyers themselves. Under the present system, the lawyer members of the commission are chosen through a non-political election. Every person licensed to practice law in Kansas can vote, even if they are not practicing lawyers. They may be business owners, bankers, realtors, homemakers, truck drivers, physicians, or any calling or profession. The political affiliation of the lawyer candidates for the commission is never disclosed.

Our present system does truly produce well qualified candidates, and it is politically non-partisan. Professor Ware's published a brief for the Federalist Society, one of the groups that are financing these attacks on non-partisan judicial selection around the country. I, of course, disagree with most of what he says in it, but he did include some very interesting data. He

has, in an appendix to the article, data showing the political affiliation of the members of the nominating committees and the political affiliation of the persons they recommended to fill judicial vacancies. It shows that, in 1988, a nominating commission that included four Republicans and five Democrats nominated three Republicans. In 1993, a commission of eight Republicans and three Democrats nominated three Democrats. In 1995, a commission of seven Democrats and two Republicans nominated two Republicans and one Democrat. Other examples could be cited, but I think this is sufficient to show that our non-partisan selection system does work without political partisanship.

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. 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. I don't believe Kansans are ready to accept a life-tenured judiciary. I think we like the idea that our judges should stand for a retention election every 4 or 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.

It is worth noting that, when Congress set up a judiciary branch for the District of Columbia, they did not provide that judges had to be approved by the Senate. Instead, they set up a system very much like our Kansas non-partisan system, with a majority of the nominating committee being lawyers.

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 nine person commission. The commissioners would all be appointed by partisan politicians: no longer would there be any pretense of non-partisanship. The proposed system would potentially leave judicial

positions vacant for extended periods of time – awaiting the next session of the legislature. The proposed system would, in a word, be a disaster.

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. It is completely inconsistent with that fundamental principle of American government: the separation of powers. To adopt such a system as the one proposed here would be a giant step backward, to the great detriment of the people of Kansas.

TESTIMONY BY JAMES M. CONCANNON
DISTINGUISHED PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW
HCR 5005 AND HB 2123
FEBRUARY 12, 2009

My name is Jim Concannon and I have taught courses in procedure, including Appellate Practice, for 36 years. While I was Dean of Washburn Law School, I had the privilege of serving as Co-Reporter, with Michael Hoeflich, then-Dean of the K.U. Law School, of the Kansas Citizens Justice Initiative, a 46-member, bipartisan Commission appointed by the Governor, leaders of the Legislature, and the Kansas Supreme Court to make recommendations to improve the Kansas justice system. Not only did the Commission not recommend changing the way Kansas selects appellate judges, its 1999 report recommended, without a dissenting vote, that merit selection, together with judicial performance evaluations like those we now have, replace partisan election in those districts still electing judges.

The Justice Initiative's conclusion that the role of politics in the selection of judges should be minimized underlies my opposition to HCR 5005 and HB 2123. These proposals will make judicial selection far more political. More current or former legislators and members of the executive branch likely would apply under the proposed system. However, many well-qualified lawyers who would apply under the current system would not apply under a system in which the Governor can reject all three nominees the nominating commission determines are the most qualified, in which the Governor can continue to do so until all that are left are unqualified candidates or the Governor's preferred candidate appears on the list, and in which even if the Governor selects one of the initial three nominees, the Senate can refuse to confirm the selection for political reasons after contentious hearings.

There are logistics issues too. These proposals risk leaving positions on the Kansas Supreme Court vacant for an unacceptably long period. If a Justice died on March 1, there would not be time for the Nominating Commission to solicit applications, conduct background checks, interview candidates, and submit names to the Governor in time for the Governor, after the K.B.I.'s separate background check, to announce an appointee who could be considered for confirmation before the Senate adjourned. The vacancy would last nearly a year, and it could last two years if the Senate refused to confirm the Governor's choice and the nominating process had to start over again because new applications should be solicited due to the passage of time.

No state in the union selects judges using a method that combines the characteristics in these proposals: a nominating commission composed solely of appointees by elected officials; unlimited authority of the Governor to reject all of the commission's nominees and to do so multiple times; a requirement of Senate confirmation; a prohibition upon the Senate meeting in a special session to consider confirmation; and post-confirmation retention votes by the people. Indeed only Utah has both Senate confirmation and retention votes. These proposals would make the Nominating Commission in Kansas the weakest in America by undermining its function to assure that all judges will be highly qualified and sufficiently free of political influence to fulfill independently the unique role of judges in our system. These proposals ask you to adopt a system of judicial selection that no other state has to replace a system that is criticized principally because it is a system that no other state has. That's a bad idea.

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HOUSE JUDICIARY COMMITTEE

Hearing on HCR 5005 and HB 2123
February 12, 2009, 3:30 p.m.
Hearing Room 143 N

Submission of James L. Bush, Past President, Kansas Bar Association
Senior Trust Officer
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COMMENTS IN OPPOSITION TO HCR 5005 AND HB 2123

Good afternoon. My name is Jim Bush. As a Past President of the Kansas Bar Association, I am appearing today on behalf of the KBA. I'm an attorney who has practiced and worked in small towns in Kansas for my entire professional career. I practiced law in the small town of Smith Center, Kansas for over twenty years and for the past ten years I've run a trust department in a bank in Hiawatha, Kansas. While in private practice, my clients were little "blue haired" ladies writing wills, criminal defendants, injured parties, banks, school districts, municipalities and unhappy spouses (or former spouses). I've handled a myriad of cases in the Federal and State District Courts, the Court of Appeals and the Kansas Supreme Court. I've also successfully argued cases before the United States Court of Appeals for the 10th Circuit. I believe I'm the only past Bar President to also serve as president of a major division of the Kansas Bankers Association. I currently serve on the Probate Law Advisory Committee of the Kansas Judicial Council. Having twice been nominated for a vacancy on the Kansas Court of Appeals, I have a pretty fair understanding of the workings of the Supreme Court Nominating Commission, not from the perspective of someone appointed by that system, but from the perspective of someone NOT appointed under the present system. Let there be no mistake about it, I whole heartedly support the current system

The Kansas Bar Association is a voluntary professional association of Kansas Attorneys, whose avowed purpose is to "promote the effective administration of our system of justice". The KBA strongly opposes HCR 2005 and HB 2123.

My testimony will be much more blunt than the eloquent, well reasoned and convincing testimony of Justice Six, an outstanding jurist and an example of the many fine justices and judges who were selected under our present system and have served with distinction on our appellate courts.

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WHAT DO OUR APPELLATE COURTS DO?

Let's first consider what our appellate judges and justices do (and don't do). I brought with me a copy of the most recent "Advance Sheets" issued by the Kansas Supreme Court and the Kansas Court of Appeals. This publication contains the "published" opinions of our Appellate Courts. There are many other opinions issued, but not deemed worthy of publication. Our Courts are VERY busy. As pointed out by Justice Six, the Supreme Court has issued **8,775** published opinions since the first justices were appointed by merit selection and the Court of Appeals has issued **3,660** published opinions since it was established. This advance sheet is rather typical of the thousands of cases handled by our appellate courts. There are many criminal cases as well as cases involving zoning issues, divorces, tax appeals, trusts and even defective RVs. Unlike the United States Supreme Court, which can decide what cases it even wants to consider, our Kansas appellate courts only **rarely** consider "hot button" issues like school finance or the death penalty. In the overwhelming majority of instances, the appellate courts handle issues about which the legislature would not have the remotest interest. Now, because some may differ with our Court's decisions on a few "hot button" issues, an effort is underway to throw the baby out with the wash.

This Committee is familiar with how the current system for the selection of appellate judges operates. We believe that system works well. The rationale or excuse for a change is best articulated by an Article written by Stephen J. Ware, a law professor who moved to Kansas in 2003. Professor Ware has never argued a case before any of our appellate courts, nor has he represented anyone in any of our District Courts. In fact, he's not even admitted to practice law in Kansas. As a member of the Faculty at KU Law School, he's a member of the KBA, but has never attended a Board of Governors meeting nor a meeting of the Legislative Committee of the KBA. Therefore, I'm going to presume that Professor Ware knows little, if anything, about the agenda of the Kansas Bar Association or as he puts it, the "interest of (Kansas) lawyers". Yet, in a widely circulated article written last year, Professor Ware concludes that the Kansas Merit Selection process is flawed because a majority members of the Supreme Court Nominating Commission are lawyers and "Bar Associations aggressively lobby for the interests of their lawyer-members." It's perplexing that someone with absolutely no experience before our courts can be perceived as an expert in determining how they are supposedly flawed. This is NOT criticism coming from someone with years of experience and hundreds of cases before our appellate courts. Professor Ware's opinions are NOT based on fact and experience, but on ideology.

Like professor Ware, the proponents of this bill argue that **"the bar"** is some kind of monolithic entity operating like a secret society to protect "its interest" by forwarding to the Governor only the names of lawyers who will protect the

interest of fellow lawyers. Assume that to be true for the point of argument, then which lawyers? The "interests of lawyers" are as diverse as the clients they represent. Are these supposedly biased nominees representing the interest of criminal defense lawyers, prosecutors, trial lawyers, bank attorneys, civil defense lawyers, municipal attorneys or maybe the interests of lawyers representing "little blue haired ladies"? Only rarely in legislative issues are there matters upon which "the bar" has a unified interest and even less frequently in matters under litigation. Therefore the term "interest of lawyers" is nothing more than a "boogey man" contrived by those seeking to exert greater control over an independent judiciary. If the Kansas appellate courts have a pattern of deciding cases based on the interest of lawyers, then where are the cases? Where are the parties aggrieved by such rulings? In the one hundred fifty-three footnotes contained in Professor Ware's article, not a single case is identified where our appellate courts ruled in such a way as to demonstrate a prejudice in favor of the best interest of lawyers, let alone a trend or pattern evidencing the prejudice Professor Ware presumes to exist. If Kansas appellate judges were selected because they represent the interest of lawyers, then their decisions would presumably reflect that prejudice, which they don't.

The fact is that we have appellate judges from diverse backgrounds and experiences, which were selected based upon their knowledge, experience, temperament and the unique perspectives they bring to the court. They were not nominated because of their political views or party affiliation. They were clearly NOT selected because they represent the "interest of lawyers". The passage of either of these bills would politicize what has heretofore been an "apolitical" process.

I know many of the attorney members who have served or are currently serving on the Supreme Court Nominating Commission. Some of them have served with me on the Board of Governors of the Kansas Bar Association. The members of this committee may be incredulous to learn that even though I have known some of these people for years, in most instances, I'm unaware of their party affiliation or their views on what most would consider as "hot button" issues. Instead, I know them as articulate, knowledgeable, experienced attorneys who have a keen interest in preserving our system of justice and maintaining an independent, knowledgeable and diverse judiciary. Based upon my experiences before the Supreme Court Nominating Commission, my party affiliation was never discussed nor disclosed. My political views were never discussed, nor were my views on typical "hot button" issues. Instead, I was asked to highlight my professional experience and articulate how that experience could translate into the effective administration of justice as required of a member of the appellate court. We firmly believe that Senate confirmation will do nothing more than probe ideology, which has no place in the selection of Kansas appellate judges.

In closing, I would like to point out another irony advanced by Professor Ware and those who support these bills. Professor Ware argues that partisan politics enters the equation because Governors frequently appoint members of their own party to the Nominating Commission and then Governors frequently appoint members of their own party to the court from the names submitted to them by the Nominating Commission. In fact, there have been several instances when Governors have appointed members of the other party to the Court. While the Governor's office has flipped rather frequently between Republican and Democratic, the legislature has remained virtually under the control of one party for many years. Do the proponents of these bills seriously contend that placing the selection of the members of our appellate courts under legislative control will somehow be LESS partisan?

We urge you to preserve the integrity, professionalism and independence of our Kansas appellate courts by maintaining the current merit system for selecting appellate judges. The current system works. Let's leave politics to the legislature and justice to our courts.

Thank you for giving me the opportunity to express the position of the Kansas Bar Association

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TO: HOUSE JUDICIARY COMMITTEE
FROM: F. JAMES ROBINSON
KANSAS ASSOCIATION OF DEFENSE COUNSEL

RE: HCR 5005
HB 2123

DATE: FEBRUARY 12, 2009

Chairman Kinzer, members of the committee, thank you for the opportunity to appear today and comment on your review of House Concurrent Resolution 5005 and House Bill 2123. My name is Jim Robinson. 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.

House Concurrent Resolution 5005 is a constitutional amendment to change the process for selecting Supreme Court justices. Changes would be made to how the nine-member Supreme Court Nominating Commission is chosen; the Governor, House Speaker and Senate President would make three appointments each. Another change is that the senate would confirm the Governor's appointee. House Bill 2123 establishes a similar process for selecting Court of Appeals judges.

The impetus for this legislation focuses on the process of selecting judges, rather than on whether the process has elevated good judges to the state's highest courts.

This debate over House Concurrent Resolution 5005 and House Bill 2123 concerns the tension between principles of democratic accountability and judicial independence. For those who support these measures, their concerns about this state's method for selecting Supreme Court and Court of Appeals judges center on a perceived lack of openness and accountability. Those who oppose these measures worry about the judiciary's loss of decisional independence. This exchange of views is a continuation of a much larger debate that is as old as the Republic.

While urging ratification of the constitution of the United States, Alexander Hamilton wrote about the need for "a steady, upright, and impartial administration of the laws," by a judiciary of "firmness and independence." Liberty, he said, "would have everything to fear from [the judiciary's] union with" the legislature or the executive." *The Federalist: No. 78.* Chief Justice John Marshall was even more emphatic: "'The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.'" Arthur T. Vanderbilt, *Judges and Jurors: Their Function, Qualifications and Selection*, 24 (1956) (quoting *Proceedings and Debates of the Virginia Convention of 1829-1830*, at 619 (1830)).

"Judicial independence" refers to the ability of judges to decide disputes impa principle best thrives in a system in which judges are free from personal and privat including the vagaries of temporary public majorities and shifting popular opinion and the

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control of the legislature or executive. Independence enables judges to protect individual rights even in the face of overwhelming popular opposition and without regard to political consequences.

Alongside this belief in judicial independence, is a belief in democratic accountability. During the ratification debate, James Madison wrote that government must derive "all its power directly or indirectly from the great body of the people." *The Federalist: Nos. 37, 39.*

"Accountability," as it is applied to judges, means different things to different people. For those who oppose the state's method for selecting judges, some believe that judge's decisions should be more in line with popular opinion. Others reject this view but still insist that for judges to be democratically accountable, the public, through its elected senators, should have a say in the selection of judges.

These opposing views have led to the development of the present system that strikes a balance between accountability and independence. It is unlikely that universal agreement will ever be achieved in this debate. Rather than become mired in it, the more practical questions for the Committee is what does the system of judicial selection seek to accomplish and what are the results.

The mechanics of judicial selection is simply a means to an end—elevating good judges to the appellate courts. The fundamental criterion for judging the present system is the results it produces. The best system is the one that over time produces the best judges.

The assumption underlying the present process involving the Supreme Court Nominating Commission is that if those who choose the judges are knowledgeable and insulated from politics, and if they are guided by proper rules and procedures, they will choose good judges. This nonpartisan commission is 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.

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

The debate about judicial selection in Kansas has focused more often on the process than on outcomes. Whatever the validity of the charges about the present process—and they are contested—they do not address directly the quality of judges who have been appointed in the present system or their inferiority to those who would have been selected using a senate confirmation process. Absent such proof, why should this Committee even consider a change?

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Kansas does not need 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 the *The Federalist Papers: No. 76* 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." Congress has enacted no statutes to regulate the appointment of judges. There are no age, professional, or training prerequisites. The country is wholly reliant on the senate confirmation process to screen federal judge nominees for merit and integrity. This is especially important because all federal judges, including Supreme Court justices, hold their positions for life "during good behavior." No justice has ever been removed from office under this standard.

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 an unwanted political element into the selection process.

Using the federal system as the model, it is worth considering what the Senate confirmation process would look like in Kansas, and how it could be abused. Once the Governor announces her nominee, Senate staff will begin the behind-the-scenes work researching the nominee's public record and past legal work, the KBI will conduct a thorough background investigation, and the Kansas Bar Association is likely to weigh in on the nominee's qualifications.

The investigation process may become mired when the opposition demands reams of additional documentation from the nominee or the investigators. This information may be beyond the scope of a normal Senate process, unnecessary or simply irrelevant. There may be objections that the Governor is deliberately withholding information that Senators have a right to review. Thereafter, "information deprivation" becomes a familiar refrain throughout the process.

After the initial work is completed the Senate Judiciary Committee will hold lengthy hearings. Committee members will make statements, the nominee will testify and answer questions, and other witnesses may provide their views. The opponents through their statements and questions will suggest that the nominee is "out of the mainstream," "too far left," "too far right," "soft on crime" *etc.* They will try to goad the nominee into pre-judging hot button issues likely to come before the courts or making an embarrassing guffaw. There will be much frustration with the process when nominees invoke the sacred mantra of judicial nominees and refuse to comment on issues that might come before the court. As we have seen at the federal level these discussions can devolve into questioning about points of prejudice and personal pique that are calculated to tarnish the judge in the court of public

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opinion, all of which can be exacerbated when coupled with a highly politicized relationship between the Governor and the Legislature.

The Judiciary Committee will deliberate and then vote. The recommendation will go to the floor of the Senate. The opponents will likely use this opportunity to lay out their case against the nominee. If there is no agreed time limit, the hearings could continue for an indefinite period.

It shouldn't be this way. The Kansas Senate is a dignified institution. But we have no reason to expect that Kansas can adopt the Senate confirmation process without the results that have played out in the U.S. Senate.

The candidates don't deserve this protracted and combative process. They deserve to be treated with the dignity and respect befitting a Supreme Court Justice or a Court of Appeals Judge. Many of the most qualified candidates who are already successful in what they do may be discouraged from participating because of the name-calling, insults, smears and demeaning attacks that have lately besmirched the federal nomination process.

The citizens of Kansas do not need, nor should they want, to replace the present system that is working very well with a Senate confirmation process that is fraught with problems.

TO: HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

FROM: MICHAEL D. HERD, PRESIDENT
WICHITA BAR ASSOCIATION

RE: HCR 5005 AND HB 2123

DATE: FEBRUARY 12, 2009

Chairman Kinzer, Members of the Committee, thank you for the opportunity to appear today and comment for your review on the proposed legislation contained under HCR 5005 and HB 2123. My name is Mike Herd. I have been in the private practice of law in Wichita for more than twenty-five years. I am currently President of the Wichita Bar Association ("WBA"), a local bar association of over 1,300 members. I am here today on behalf of the WBA at the direction of its Board of Governors in opposition of HCR 5005 and HB 2123 and in support of the current merit selection process for selecting appellate judges.

An Independent and Impartial Judiciary.

In order to protect the rights of our citizens afforded by the Constitution and laws, the courts must be independent and impartial. The best way to ensure such independence is to establish a selection process that minimizes political influence. I appreciate the notion that the current merit selection process is an attorney selection process and there is no direct accountability to the people or to the legislative branch with the selection of our appellate judges. However, the merit system has historically fulfilled its mission of selecting three qualified nominees to submit to the Governor with little credible evidence of political influence. Our current political landscape is full of strident partisan politics. To interject the legislative branch in the process by controlling the nominating commission and subsequently the confirmation would impair the ability to protect the independence of our judiciary.

Qualified Selection Commission.

With no disrespect intended, the general public does not have an understanding or appreciation for the Rule of Law, Stare Decisis, or what is required of an individual to fulfill the duties of an appellate court judge. Further, non-lawyers have limited expertise to assess the

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intellectual ability, technical analysis skills or professional experience to be a qualified candidate. Unless you have participated in or appeared before the appellate courts, you cannot fully appreciate the demands and challenges required of the job to interpret the law. Having a super-majority of non-lawyers on the commission and having all the commissioners appointed by elected officials dilutes the selection expertise and directly interjects political influence into the selection committee.

Legislation.

Under the federal system, unlike the merit selection system, the President screens and nominates the candidate. As a means of checks and balances between the legislative and executive branch (especially involving lifetime appointments of judges), to ensure the candidate is qualified, the Senate exercises a confirmation right. We have all witnessed the delays and political theater that has been generated by the federal confirmation process.

Under HCR 5005 and HB 2123, the legislative branch has asserted control over the selection process. With the appointment of a super-majority of commissioners and retaining final approval by confirmation, the legislature is wielding its power over the executive and judicial branches of government. Further, with the selection and confirmation occurring only during the legislative session, it is almost a certainty that the political battles occurring during the legislative session will spill over into the confirmation process.

The citizens of Kansas do not need to dilute the expertise to scrutinize the selection of quality applicants, or risk losing the independence of the judiciary by political influence. The appellate courts serve to interpret and enforce the law passed by the legislative branch. To interject such legislative branch power and influence on the selection of the appellate court judges jeopardizes the independence of the judiciary. I am not aware of any example in my twenty-five plus years of practice of the selection of an unqualified appellate judge to serve under our current merit system. The merit system has worked successfully and the proposed changes significantly risk partisan politics influencing the independence of the judiciary.

LEAGUE OF WOMEN VOTERS® OF KANSAS

February 12, 2009

Honorable Lance Kinzer, Chair
House Judiciary Committee
The Kansas House of Representatives

Chairman Kinzer and members of the committee:

Thank you for allowing me to present testimony on behalf of League of Women Voters of Kansas in opposition to both HCR 2123 and HCR 5005. We assert changing the present process of appointing the Nominating Commission without a compelling basis for such a change does not serve the best interests of good public policy for Kansans.

1. Our existing method of selecting/appointing the Supreme Court Nominating Commission has honorably served Kansas for many years.
2. The proposal for Senate confirmation of the Governor's appointment introduces a political element League believes unnecessary and perhaps counterproductive. Furthermore, the possibility of a judicial vacancy for an extended period if the legislature is not in session could impose an undue burden on other judges and delay justice for Kansas citizens.
3. Changing the ratio of attorneys to non-attorneys diminishes the critical importance of professional scrutiny in screening judicial candidates. According to the American Judicature Society website a majority of states using Nominating Commissions to select candidates for appellate courts include more attorneys than non-attorneys. In only one state is there a 2:1 ratio of non-attorneys to attorneys.
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 Commissions, partisan politics could result in a partisan court system.

A non-politicized court system promotes an independent third branch of government, assuring the necessary checks and balances in our democracy. Judges must be servants of the law and the Constitution, not of politicians or special interest groups.

League urges you **not** to support either HCR 2123 or HCR 5005.

Diane Kuhn
President, Kansas League of Women Voters

Diane Kuhn

House Judiciary
Date 2-12-09
Attachment # 19

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To: Representative Lance Kinzer, Chairman
Members of the House Judiciary Committee

From: Terry Humphrey, Executive Director
Callie Denton Hartle, Director of Public Affairs

Date: February 12, 2009

Re: HCR 5005 and HB 2123

The Kansas Association for Justice (KsAJ) is a statewide nonprofit organization of attorneys. We appreciate the opportunity to submit testimony in opposition to HCR 5005 and HB 2123.

An independent judiciary is vital to justice. Judges must be free to make decisions that are unpopular when the law requires it. The courts cannot be subject to private or political influence, including interference by the legislative and executive branches, nor should judges be selected based on their political skills or the way they may decide a particular case or controversy.

Kansas' merit selection process has proven to be an appropriate means of identifying and appointing qualified judges based on their legal skills. While some elements of merit selection remain in HCR 5005 and HB 2123, we question the necessity of changing the current selection process. There has been no evidence that the justices or judges that have been selected are unqualified, lacking in integrity, or otherwise unfit. From a process standpoint, we believe the Nominating Commission better reflects Kansas' part-time citizen Legislature than the federal model of Senate confirmation.

KsAJ believes that confusion about the justice system has fueled public scrutiny of the judicial selection process. However, Kansas took an important step forward in 2006 by establishing the Kansas Commission on Judicial Performance. The Commission evaluates judges and evaluations are made available to the public. The work of the Commission strikes a fair balance between judicial independence and the public accountability of the judiciary. KsAJ suggests that promoting the work of the Commission is a more appropriate step than changing the judicial selection process.

We respectfully request that the House Judiciary Committee oppose HCR 5005 and HB 2123.

House Judiciary
Date 2-12-09
Attachment # 20