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The Honorable Jeffrey King
Senate Vice President & Chair, Senate Judiciary Committee
Room 341-E
Kansas State Capitol
300 SW 10th St.
Topeka, KS 66612

VIA EMAIL: Jeff.King@senate.ks.gov

RE: *September 3, 2013 Testimony Concerning Process For Senate Confirmation Of Kansas Court Of Appeals Nominees*

Dear Senator King and Members of the Judiciary Committee,

Thank you for extending your invitation to testify concerning this committee's procedures for conducting confirmation hearings of Kansas Court of Appeals nominees. Especially as a member of the law faculty at the University of Kansas, which has a long tradition of serving the Kansas legislature, I am honored accept your invitation. During my 20 to 25 minutes of testimony, I will address four topics. First, I will highlight the unique role that the Kansas Court of Appeals plays as a part of the overall Kansas judicial system. Second, I will provide an overview of the processes used in Senate judicial confirmations at the federal level and in other states. Third, I will discuss the limitations that the canons of judicial ethics place upon nominees in answering questions during confirmation hearings. Fourth, I will briefly highlight a few prominent schools of judicial philosophy. I preview each of these topics in the remainder of this letter.

1. Role of the Kansas Court of Appeals

The Kansas court system, like that of most states and the federal system, is composed of three tiers. The system has trial courts (labeled in Kansas as district courts), an intermediate court of appeals (the Kansas Court of Appeals), and a high court (the Kansas Supreme Court).[1]

[1] In limited instances, parties may seek review of Kansas Supreme Court cases in the United States Supreme Court.

Each tier in this system serves a unique function. The role of the district courts in this scheme is to determine the facts of the case with the aid of the jury and to apply the law to the case as it has been determined by the Kansas appellate courts and the United States Supreme Court. The Kansas appellate courts (*i.e.*, the Kansas Court of Appeals and the Kansas Supreme Court) have two primary roles: (1) to review individual decisions of districts courts for error, and (2) to interpret ambiguous or unclear Kansas law for general application in future cases.

The legal systems in most states initially contemplated a single appellate court that served both functions (*i.e.*, the error-correction function and the interpretation function). With but a short six-year exception, this single-appellate-court approach was deployed in Kansas until the 1970s. By 1977, however, the Kansas Supreme Court, like most other state high courts, experienced such significant increases in workload that an unacceptably large backlog of appellate cases prompted the Legislature to act. At that time, the Legislature created our current Kansas Court of Appeals. In so doing, the Legislature functionally divided the traditional appellate court roles. Thus, under our current system, the primary role for the Kansas Court of Appeals is to correct errors that occur at trial, while the primary role for the Kansas Supreme Court is to interpret unclear Kansas constitutional, statutory, and common law.

This bifurcation of the error-correction function and the interpretive function, moreover, is coupled with the concept of *stare decisis*. The application of this *stare decisis* principle means that the Kansas Court system, like all others in the country, is strictly hierarchical. Thus, Kansas Supreme Court and United States Supreme Court precedents unequivocally bind the Kansas Court of Appeals as it acts in furthering its primary goal of correcting trial errors. That is to say, because the primary job of the Kansas Court of Appeals is to correct trial errors—not to offer definitive interpretations of Kansas law — the Kansas Court of Appeals, when a higher court opinion is directly applicable, must apply that higher court's precedent.

This is not to say that the Kansas Court of Appeals never exercises the appellate interpretation function. Indeed, not all of the cases it hears involve only settled law or routine applications of facts to clear precedent. In those cases, the Kansas Court of Appeals, like all other intermediate courts of appeals, has a responsibility for interpreting the law. But its responsibility in such cases is subordinate to that of the United States and Kansas Supreme Courts. As a result, Kansas Court of Appeals opinions have precedential value, binding the Kansas district courts in all future cases, but only until such time as the United States or Kansas Supreme Court displaces them.

The Kansas Court of Appeals, like most intermediate courts of appeals, is a workhorse. The Kansas Court of Appeals hears civil, criminal, post-conviction, and administrative appeals. The vast majority of its cases come to it in so-called mandatory jurisdiction, meaning that the court must hear the appeal. (This is to be contrasted with the Kansas Supreme Court, which hears the bulk of its suits on a discretionary docket.)

The Kansas Court of Appeals, as do most intermediate courts of appeals, assigns three judges per appeal, with a majority vote of the panel determining the outcome in the case. After a case has been briefed, orally argued (if that is required in the particular matter), and an opinion issued, the matter is closed. If the party losing in the Kansas Court of Appeals wishes, he may petition for discretionary review from the Kansas Supreme Court.

2. Federal & State Senatorial Confirmation Processes

With this overview of the Kansas Court of Appeals' role at hand, I turn next to this committee's confirmation hearing. I start with what are the common objectives in conducting judicial confirmation hearings and next provide a brief overview of several confirmation hearing models.

Goals

While the various confirmation processes deployed across the nation often do not state explicit goals, a number of common themes are discernable. As I see them, these goals are:

1. To vet judicial nominees so as to ascertain technical competency and suitability for judicial authority.

2. To give the public the opportunity to express recommendations or reservations about nominees without resorting to partisan elections and the problems inherent therewith.

3. To establish longer tenures for judges to eliminate pressures and influences—including, but not limited to monetary and political influences—by interest groups.

4. To ensure public participation generally, whether directly or by elected representatives, in the selection and appointment of judges.

5. To instill confidence in the judiciary.

Confirmation Hearing Models

The Federal government, California, Maine, and New Jersey employ confirmation of executive-branch-nominated judicial candidates prior to appointment to the bench. In the federal system, Maine, and New Jersey the chief executive appoints judges for all courts in that system, followed by Senate confirmation.[2] In California, the

[2] *See* N.J. CONST. art. VI, § VI; *see also* American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2013)

Governor appoints candidates to the supreme court and courts of appeals only.[3] In California, confirmation is performed by the Commission on Judicial Appointments not the Senate.

Federal: At the federal level, the Senate must confirm the nominee. As in the Kansas approach, this is completed first by the Senate Judiciary Committee, then by the full Senate. Before the Judiciary Committee holds a confirmation hearing, the nominee must complete a comprehensive questionnaire detailing his or her qualifications for the position. Senators from the nominee's home state may use a "blue slip" to approve the nominee and move him or her through the process. Receipt of a home-state senator's blue slip does not entail confirmation, but it does speed up the process by providing an endorsement. Also prior to the confirmation hearing, the ABA Standing Committee on the Federal Judiciary provides an evaluation of a nominee's professional qualifications. The ABA Standing Committee evaluates the nominee's integrity, competence, and judicial temperament, but does not evaluate the nominee's philosophy or political ideology.[4] During the confirmation hearing, the members of the Senate Judiciary Committee engage in a question and answer session with the nominee. The goal of this hearing is to resolve any questions or concerns the Committee members have regarding the nominee's qualifications. These questions range from discussions of work history, past political posts, legal experience, and judicial philosophy. The Judiciary Committee will also call other parties to testify as to the nominee's fitness for judicial office, review references and recommendations, and other past "paper trail" documents related to the nominee.

California: In California, nominees must be confirmed by the Commission on Judicial Appointments ("CJA"), which consists of the California Supreme Court Chief Justice, the California Attorney General, and the Senior Presiding Justice of the Court of Appeals.[5] The CJA reviews written recommendations and testimony by the California Bar Commission on Judicial Nominees Evaluations, testimony by the nominee, and testimony by other interested parties who submit a request to testify.[6]

Maine: In Maine, nominees must be confirmed first by a joint standing committee of the state legislature, and then by the state senate as a whole.[7] The joint standing committee of the Maine legislature must hold a prehearing conference to

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(discussing judicial selection in New Jersey); State of Maine, Office of Governor Paul LePage, http://www.maine.gov/governor/lepage/cabinet/appointments/confirmable.shtml.

[3] CAL. CONST. art. 6, § 16; *see also* American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=CA.

[4] Senate Judiciary Committee, http://www.judiciary.senate.gov/nominations/judicial.cfm.

[5] GUIDELINES FOR THE COMMISSION ON JUDICIAL APPOINTMENTS, Guideline 2, available at http://www.courts.ca.gov/documents/guidelinescja.pdf (last visited Aug. 27, 2013).

[6] *Id.* Guideline 4.

[7] ME. REV. STAT. tit. 3, § 154 (1993); *see also* State of Maine, Office of Governor Paul LePage, http://www.maine.gov/governor/lepage/cabinet/appointments/confirmable.shtml (last visited Aug. 27, 2013).

discuss the nominee's fitness for judicial office and to review the findings of background checks performed before the conference.[8] After the prehearing conference, the committee conducts a public hearing, which may be conducted under oath.[9]

New Jersey: Nominees for New Jersey judicial vacancies also must be confirmed by the state senate — specifically the senate judiciary committee — before taking the bench.[10] According to the American Judicature Society, New Jersey judicial confirmations are subject to two peculiar features: (1) a professional courtesy akin to that in the federal system, where senate members will not permit nominees who fail to receive the support of senators representing the nominee's home district to proceed through the process;[11] and (2) political balance such that governors replace outgoing judges with judges of the same political party.[12]

3. Canons of Judicial Ethics

As is appropriate, members of this committee in questioning nominees will want to learn more about his or her general approach to judging. In so doing, members of confirmation committees such as this one often ask nominees how they would rule on particular pending cases before the courts or cases that quite likely will soon be pending before the courts. In what may seem a frustrating set of responses, responsible nominees will refuse to answer such pointed and direct questions about pending cases, giving only broader answers discussing the nominee's philosophy in general terms.

This rule, that nominees should not address pending cases, is known as the "Ginsburg Rule." The name derives from the federal confirmation hearing of now-Justice Ginsburg where she asserted that the canons of judicial conduct prohibited her from answering questions about pending cases. Since her confirmation, both Republican-nominated and Democratic-nominated judges always invoke the Ginsburg Rule in response to questions concerning pending, or likely to be pending, cases. It is worth noting, however, that despite the perception that the Ginsburg Rule has turned federal confirmation hearings into some sort of scripted sideshow, the empirical academic literature finds that nominees are at least, if not more, forthcoming now than they were in the 1950s and 1960s.[13]

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[8] ME. REV. STAT. tit. 3, § 156 (1993).

[9] *Id.* § 157.

[10] N.J. CONST. art. VI, § VI; *see also* American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2013) (discussing judicial selection in New Jersey).

[11] This feature, however, applies only to initial appointments, not reappointments. *See* American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2013) (discussing judicial selection in New Jersey).

[12] American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2013) (discussing judicial selection in New Jersey).

[13] *See* Dion Farganis & Justin Wedeking, *No Hints, No Forecasts, No Previews: An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan*, 45 LAW & SOC. REV. 525 (2011).

Assuming that the Ginsburg Rule is the best interpretation of the canons of judicial conduct, Kansas law similarly imposes a duty not to address pending cases during confirmation hearings. The Kansas Code of Judicial Conduct, as codified under Kansas Supreme Court Rule 601B governs the conduct of both judges and judicial nominees.[14] While many provisions in these Canons speak to this issue of commenting on pending cases, the most relevant is Canon 2.10[15]:

> (A) A judge [or a nominee] shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
>
> (B) A judge [or a nominee] shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Canon 4.1 also speaks to this issue of a nominee's duty not to discuss pending cases:

> (A) A judge or a judicial candidate shall not: . . . .
>
> (5) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
>
> (6) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Given these rules governing judicial behavior, a nominee cannot state how he or she would vote on a pending, or likely to be pending, case without violating these codes of conduct. The purpose of these codes is to protect the independence of the judiciary and to ensure to the public that each case is judged solely on the facts and merits of that case — not on past promises made to members in the other branches of government.

4. Schools of Judicial Philosophy

Learning more about a nominee's proposed judicial philosophy, as opposed to his or her views on pending cases, appropriately forms one of the core inquiries in

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[14] KAN. SUP. CT. R. 601B, CANONS OF JUDICIAL CONDUCT, application I.(D) (explaining that the judicial candidates are included in the meaning of "judge" throughout the Canons, and that such candidates are subject to the provisions of Canon 4.).

[15] KAN. SUP. CT. R. 601B, CANONS OF JUDICIAL CONDUCT, CANON 4, Cmt. 12 ("Paragraph (A)(6) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.).

confirmation hearings. To that end, I briefly review some differing schools of thought as an aid to your upcoming hearings.

General Judicial Philosophy

I begin with the concept of judicial activism, a notion that could affect a nominee's judicial reasoning generally.

Judicial Activism: Despite the fact that "judicial activism" is a term used often in the popular media, I fear it lacks any definitive meaning. For example, the United States solicitor general under President George W. Bush, Theodore Olson, said in an interview on Fox News that "most people use the term 'judicial activism' to explain decisions that they don't like."[16] The term seems to have no other meaning than as a means of expressing disapproval. To that end, I can imagine no nominee before this committee who would accept the label "judicial activist" to describe his or her judicial philosophy.

To the degree that the term "judicial activism" means anything beyond the speaker's disagreement with the court, it may signify that a judge is more willing to strike legislation as unconstitutional or otherwise rule in a manner that is not as deferential to legislative judgments than that of an average judge's rulings. Using this understanding, "judicial activism" stands as the opposite of a philosophy of "judicial restraint" (*i.e.*, the view that judges should defer as much as possible within the restraints of the law to legislative judgments). Attempting to use these definitions, both liberal and conservative critics of the United States Supreme Court, for example, have levied the charge of judicial activism at that Court: conservative critics in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003), and liberal critics in the case of *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010). But again, these critiques likely boil down to mere political disagreement with the decisions at hand.

Constitutional Interpretation Philosophy

I turn next to a discussion of two leading schools of thought regarding constitutional decisionmaking. Of course, as a Kansas Court of Appeals judge, one is strictly bound by U.S. Supreme Court and Kansas Supreme Court decisions interpreting the federal and Kansas Constitutions. Kansas Court of Appeals nominees, therefore, will not have much occasion to independently exercise his or her theories of constitutional interpretation. Nevertheless learning more about a nominee's thoughts in this regard may give this committee insights it deems important in its confirmation task.

Originalism: In the context of U.S. constitutional decisionmaking, originalism is a principle of interpretation that tries to discover either (1) the original meaning of the

[16] Chris Wallace & Theodore Olson (August 8, 2010). Fox News Sunday (Fox News Channel).

Constitution as understood by average educated people at the time the document was written or (2) the original intentions of the actual authors of the Constitution. If such an original understanding can be gained from the historical record, an originalist judge will rule in line with this original meaning or intention.

Stereotypically, politically conservative judges endorse originalism as the best means of constitutional interpretation (*e.g.*, Justice Scalia and Justice Thomas). Many political liberals, however, have endorsed the view (*e.g.*, Justice Hugo Black and Professor Akhil Amar). Supporters of this approach argue that this view represents the most faithful way of preserving both the people's constitutional rights and limiting the power of the judiciary to intrude upon legislative action.

Originalism, if faithfully relied upon, does not necessarily lead to preconceived answers to particular questions. Indeed, because the historical record surrounding the federal constitution is over 200 years old, and the questions presented to the courts are often very fine grained, originalist reasoning can often lead to differing outcomes. Two recent examples illustrate this point. In *Boumediene v. Bush*, 553 U.S. 723 (2008), a case regarding the power of the federal courts to hear writs of habeas corpus from detainees at Guantanamo, Justices Kennedy and Scalia (both President Reagan appointees) differed greatly as to the original, seventeenth and eighteenth century scope of English legal practice in issuing writs of habeas corpus to areas under the crown but outside of England (i.e., Scotland, Ireland, Hanover in Germany, and India). That is to say, they both sought historical, or originalist, precedent to apply to the case, but disagreed as to what the historical record contained. Similarly, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the handgun-ban case, Justices Scalia and Breyer read the historical record regarding colonial America's experiences with gun-control laws very differently. As such, a nominee's assertion that he or she is an originalist, or that he or she uses originalist reasoning, cannot be used as an effective proxy for predicting judicial decisionmaking in all cases.

Purposivism (or Living Constitution Approach): Purposivism is a school of thought regarding the interpretation of the Constitution that looks to the general principle or purposes that the Constitution aims to preserve and then applies these broad principles to current cases. Generally speaking, purposivists reject a strictly originalist approach because, with its sole focus on the late 1700s context, (1) original understanding as to particular and detailed legal questions often cannot be found in the historical record and (2) original understandings, even if knowable, may seem to some irrelevant to twenty-first century legal questions.

Stereotypically, the purposivist view is associated with more liberal judges (*e.g.*, Justice Breyer and Justice Ginsberg). But just as often one can see the rejection of originalist reasoning from a conservative judge in favor of a purposivist approach. For example, Justice Alito, appointed by President George W. Bush, drafted the following

passage where he rejects an originalist approach to the Fourth Amendment in favor of purposivist approach:

> This case requires us to apply the Fourth Amendment[] . . . to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. . . . This holding, in my judgment, is unwise. . . and it is highly artificial. I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated. . . . [I]t is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?) . . . .[17]

As with originalism, then, purposivism is not an effective proxy for determining how a judge will vote in any given case.

In my estimation, no judge or nominee is purely an originalist or purely a purposivist. Rather, judges in constitutional interpretation take in a whole host of information when making decisions. Thus all judges, at times, will consult the text of the provision at issue, the overall structure of the document, past precedents, ethical and prudential considerations, the overarching principles and purposes of the document, and the historical record in deciding a case. Differences in constitutional philosophy, in my view, boil down to a matter of emphasis as to each of these factors.

Statutory and Administrative Interpretation

Much of what modern Kansas appellate judges do is interpret statutory and administrative language. Statutory construction, as lawyers call this task, is the process by which courts interpret and apply legislation. Some amount of interpretation is almost always necessary when a case involves a statute. Sometimes the words of a statute have a plain and straightforward meaning that readily applies to the facts at hand. But in many cases, there is some ambiguity or vagueness in the words of the statute that must be resolved by the judge. And even if the language is clear, courts are often confronted with factual settings that do not mesh well with the language of the statute.

When faced with this interpretive task, the Kansas courts universally hold that "[t]he most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained."[18] While this sentiment holds universal assent, one finds two broad camps in regards to what are the best tools for ascertaining the intent of the legislature.

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[17] *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 957–58 (2012) (Alito, J., concurring).
[18] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

Plain Language: The plain-language approach, or textualism approach, is a theory of statutory interpretation, holding that a statute's ordinary meaning should govern its interpretation. This view can be contrasted with one which endorses inquiries into non-textual sources such as sponsors' stated intentions of the legislature in passing the law, committee reports, floor speeches, the problem it was intended to remedy, or other substantive questions regarding the justness of the statute. Whenever possible, the Kansas appellate courts "first attempt to ascertain legislative intent by reading the plain language of the statute and giving common words their ordinary meanings."[19] Thus, when a statute is plain and unambiguous, Kansas courts do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in the plain text.

Supporters of this view conclude that the plain-meaning approach to statutory construction is appropriately respectful of the legislature's primary role in enacting Kansas law and the centrality of statutory language.

Non-textual Intent (or Spirit of the Law): The other broad school of thought regarding statutory construction takes a non-textual approach to determining legislative intentions. This is not to say that one following this approach ignores the language of the statute. Rather, this view finds that often non-textual sources offer greater insight as to legislative intent than does the plain statutory text. This is because statutory language, especially in technical areas, can be complex or deploy specialized jargon. Many legislators, therefore, rely upon committee reports, floor speeches, statements of intent and the like to analyze bills. These reports, then, may well shed more light on the intent of the legislature than does the plain text of the bill. Kansas courts will engage in this type of statutory construction when the statute's language or text is unclear or ambiguous and "employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly."[20]

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Once again, thank you for this opportunity to testify and to participate in the KU Law School's long and proud tradition of service to the Kansas legislature.

Warmest Regards,

Lumen N. Mulligan

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[19] *Padron v. Lopez*, 289 Kan. 1089, 1097, 220 P.3d 345 (2009).

[20] *Stewart Title of the Midwest v. Reece Nichols Realtors*, 294 Kan. 553, 564–65, 276 P.3d 188 (2012).