



March 4, 2022

JUDICIAL SELECTION

This memorandum describes the methods for filling vacancies on the Kansas Supreme Court and the Kansas Court of Appeals, as well as recent legislative efforts to amend the selection process.

Current Method for Filling Vacancies

Article 3, Section 5 of the *Kansas Constitution* governs selection of Kansas Supreme Court justices. Since its amendment in 1958, Section 5 has specified any vacancy on the Supreme Court shall be filled through the Governor's appointment of one of three candidates nominated by the Supreme Court Nominating Commission (Commission). The nonpartisan Commission has nine members: a chairperson who is an attorney chosen by the members of the Kansas Bar, one attorney member from each congressional district chosen by members of the Kansas Bar who reside in that district, and one non-attorney member from each congressional district appointed by the Governor.

The process for filling vacancies on the Kansas Court of Appeals is governed by statute and was amended by the enactment of 2013 HB 2019 to allow the Governor, with the consent of the Senate, to appoint a qualified person to fill a vacancy. Under the procedures of KSA 2021 Supp. 20-3020, the Governor must make an appointment within 60 days of receiving notice of the vacancy from the Clerk of the Supreme Court.

Otherwise, the Chief Justice of the Supreme Court, with the consent of the Senate, will appoint a qualified person for the position. The Senate is required to vote on the appointment within 60 days of being received or, if the Senate is not in session and will not be in session within the 60-day time limit, within 20 days of the beginning of the next session. If the Senate fails to vote within the time limit, its consent will be deemed given. If the appointee does not receive a majority vote in the Senate, the Governor will appoint another qualified person within 60 days, and the same consent procedure will be followed.

In a 2019 decision, the Kansas Supreme Court held that, under the statutory process, once the Governor has made an appointment to the Court of Appeals, neither the Governor nor the appointee may withdraw the appointment, and the appointment can fail only if the Senate holds a vote to consent within 60 days of receiving the appointment and a majority of the Senate does not vote to consent. See *State ex rel. Schmidt v. Kelly*, ___ Kan. ___, 441 P.3d 67 (2019).

Once appointed, each Supreme Court justice and Court of Appeals judge is subject to retention elections following the justice's or judge's first full year in office and at the end of each

term. Supreme Court justices serve six-year terms, and Court of Appeals judges serve four-year terms.

Recent Legislative Efforts

Vacancies on the Kansas Supreme Court

The method for filling vacancies on the Kansas Supreme Court is governed by the *Kansas Constitution*, requiring a constitutional amendment to modify that process. Article 14, Section 1 of the *Kansas Constitution* provides that a concurrent resolution originating in either house of the Legislature that is approved by two-thirds of all members will be considered by Kansas voters at the next election. If a majority of those voting on the amendment approves the amendment, it becomes a part of the *Kansas Constitution*.

During the 2013 Session, the Kansas Legislature considered numerous bills and concurrent resolutions related to judicial selection. One of these concurrent resolutions, HCR 5002, which was approved by the House Committee on Judiciary, would have submitted a constitutional amendment to the qualified electors of the State to modify the method of selection for justices of the Kansas Supreme Court and add the law governing the Court of Appeals to the *Kansas Constitution*. Specifically, the amendment would have eliminated the Supreme Court Nominating Commission and allowed the Governor to appoint qualified persons to the Supreme Court and Court of Appeals using the procedure adopted for the Court of Appeals in 2013 HB 2019. While the selection method would have been modified, both Supreme Court justices and Court of Appeals judges would have continued to be subject to retention elections.

Several concurrent resolutions concerning the selection of Kansas Supreme Court justices were introduced during the 2015 Session. HCR 5004 and HCR 5005 both were approved by the House Judiciary Committee. HCR 5004 would have provided for election of justices. HCR 5005 was similar to 2013 HCR 5002 and was considered by the House Committee of the Whole during the 2016 Session; however, it was not adopted by the required two-thirds majority.

In 2019, SCR 1610, containing provisions similar to 2013 HCR 5002, was introduced and initially referred to the Senate Committee on Judiciary. On May 29, the Senate voted to withdraw the concurrent resolution from the Judiciary Committee and refer it to the Senate Committee of the Whole, but no further action on SCR 1610 was taken during the 2019 Session.

Selection of Lawyer Members of the Commission

Among other changes, 2016 House Sub. for SB 128 added requirements for licensed attorneys to provide certain identifying information to the Clerk of the Supreme Court (Clerk) (KSA 2021 Supp. 7-127), who must maintain a roster of licensed attorneys. Prior to selection of attorney members of the Commission, the Clerk must transmit a certified copy of the roster to the Secretary of State (KSA 2021 Supp. 20-170). After the election, the Clerk must preserve qualification certificates, create a list of the names and residential addresses of all persons who returned a ballot with a signed certificate for an election, and transmit a certified copy of this list to the Secretary (KSA 2021 Supp. 20-122).

The identifying information and unique voter identification numbers assigned by the Secretary, the dates of licensure to practice law in Kansas of all persons on the certified rosters, the qualification certificates, and the lists of persons returning a ballot are subject to a request under the Kansas Open Records Act (KSA 2021 Supp. 20-122 and 20-170). Further, the bill deems the Commission to be a public body subject to the Kansas Open Meetings Act and prohibits recessing for any closed or executive meeting except for the purpose of discussing sensitive financial information contained in the personal financial records or official background check of a judicial nomination candidate (KSA 2021 Supp. 20-2907).

The bill also requires the Governor (or the Chief Justice, if making an appointment because the Governor failed to make an appointment) to make public the name and city of residence of each applicant to the Court of Appeals (KSA 2021 Supp. 20-3020).

Legislation introduced in 2017 (HB 2245), 2019 (HB 2020), and 2021 (HB 2013), would have eliminated many of the changes described above made by 2016 House Sub. for SB 128 and restored previous law in those areas. HB 2245 and HB 2020 received hearings in the House Committee on Judiciary without further action, and HB 2013 remains in the House Committee on Judiciary as of March 2022.