

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 14<sup>th</sup> 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

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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

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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 Court", 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

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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 06:05 p.m.