



**KANSAS BAR  
ASSOCIATION**

**TESTIMONY PRESENTED TO THE  
SENATE COMMITTEE ON JUDICIARY**

**LEE SMITHYMAN  
KANSAS BAR ASSOCIATION**

**January 17, 2013**

**SCR 1601**

**A PROPOSITION to amend the constitution of the state of Kansas by revising  
article 3 thereof, relating to the judiciary.**

**SB 8**

**An Act concerning judicial appointments; creating the Kansas commission on  
judicial qualifications; relating to senate confirmation.**

Good morning Chairman King and Members of the Senate Committee on Judiciary. I am Lee Smithyman and I am a partner in the Overland Park-based law firm of Smithyman & Zakoura, Chtd. I currently serve as the President of the Kansas Bar Association and I appreciate the opportunity to appear before you today to provide the KBA's thoughts on the appellate selection process and in particular, our proposal to amend the current merit selection system for filling vacancies on our state's appellate courts.

The Kansas Bar Association has long supported a merit selection process and the nonpartisan Kansas Supreme Court Nominating Commission for selecting judges and justices for our appellate courts. The system has served our state well since 1958 when 60% of the Kansas electorate approved it.

The Kansas Constitution provides for a nine-member Supreme Court Nominating Commission, which is selected as follows:

- One attorney serves as chair, who is elected by all licensed attorneys residing in Kansas;
- Four attorneys, one elected from each of the state's four congressional districts by licensed attorneys residing in those districts; and
- Four non-attorneys, one selected by the Governor from residents within each of the state's four congressional districts.

The KBA supports the present system; it works well to select our best and our brightest. Recently, the U.S. Chamber of Commerce ranked Kansas as the fifth best state in the nation for the legal-

business climate of its state courts. Four of the five top states used a form of merit selection. Kansas also ranked in the top ten for judicial impartiality and competence.

The leading criticism of our current system is that the majority of commission members are attorneys selected by attorneys who are not effectively accountable to the public. However, merit selection works well; merit selection will work well independent of the selection process. As a result, at the urging of its membership, the Kansas Bar Association addressed judicial selection and adopted the following resolution at its December 7, 2012 meeting of the KBA Board of Governors:

*RESOLVED, that the Kansas Bar Association supports the merit selection system for appellate judges and justices, independent of how merit panel members are selected. The present application, interview, questioning and selection process provides the best available information to identify and select the most qualified appellate judges and justices, independent of political considerations.*

Rather than simply recite the previously-referenced statement and/or express general opposition to non-merit selection proposals to amend the appellate selection process, the KBA felt it appropriate to offer specific changes within the merit system process that could be considered alongside other proposals and has requested introduction of what we refer to as the 4-5-6 Plan for Appellate Selection.

In summary, the KBA proposal for amending the Kansas Supreme Court Nominating Commission is as follows:

- Four attorneys elected by registered attorneys within each of the state's four congressional districts;
- Five members selected by the Governor; one each from the state's four congressional districts and a fifth member to serve as the non-voting chair; and,
- Six (non-legislator) members selected by House and Senate Leadership as follows:
  - o Two selected by the President of the Senate;
  - o Two selected by the Speaker of the House;
  - o One selected by the Senate Minority Leader; and,
  - o One selected by the House Minority Leader.

This 4-5-6 Plan proposed by the Kansas Bar Association would protect judicial independence, while opening appointments to a remarkably democratic process, one which the Governor, the House, the Senate and the voters (through retention elections) all would participate.

The three best judicial nominees as determined by the Commission would be submitted to the Governor for selection. The Governor and the Legislative leaders could appoint attorneys or non-attorneys as they deem appropriate; no commission members could be members of the Kansas Legislature or executive branch; and, the members would serve staggered three-year terms.

The benefits of a merit selection system are many and we believe far outweigh any of the attributes of a Federal model or direct elections.

Most important, a merit selection process is open for all Kansas attorneys to apply to the appellate bench, not just those who might be selected by our state's chief executive. Every applicant's credentials and experience are reviewed by the panel and those best qualified are interviewed. Kansas courts will greatly benefit from access to the best and brightest of our attorneys and lower court judges. Each applicant will have their credentials vetted by an impartial nominating commission charged with forwarding the three best candidates to the Governor for consideration, rather than the kind of a system that would be created under SCR 1601 and SB 8 that would arguably set minimum standards for nomination to our appellate courts and most certainly limit the number of attorneys given consideration for an appellate court position.

The KBA sees the issue of changing our state's appellate selection process, which has been in place for more than fifty years, to be a decision in which all Kansans should participate. The KBA believes any constitutional amendment changing our current system should be placed on a general election ballot where all Kansans vote – Republicans, Democrats, Independents and other parties as well, not simply those who have a declared political party. Impartiality and nonpartisanship demands such consideration.

In closing, merit selection should not be discarded. It works. Witness the resolutions passed by bar associations and civic organizations across the state of Kansas that endorse merit selection as the best process for selecting judges and justices.

On behalf of the Kansas Bar Association, I thank you for your time and consideration of our thoughts on this important issue and I would stand for questions at the appropriate time.

Lee Smithyman  
KBA President  
2012-2013

[www.ksbar.org](http://www.ksbar.org)

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,000 members, including lawyers, judges, law students, and paralegals.

Attachment (List of bar and civic organizations)