

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:35 a.m. on March 18, 2010, in Room 548-S of the Capitol.

All members were present except:

Senator Jean Schodorf- excused

Committee staff present:

Doug Taylor, Office of the Revisor of Statutes

Jason Thompson, Office of the Revisor of Statutes

Athena Andaya, Kansas Legislative Research Department

Karen Clowers, Committee Assistant

Others attending:

See attached list.

The Chairman announced that it was his intention to refer **SB 374 - Sub for S 374 by Committee on Judiciary – Enacting the Kansas Adverse Medical Outcome Transparency Act** for review during the interim.

Senator Haley moved, Senator Lynn seconded, to approve the Committee minutes for February 9, February 10, February 11, February 12, February 15, February 16, February 17, February 23, and February 24. Motion carried.

The Chairman called for final action on **SB 211 - Providing journalists with privilege concerning the disclosure of certain information**. Jason Thompson, staff revisor, reviewed the bill and distributed a balloon amendment. Senator Bruce reviewed the changes in the proposed balloon amendment. (Attachment 1)

Senator Bruce moved, Senator Pilcher-Cook seconded, to amend SB 211 by adopting the proposed balloon amendment.

Senator Vratil indicated he had three amendments which would restore the balance between the competing interests of journalists and law enforcement. Senator Vratil made a substitute motion to amend SB 211 on page 1, line 36, striking “clear and convincing” and insert “a preponderance of”, to amend on page 1, lines 41-42, to delete “is of a compelling and overriding interest for the party seeking the disclosure” and on page 2, beginning on line 15, strike section 5. Senator Umbarger seconded the substitute motion. Motion failed.

The Chairman stated the Committee was back on the original motion made by Senator Bruce, seconded by Senator Pilcher-Cook, to amend **SB 211** by adopting the proposed balloon amendment. Motion carried.

Senator Vratil moved, Senator Kelly seconded, to amend SB 211 on page 1, line 36, after the word “establishes” inserting “a preponderance of”, and on page 2, beginning with line 15, strike section 5.

Senator Schmidt moved, Senator Bruce seconded, to divide the question. Motion carried.

On the preponderance question, part 1 of the motion. Motion carried.

On the striking of Section 5, Senator Bruce made a substitute motion to amend SB 211 on page 2, striking the language “party seeking to compel”. Senator Vratil suggested amending his motion.

Senator Vratil amended his substitute motion to amend SB 211 on page 2, inserting the word “resist” so the bill reads: “that the party seeking to compel disclosure and no reasonable basis to request or resist such disclosure...”. Senator Kelly agreed to the amended motion. Motion carried.

Senator Bruce moved, Senator Schmidt seconded, to delete the contents of **HB 2585** and insert the contents on **SB 211**, as amended, alter the title to reflect the substitute bill and recommend it favorably for passage. Motion carried.

3/18

CONTINUATION SHEET

Minutes of the Senate Judiciary Committee at 9:35 a.m. on March 18, 2010, in Room 548-S of the Capitol.

Senator Owens called for final action on **SB 488 - Office of vital statistics; fingerprinting and criminal history records check required for new employees** which had been re-referred to the committee and reviewed the bill history.

Senator Pilcher-Cook distributed data regarding the floor amendment she had offered. (Attachment 2)

Senator Vratil moved, Senator Kelly seconded, to strip out the floor amendment and return SB 488 as it originally left the Committee and recommend favorably for passage. Motion carried.

The Chairman called for the Sub-Committee report on **SCR 1626 - Constitutional amendment to preserve right to choose health care services and health insurance plan.**

Senator Vratil reviewed the Sub-Committee's report which recommended **SCR 1626** be rewritten as a Senate Resolution which will be non-binding. (Attachment 3)

Senator Pilcher-Cook moved, Senator Donovan seconded, to reject the committee recommendation and to recommend SCR 1626 favorably for passage.

Senator Vratil made a substitute motion to adopt the Sub-Committee recommendation on SCR 1626 and have the Chairman request contents of SCR 1626 be put in a Senate Resolution. Senator Kelly seconded. Motion failed.

Back on the original motion, to recommend SCR 1626 favorably for passage. Motion failed.

The next meeting is scheduled for March 19, 2010.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 18, 2010

NAME	REPRESENTING
Mark Gleeson	Judicial Branch
Doug Anstett	KPA
Kent Cornish	KAB
Rich Gunnar	KPA
MIKE Taylor	United Gov
Melissa Wangemann	KAC
Sandy Jaquost	LKM
Cynthia Smith	SCUHS
John Mitchell	KDHE
Fred Kersen	KDHE
Nancy Stoyse	Judicial Council
Laura Cottrill	KCC
Susan KCC	KDHE
Jimie Noble	KDHE
Tracy Russell	KHCC
Kevin Benore	Cap Idg Grp.
Jimie Ross	KCSL
ERIK SARTORIUS	CITY of Overland Park

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: MARCH 18, 2010

NAME	REPRESENTING
Emi Kelly	AARP KS
JEAN MICHEL	CAPITOL STRATEGIES
Scott Rothchild	Lumme jewel - Wash

SENATE BILL No. 211

By Senators D. Schmidt and Hensley

2-4

SB211-Balloon-Sub.pdf
RS - JThompson - 03/17/10

Senate Judiciary
3-18-10
Attachment 1

9 AN ACT concerning journalists; providing a privilege with regard to cer-
10 tain disclosures of information.

11

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. As used in sections 1 through 6, and amendments thereto:

14 (a) "Journalist" means a publisher, editor, reporter or other person
15 employed by a newspaper, magazine, news wire service, television station
16 or radio station who gathers, receives or processes information for com-
17 munication to the public.

18 (b) "Information" means any information gathered, received or proc-
19 essed by a journalist, whether or not such information is actually pub-
20 lished, and whether or not related information has been disseminated,
21 and includes, but is not limited to, all notes, outtakes, photographs, tapes
22 and other recordings or other data of whatever sort that is gathered by a
23 journalist in the process of gathering, receiving or processing information
24 for communication to the public.

25 (c) "Acting as a journalist" means a journalist who is engaged in ac-
26 tivities that are part of such journalist's gathering, receiving or processing
27 information for communication to the public.

28 Sec. 2. Except as provided in section 3, and amendments thereto, a
29 journalist cannot be adjudged in contempt by a judicial, legislative, ad-
30 ministrative body or any other body having the power to issue subpoenas,
31 for refusing to disclose, in any state or local proceeding, any information
32 or the source of any such information procured while acting as a
33 journalist.

34 Sec. 3. A journalist may not be compelled to disclose any information
35 or the source of any such information procured while acting as a journalist
36 until the party seeking to compel the disclosure establishes by clear and
37 convincing evidence in district court that the disclosure sought:

(1)

38 (a) Is material and relevant to the controversy for which the disclo-
39 sure is sought;

(2)

40 (b) cannot be obtained by alternative means; and

(3)

41 (c) is of a compelling and overriding interest for the party seeking the
42 disclosure and is necessary to secure the interests of justice.

43 Sec. 4. Upon a finding by the court that the party seeking to compel

: (1)

; or (2) an online journal in the regular
business of newsgathering and
disseminating news or information to
the public

(a)

previously undisclosed

Strike

could not, after exercising due diligence,

(b) For purposes of this section, a
"compelling interest" is evidence likely
to be admissible
(continued on next page)

1-2

1 ~~the disclosure has met the requirements in section 3, and amendments~~
 2 ~~thereto, the court shall order the disclosure, and such disclosure only, for~~
 3 ~~in camera inspection. Upon such in camera inspection, the court shall~~
 4 ~~determine whether the disclosure is likely to be admissible as evidence~~
 5 ~~and whether its probative value is likely to outweigh any harm done to~~
 6 ~~the free dissemination of information to the public through the activities~~
 7 ~~of journalists. The party claiming the privilege and the party seeking to~~
 8 ~~compel disclosure shall be entitled to a hearing in connection with the in~~
 9 ~~camera inspection of such disclosure by the court, during which hearing~~
 10 ~~each party shall have a full opportunity to be heard. If the court then~~
 11 ~~determines that such disclosure is admissible and that its probative value~~
 12 ~~outweighs any harm to the free dissemination of information to the public~~
 13 ~~through the activities of journalists, then the court shall direct production~~
 14 ~~of such disclosure and such disclosure only.~~

15 Sec. 5. ~~If the court finds no reasonable basis has been shown for~~
 16 ~~requesting the disclosure, costs and attorney fees may be assessed against~~
 17 ~~the party seeking disclosure. If an application for attorney fees is made,~~
 18 ~~the judge shall set forth the reasons for awarding or denying such costs~~
 19 ~~or fees.~~

20 Sec. 6. The rights and privileges provided by this act are in addition
 21 to any other rights guaranteed by the constitutions of the United States
 22 or the state of Kansas. The provisions of sections 1 through 6, and amend-
 23 ments thereto, shall not be construed to create or imply any limitation on
 24 or to otherwise affect a privilege guaranteed by the constitutions of the
 25 United States or the state of Kansas.

26 Sec. 7. This act shall take effect and be in force from and after its
 27 publication in the statute book.

Strike

After such hearing, the court may conduct an in camera inspection to determine if such disclosure is admissible.

sepcifically finds

that the party seeking to compel disclosure had no reasonable basis to request such disclosure, the court may assess costs and attorney fees against the party seeking to compel disclosure

Sec. 3. (b) (continued)
 and has probative value that is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists, which includes, but is not limited to:

- (1) the prevention of a certain miscarriage of justice; or
- (2) an imminent act that would result in death or great bodily harm.

Interests that are not compelling include, but are not limited to, those of parties whose litigation lacks sufficient grounds, is abusive or is brought in bad faith.

Kansas



Selected Special Statistics Stillbirths and Infant Deaths Kansas, 2008

Research Summary

Kansas Department of Health and Environment
Division of Health
Bureau of Public Health Informatics
Curtis State Office Building – 1000 SW Jackson, Topeka, KS, 66612-1354
<http://www.kdheks.gov/bphi/>
January 2010

Senate Judiciary

3-18-10

Attachment 2

Conclusion

Analysis of infant mortality by combining years shows a more stable estimate of infant mortality in Kansas – a significant decreasing trend in infant mortality with stagnation in recent years. Combining years with the linked birth/death file shows that prematurity or low birth weight is a primary risk factor in of infant deaths (about 62 % in the linked file). Studies indicate that many of the factors associated with preterm birth occur together.^{5,6} Thus, there is a clear need to understand the causes of premature birth as well as the risk factors such as population group of the mother, age of mother and no prenatal care and how they interrelate.

Limitations

This report's findings are subject to several limitations. An important concern is the issue of receiving vital events from other states within the KDHE reporting deadline. Vital statistics are gathered on an occurrence basis but are traditionally reported on a residence basis. For complete residence statistics reports must be received from other states for events occurring to Kansas residents. These events are reported for a full calendar year. Because of delays or other late reporting some vital event reports have not been received by KDHE by the cutoff date of June 30 of the year following the event year. Past evaluations indicate that over 99 percent of all vital events to Kansas residents are received before the cutoff date.

Evaluation of the linked birth infant death cohort is subject to limitations due to the inability to link all deaths to a corresponding birth report. This inability may be due to a number of reasons related to receipt of the corresponding record from another state, name differences between the two reports, both events not occurring in Kansas, and residency changes.

The ICD10 death classification system limits the bias of human coding of mortality information. The system also attempts to reduce the effect of spelling errors or placement of literal information in the cause of death fields. One limitation is the system's inability to take into account differences in knowledge and attitudes among physicians who complete the cause of death information. Individual biases, unfamiliarity with the patient, or inability to perform an autopsy may affect the information available to the physician when certifying the cause of death. While many death certificates contain four full lines of detailed information on the events or illnesses leading up to the death, some death certificates contain only limited information.

The causes of stillbirths are not as well documented as infant deaths. The American Congress of Obstetricians and Gynecologists recommends an increase in the percentage of stillbirths for which placental evaluation is preformed and autopsy is offered.⁷ Additionally, since KSA 65-2401 defines stillbirth by weight of the fetus (>350 grams) vital records data does not represent the full picture of all fetal deaths.

Report of the Judiciary Subcommittee on 2010 SCR 1626 to the Senate Committee on Judiciary

CHAIRPERSON: Senator John Vratil

OTHER MEMBERS: Senator Terry Bruce, Senator Laura Kelly, and Senator Julia Lynn

STUDY TOPIC

- Study the constitutional issues in 2010 SCR 1626

March 2010

Senate Judiciary
<i>3-18-10</i>
Attachment <i>3</i>

Judiciary Subcommittee on 2010 SCR 1626

CONCLUSIONS AND RECOMMENDATIONS:

The subcommittee recommends that SCR 1626 be converted into a senate resolution, with the same concepts and message, and that copies be sent to each member of the Kansas Congressional Delegation, as well as to the President of the United States, the President of the United States Senate, the Majority Leader and the Minority Leader of the United States Senate, the Speaker and Minority Leader of the United States House of Representatives.

Proposed Legislation: A senate resolution is proposed.

BACKGROUND

On February 4, 2010, SCR 1626 was separately referred to the Senate Committee on Public Health and Welfare and the Senate Committee on Judiciary. On February 17, 2010, the Senate Committee on Public Health and Welfare reported the Concurrent Resolution out of Committee without recommendation. As of March 16, 2010, the Concurrent Resolution is in the Senate Committee on Judiciary.

The subcommittee was created at the initiative of Senator Thomas C. "Tim" Owens, Chairperson of the Senate Committee on Judiciary to study the constitutional issues in 2010 SCR 1626.

SCR 1626 would amend the *State Constitution* by adding a new Article 16. The purpose of the new constitutional article, which concerns health care, would be to preserve the freedom of Kansans to provide for their health care. Article 16 would include the following protections:

- No law or rule would compel, directly or indirectly, any person, employer, or health care provider to participate in any

health care system or to purchase health insurance;

- Any person or employer could pay directly for lawful health care services and would not be required to pay penalties or fines for paying directly for lawful health care services; and
- Any health care provider could accept direct payment for lawful health care services and would not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

The constitutional amendment would not affect which health care services a health care provider or hospital would be required to perform or provide. The amendment would not affect which health care services are permitted by law and would not prohibit care provided through the Workers Compensation program or state employee benefit programs. The amendment would not affect laws or rules in effect as of August 1, 2009. Additionally, the amendment would not affect the terms or conditions of any health care system as long as they do not

punish or penalize any person or employer for paying directly for lawful health care services or punish or penalize a health care provider or hospital for accepting direct payment for lawful health care services.

If the Concurrent Resolution is approved by two-thirds of the members of the Senate and two-thirds of the members of the House of Representatives, the proposed constitutional amendment would be submitted to the electors of the State at the November 2010 general election, unless a special election is called at an earlier date by a concurrent resolution of the Legislature. Language to be included on the election ballot is included in the resolution.

COMMITTEE ACTIVITIES

The subcommittee met on March 11, 2010, and March 16, 2010. Items discussed by the 2010 Subcommittee relating to its charge by the Chairperson are reviewed in the following material, along with the Subcommittee's conclusions and recommendations to the 2010 Senate Committee on Judiciary.

MARCH 11, 2010

The subcommittee received a briefing by an Assistant Revisor of Statutes on the Concurrent Resolution. She stated that the resolution incorporates model language from the American Legislative Exchange Council's (ALEC) model legislation, "Freedom of Choice in Health Care Act." The Assistant Revisor stated 25 states have a similar constitutional amendment pending in their Legislature. Arizona's constitutional amendment is on the ballot for November, 2010. Twelve states have proposed statutory changes regarding freedom of choice health care. Virginia's statutory change was

recently enacted on March 4, 2010. A number of states, on the other hand, have rejected a statutory change including Indiana, Michigan, Minnesota, New Mexico, West Virginia, and Wyoming.

Proponents who provided testimony to the subcommittee were Senator Mary Pilcher-Cook, and Kris W. Kobach, Professor of Constitutional Law at the University of Missouri, Kansas City, on behalf of himself. Written testimony was provided by Christie Herrera, Director of the Health and Human Services Task Force, American Legislative Exchange Council.

Generally, the proponents assert that the Concurrent Resolution would protect against or prohibit an unprecedented individual mandate to purchase health insurance. The proponents also assert that SCR 1626 would declare a state constitutional right of Kansans to make their own health care choices; allow the State to intervene as a party in a lawsuit over the constitutionality of a comprehensive health care reform act; and gain the protection of the "plain statement rule."

According to Professor Kobach, the plain statement rule is the rule that any federal act that potentially alters the constitutional balance between states and the federal government must use unmistakable language indicating that Congress intends to displace the power of the state. If there is ambiguity in the language of the federal law enacting the individual mandate, the court would be compelled to weight its analysis in favor of the state's sovereign authority. Professor Kobach asserts that without SCR 1626, the plain statement rule would not apply.

Conferees providing neutral testimony to the Senate Judiciary Subcommittee on SCR 1626 were Stephen R. McAllister, Professor of Constitutional Law, University of Kansas

School of Law, on behalf of himself, and Dave Roland, a policy analyst with the Show-Me Institute, on behalf of himself. Clint Bolick, Litigation Director, Goldwater Institute provided written testimony.

Stephen McAllister asserted that the real issue is the power of Congress to mandate that individuals must have health insurance. If Congress has the power, either through its power to regulate interstate commerce or possibly even the power to tax, then he states it will be done. Professor McAllister said it has been very easy for the United States Supreme Court to find a connection with the Commerce Clause in previous cases. Further, if Congress has the power, SCR 1626 will not have any effect.

Professor McAllister observed, as a student of state constitutional law himself, SCR 1626 will not constrain Congress but it will constrain the Kansas Legislature, with, perhaps, unintended consequences. He stated the Concurrent Resolution is a symbolic measure and nothing more. A statute would have the same symbolic effect but would be easier to change, if necessary. Another alternative would be to do a resolution which does not call for a constitutional amendment.

Dave Roland suggested the question to be decided by a court is whether the *Constitution* gives Congress the authority to punish citizens for refusing to purchase health insurance.

Clint Bolick, in his written material, stated that the Goldwater Institute has offered to defend the constitutionality of the Health Care Freedom Act at no cost to any state.

There was no testimony offered in opposition to SCR 1626 during the hearing before the Senate Judiciary subcommittee.

MARCH 16, 2010

The subcommittee discussed the information that was obtained during the hearing on SCR 1626. The subcommittee also discussed the options of recommending the concepts of SCR 1626 being placed in a statute, the concepts of SCR 1626 being placed in a nonbinding resolution, recommending passage of SCR 1626, or making no recommendation.

Senator Lynn stated that she has received numerous correspondences from constituents expressing fear of what might happen on the national level with regard to health care. For that reason, she would like to get the Concurrent Resolution out of Committee and onto the floor of the Senate. Senator Lynn would like specific language authorizing the Kansas Attorney General to intervene on behalf of the citizens of Kansas in the event that Congress passes a health care bill with an individual mandate.

Senator Bruce stated he is comfortable with the SCR 1626, however, he believes the hurdle to get the SCR 1626 properly enacted is high. He stated he tends to agree with the testimony of Professor McAllister that this Concurrent Resolution is more of a gesture or a statement. On the other hand, Senator Bruce said he is persuaded by Professor Kolbach's argument that one of the benefits of having a constitutional amendment was standing or the ability to intervene in a lawsuit. Senator Bruce stated that the balance between the ideas that SCR 1626 is a gesture and that it would guarantee a day in court is addressed by placing the concepts of SCR 1626 in a statute.

Senator Kelly was concerned that she does not know the full ramifications of placing the concept in a statute. Senator Vratil stated one ramification is that a statute can be changed more easily than an

amendment to the *Kansas Constitution*. He pointed out that SCR 1626 anticipates a problem that may or may not come to pass, therefore crafting a constitutional amendment to address the anticipated problem is very difficult. The advantage and the disadvantage of a statutory change is that this option is flexible to amendment to address a situation which may arise.

Senator Kelly stated she is in favor of sending Congress a message in the traditional form of a nonbinding resolution. Senator Vratil expressed concern that putting the concepts in statutory form is practically impossible with only 3 days left for meetings in the standing committees. He stated a resolution is far more likely to make it to the Senate Committee of the Whole than a newly introduced bill. Senator Bruce stated he wanted something more forceful than a nonbinding resolution to send a message to Congress and to ensure the right to intervene in a lawsuit.

A motion to recommend SCR 1626 favorably to the Senate Committee on Judiciary was made by Senator Lynn and seconded by Senator Bruce. A substitute motion to recommend SCR 1626 be converted to a senate resolution and recommend the resolution be passed was made by Senator Kelly and seconded by Senator Vratil. The substitute motion failed. The motion to recommend SCR 1626 favorably failed.

A motion to place the concepts of SCR 1626 into a statute and that a bill be drafted and introduced was made by Senator Bruce and seconded by Senator Lynn. Senator Kelly stated this option was nearly impossible because of time constraints so she would be voting "no" on the motion. Senator Vratil agreed with Senator Kelly.

Senator Kelly made a substitute motion to convert SCR 1626 into a senate resolution with the same concepts and message, require that copies be sent to the Kansas Congressional Delegation, and that the senate resolution be recommended favorably to the Senate Committee on Judiciary. Senator Bruce seconded the motion. The motion was unanimously approved.

CONCLUSIONS AND RECOMMENDATIONS

The subcommittee recommends that SCR 1626 be converted into a senate resolution, with the same concepts and message, and that copies be sent to each member of the Kansas Congressional Delegation, as well as to the President of the United States, the President of the United States Senate, the Majority Leader and the Minority Leader of the United States Senate, the Speaker and Minority Leader of the United States House of Representatives.

MINORITY REPORT

Whereas I completely agree with the Majority Report with respect to its conclusion that the Supremacy Clause of the *US Constitution* will supercede either state statutory or constitutional law and concerns that SCR 1626 is thereby relegated to a symbolic gesture, I disagree with its position to only advance a nonbinding resolution.

By doing so, the Majority Report ignores the advantage of a statutory law giving Kansans the right to purchase private health insurance. Enacting a bill would address concerns about any potential unintended consequences of changing the *Kansas Constitution*. Additionally, passage of such a law would allow the attorney general to intervene on behalf of Kansans in a court of law.

Because a statutory enactment of SCR 1626 avoids potential long-term, unintended consequences of a constitutional amendment, sends a message to Congress,

and allows for Kansas to protect the rights of its citizens, I believe the Majority Report is lacking.

Senator Terry Bruce