Approved: 3/17/11
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 16, 2011, in Room 346-S of the Capitol.

All members were present except:
Representative Suellentrop

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Representative Ruiz, Thirty-Second District, Kansas City, Kansas
John Peterson, Lobbyist
Caleb Stegall, Counsel to Governor
Alan Cobb, Kansas Attorney, Vice President of Americans for Prosperity
Jim Rankin, Attorney
Alan Tarr, Distinguished Professor, Director-Center for State Constitutional Studies, Rutgers University
Curt Roggow, Sanders Warren & Russell LLP, Overland Park, Kansas
Clay Barker, Attorney, Olathe
Brian Fitzpatrick, Associate Professor of Law, Vanderbilt University
Andrew Gray, a citizen of Kansas, Chair of the Libertarian Party
Mrs. Donna Gillett, Kansas Citizen, Leavenworth, Kansas
Keith Esau, Concerned Citizen, Olathe, Kansas
Professor Stephen Ware, Professor of Law, University of Kansas
Anne Burke, Chair of Supreme Court Nominating Commission
Debbie Nordling, Former Member of Supreme Court Nominating Commission
Chief Judge Richard D. Greene, Kansas Court of Appeals
Professor Jim Concannon, Washburn University School of Law
Former Justice Fred N. Six
Diane Kuhn, League of Women Voters of Kansas
James L Bush, Kansas Bar Association
Jon Newman, Wichita Bar Association
Eugene Balloun, Kansas Association of Defense Counsel
Zachary Reynolds of Reynolds Law Firm, Ft. Scott, Kansas Association for Justice
Representative Bill Otto, Ninth District, LeRoy, Kansas
Richard Gannon, government Affairs Director, Kansas Press Association
Sandy Jacquot, General Counsel, League of Kansas Municipalities
Eric Sartorius, City of Overland Park, Kansas
Melissa A. Wangemann, General Council & Director of Legislative Services

Others Attending:
See attached list:

The hearing on **HB 2150 - Consumer protection; relating to automatic renewals** was opened.

Matt Sterling, Assistant Staff Revisor, provided an overview of the bill for the committee. (Attachment 1)

Representative Ruiz, Thirty-Second District, was scheduled to address the committee in support of the bill but was delayed in another committee, so Chairman Kinzer asked the committee to read the written testimony as submitted. (Attachment 2)

John Peterson addressed the committee and presented testimony, as an opponent on behalf of Greg Ferris, Kansas Health and Fitness Association. (Attachment 3)

Joe Moore, Executive Director, International Health, Racquet and Sports Club Association provided written testimony in opposition of the bill. (Attachment 4)

The hearing on **HB 2150** was closed.

The Hearing on **HB 2185 - Kansas open records act; civil penalties** was opened.

Representative Bill Otto, Ninth District, LeRoy, Kansas, spoke before the committee as the originator of this bill and stated it gives the people a chance to do something about the violations of the open meetings law in Kansas. (Attachment 5)

Richard Gannon, Government Affairs Director, Kansas Press Association, addressed the committee in support of this bill. He explained the current options available to the public if they believe a violation has ocurred, and, further stated that it is a heavy burden of proof for anyone who files a complaint, and, even if the citizen or reporter wins the case, there is no provision for the awarding of attorney's fees to the plaintiff now, only court costs. (Attachment 6)

Sandy Jacquot, General Counsel, League of Kansas Municipalities appeared before the committee in strong opposition of the bill, stating the mandatory attorney fees in Section 3 is one sided, and, the most troubling aspect of this bill, is in Section 4, which gives any person the right to subpoena witnesses, evidence, or documents; hold depositions under oath; examine any documentary material, and, serve interrogatories in investigating whether a violation of KOMA has occurred. (Attachment 7)

Eric Sartorius, City of Overland Park, Kansas, spoke in opposition of the bill and explained how this legislation would create serious privacy issues for public employees and hamstring government actions, while not actually promoting the "openness in government." (Attachment 8)

Melissa A. Wangemann, General Council and Director of Legislative Services addressed the committee and expressed concerns about the rights this bill would give to individuals bringing actions pursuant to the Kansas Open Meetings Act, and, believes the Attorney General and county/district attorneys are better trained and bound by rules of ethics if a violation of the law has occurred. (Attachment 9)

The hearing on **HB 2185** was closed.

The Hearing on **HB 2101 - Court of appeals judges appointed by the governor, confirmed by the Senate; eliminating the nominating commission for the court of appeals appointments** was opened.

Jill Wolters, Senior Staff Revisor, presented an overview to the committee. (Attachment 10).

Chairman Kinzer told the committee, as the drafter of this bill, it was his hope to make the system for judicial appointments of court of appeals judges as close as possible in the nuances of our system to the federal system. He further explained one of the items proposed in the bill is the elimination of the retention election process. Since drafting of the bill, it has come to his attention there is a potential constitutional pediment: Article 15 of the Constitution, the ability of the Kansas Legislature to set terms for office for a period longer than four years. Therefore, when the bill is worked in committee, this matter will have to be discussed. He stated he may be offering an amendment at such time to reinsert the existing retention election process although that is not his policy preference.

Caleb Stegall, Chief Counsel to Governor, addressed the committee on behalf of Governor Brownback and his administration, in strong support of this bill. He stated government draws its legitimate authority to govern from the consent of the people it governs and this bill is an important step towards the federal model for the selection of judges in Kansas and towards restoring to all Kansans the ability to have a voice in their government. (Attachment 11)

Alan Cobb, Kansas Attorney, Vice President of Americans for Prosperity, spoke before the committee in support of the bill. He also provided each member of the committee a booklet entitled "*Selection To The Kansas Supreme Court", written by Stephen J. Ware*, November 2007. He also spoke in defense of previous personal attacks on Professor Ware and stated Professor Ware has, most likely, performed the most extensive research regarding selection to the Kansas Supreme Courts. He also provided a list of

other Kansas appointments subject to senate confirmation. (Attachment 12)

Jim Rankin, a lawyer in private practice, spoke in support of the bill, on his own behalf and as a Kansas citizen. He stated this bill is modeled on the best aspects of the federal system without carrying over its worst aspects. He stated the current system involves intra-fraternal election of the professional members of the Committee and gubernatorial appointment of the lay members. (Attachment 13)

Alan Tarr, Distinguished Professor, Director-Center for State Constitutional Studies, Rutgers University in Camden, New Jersey, stated he has done research on state courts throughout his career and has served as the chief academic consultant on the American Bar Association's State Court Assessment Project, and spoke as a proponent. He discussed the various aspects of this proposed legislation and believes the bill represents an improvement over the current system and urges its adoption. He also stated if this bill is enacted into law and works well, it can be expected that other states may follow Kansas' lead and reexamine their systems of judicial selection. (Attachment 14)

Curt Roggow, a partner with the law firm of Sanders Warren & Russell LLP, Overland Park, Kansas, appeared before the committee in support of the bill. He stated the current system of selecting our judges is not free from the influence of the political process, regardless of political party. He also stated lawyers constitute only a very small segment of the citizens of this state and the present system is heavily weighted in favor of permitting a very small portion of the citizens of Kansas to determine who will sit on the bench. (Attachment 15)

Clay Barker, is a resident of Leawood, Kansas, a graduate of University of Kansas Law School, licensed to practice law in Kansas and Missouri, in the Federal District of Kansas, Western District of Missouri and several US Courts of Appeal. He is currently employed by the Republican Party as its General Counsel. He spoke in support of the bill, and, provided testimony regarding the lack of participation of most members of the Kansas Bar in the elections for members of the Nominating Commission, and, that most eligible attorney voters are unfamiliar with the organization and role of the Supreme Court Nominating Commission, unfamiliar with the attorneys whose names appear on the ballot, and are lobbied for their vote through solicitations from candidates, usually by letter, and through internal e-mails from law firms urging lawyers to vote for a particular candidate. (Attachment 16)

Brian Fitzpatrick, Associate Professor of Law, Vanderbilt University, appeared before the committee in support of the bill and stated this bill would mark a significant improvement in the way appellate judges are selected in Kansas. He noted that no one can become an appellate judge in Kansas without the blessing of a commission that nominates candidates to the governor, and by law, this commission is dominated by the legal profession. He further stated when the commission is controlled by the bar, it is the bar's political preferences that drive the system and as public officials begin to realize this, they are reforming their commissions. He ended by stating "we cannot take politics out of judging, but we can make sure the politics reflect the preferences of all citizens, not just the preferences of a small special interest group." (Attachment 17)

Andrew Gray, a citizen of Kansas, Chair of the Libertarian Party, addressed the committee as a proponent of the bill and stated he seems to be a rarity at this hearing as he is not a lawyer, but a private citizen. He stated it is time for Kansas to revisit our antiquated method of selecting appellate judges and is appalled that it is assumed a lawyer's vote from a small committee is considered more valuable than his vote as a citizen of Kansas. (Attachment 18)

Mrs. Donna Gillett, Kansas citizen, Leavenworth, Kansas spoke in support of the bill, stating that as self-governing people in a constitutional republic, Kansans should elect all judges in their state, but since Kansas is so far from that ideal she came to speak for the next closest thing, which is, to have our Appellate Court judges appointed by the governor with confirmation by the senate. She urged the committee to pass this bill so that no Kansas citizen will have their vote devalued simply because they are not lawyers. (Attachment 19)

Keith Esau, Concerned Citizen, Olathe, Kansas, addressed the committee in support of the bill and stated this bill solves the inequity by restoring the concept of "one person, one vote" as every voter in Kansas gets an equal choice in the election of both Governor and the State Senators that confirm the nomination of appellate judges under this bill. (Attachment 20)

Professor Stephen Ware, Professor of Law, University of Kansas, addressed the committee, not on behalf of KU but on his own as a concerned citizen. He has published articles that researched how all fifty states select their supreme court judges, and based on that research, he recommends Kansas move toward the mainstream of states by removing the undemocratic aspects of the process for selecting Kansas appellate judges. He stated Kansas is the only state that gives its bar (the state's lawyers) majority control over the selection of the judges. He also pointed out that the current process is not only undemocratic but secretive and under the new bill, senate confirmation votes are public and would reduce the secrecy of the process and increase accountability to the public. Professor Ware also provided a copy of his "*The Kansas Journal of Law & Public Policy, Volume XVIII Number 3, Spring 2009, entitled "The Bar's Extraordinarily Powerful Role In Selecting the Kansas Supreme Court."* (Attachment 21)

Anne Burke, Chair of the Supreme Court Nominating Commission, appeared before the committee on behalf of its members, past and present, in opposition of this bill. She explained when the current Court of Appeals was established in 1977, the legislature invested the Supreme Court Nominating Commission with the responsibility for nominations to the Court of Appeals as well as Supreme Court. She further explained how the current process works and stated the system has worked well so far. She also stated interviews are being conducted the next two days for a current open position on the Court of Appeals and in an effort to create greater transparency in the process, the Commission is opening interviews to the public for the first time. She ended by stating the Commission is committed to an independent judiciary, selected on merit rather than political considerations and the Commission is equally committed to retention votes which allow the people of Kansas to periodically review the performance of our appellate judges and urged the committee to reject this bill. (Attachment 22)

Debbie Nordling, Former Member of the Supreme Court Nominating Commission, spoke in opposition to the bill, stating that she has first hand experience that our current selection process consistently delivers excellent appellate judges to this state and is the most fair and non-threatening system. She stated the current selection system is not broken or flawed, and, the merit selection has churned out the "cream of the crop", to serve the laws of Kansas and not the politics of Kansas. (Attachment 23)

Chief Judge Richard D. Greene, Kansas Court of Appeals, spoke in opposition of the bill on behalf of a unanimous Court of Appeals and offered a host of reasons why the proposed legislation would dilute the quality of judicial personnel on our court, politicize if not polarize the process of judicial selection, and create two classes of judges on the court, one of which would be insulated from accountability to the people of Kansas both before and after selection. He ended by asking the committee to defeat this legislation and keep the court free of partisan politics, accountable to the people, and dedicated to justice promised by our state and federal constitutions. (Attachment 24)

Professor Jim Concannon, Washburn University School of Law, addressed the committee in opposition of the bill, advising the committee similar bills have been presented in most sessions of the Legislature since 2005. Each time the Legislature has refused to change the Kansas method of selecting appellate judges which has worked effectively, and it should refuse to do so again. He advised he has served as a member of the Kansas Commission on Judicial Performance since its creation and explained how the evaluation of judges currently works. He ended by stating this bill will increase the risk that we will have unqualified judges on our Court of Appeals and we should not adopt it. (Attachment 25)

Justice Fred N. Six (Ret.), retired Supreme Court Justice and former Judge on the Kansas Court of Appeals, addressed the committee as an opponent stating there is no solid evidence that the existing system is broken and irreparable and that the proposed changes would make the institution better rather than worse. He also told the committee it costs approximately $28,000 to bring the Senate back to Topeka for a special session if needed for the Senate confirmation. He concluded by stating this bill is a paper solution chasing a non-existing problem. (Attachment 26)

Diane Kuhn, spoke in opposition of the bill on behalf of the League of Women Voters of Kansas, stating a non-partisan Nominating Commission has ensured that candidates for the Appeals Court have been chosen because of their merit, not their politics, and those selected by the governor from their recommendations have served with distinction, free from any political obligations to party or public officials. She concluded that judges must be servants of the law and constitution, not of politicians or special interest groups and our current system provides an effective, non-political selection system.

(Attachment 27)

James L. Bush, spoke in opposition on behalf of the Kansas Bar Association (KBA), stating he is just an average hard working small town lawyer. He stated as past President of the KBA, he can tell the committee that Kansas attorneys who regularly appear before the appellate courts believe our current system works and does not need to be changed. He also stated he has a unique perspective that distinguishes him from all of the other conferees appearing today, as he has been selected twice as a member of a panel of three attorneys whose names were presented to the governor for appointment to the court of appeals, and although he was not selected on either occasion, he still believes the process is absolutely sound and focused on selecting judges based on their competence, objectivity, professionalism, and character and not their politics. He encouraged the committee members to defeat this bill and stated to change the system under this bill will do nothing more than politicize the delivery of justice in the state of Kansas. (Attachment 28)

Jon Newman, appeared as an opponent on behalf of the Wichita Bar Association (WBA) and is the current President of the WBA. He stated this is the seventh occasion, in the last eight years, of the discussion of whether Kansas should change the method of selecting appellate judges and that the proponents of this bill focus on the process of selecting judges rather than on judicial outcomes and transports the committee back in time to the debate during the ratification of the Constitution of the United States. He concluded by stating Kansas must decide whether it wants to retain the non-partisan nominating commission to choose fair and impartial judges. (Attachment 29)

Eugene Balloun, spoke as an opponent on behalf of the Kansas Association of Defense Counsel and supports the current system, stating the Supreme Court Nominating Commission has done an outstanding job of insuring only the best qualified candidates are submitted to the Governor for appointment, and secondly, once appointed, the judges must be approved by the voters every four years. He told the committee the merit selection is a process that uses a nonpartisan commission of lawyers and non-lawyers to investigate, evaluate and occasionally recruit applicants for judgeships and that applicants are chosen on the basis of their intellectual and technical abilities and experience and not on the basis of their political or social connections. He also stated that our judges do not represent the people, they represent the law and must be able to make unpopular decisions, so they do what is legally right and not necessarily what's popular. He concluded by stating Kansans do not need, nor should they want, to replace the merit selection with a political process that invites unsavory attacks or subjects the selection of our appellate judges to the type of backroom lobbying that invariably results. (Attachment 30).

Zachary Reynolds of Reynolds Law Firm, Ft. Scott, on behalf of the Kansas Association for Justice, addressed the committee in opposition of the bill. He explained the current system, which was enacted after the famous "Triple Play" of 1956, led to the merit plan for the Supreme Court justices, and was later extended to the Court of Appeals and the District Courts, with individual districts having the option to move to merit selection or maintain partisan elections. He stated the majority of judicial districts in Kansas have chosen the merit selection. He further stated the Nominating Commission, and, the merit selection process, protects the independence of the judiciary, which is paramount to our system of democracy, and one of the hallmarks of an independent judiciary is the ability of the courts to be insulated from political pressure so they can uphold the laws of Kansas without fear of political reprisal. (Attachment 31)

Dale E. Cushinberry, a current lay-member of the Nominating Commission and a retired school principal, asked to speak before the committee in opposition of this bill. He expressed his concern that people were not here in numbers to oppose this bill and if this bill passed it would escalate the role of politics in the selection of judges. He also stated the Governor will not have time to do the work currently done by the Nominating Commission, compiling background information, making investigative phone calls, and conducting interviews and will end up selecting a few people or establish a committee to do what the current Commission does, and the composition of those groups by the Governor could potentially reflect the political affiliation of the Governor. He further stated appellate judges appointed under the proposed system potentially will have obligations to special interest groups. He ended by stating that some committee is going to make a decision to narrow the applicants for the Governor's consideration and the question is whether that body is going to be this Commission, which has a proven track record of service to the people of Kansas, or an ad hoc committee selected by the Governor. Chairman Kinzer requested he subsequently provide written testimony in support of his appearance today as required by the committee

Minutes of the House Judiciary Committee at 3:30 p.m. on February 16, 2011 in Room 346-S.

rules. (Attachment 32)

The hearing on **HB 2101** was closed.

The next meeting is scheduled for February 17, 2011.

The meeting was adjourned at 7:10 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 16, 2011

NAME	REPRESENTING
BRIAN FITZPATRICK	myself
Clayton Barker	myself
Curtis Loccow	myself
Alan Tarr	myself
Donna Gillett	myself
Stephen Ware	myself
James P. Rankin	myself
Melissa Wangemann	KAC
Sandy Jacquot	CKM
Zackery E. Reynolds	Kansas Association of Justice
Scott Heidner	KS Association of Defense Counsel
Gene Balloun	Ks. Association of Defense Counsel
Jim Robinson	KS Association of Defense Counsel
Dale E. Cushinberry	Nominating Commission
Anne E. Burke	Chair, Supr. Ct. Nom. Commission
Debbie L. Nordling	Lay Person Supreme Ct. Nom. Commission
Burke Nordling	Guest
Dagne Kuda	Kansas League of Women Voters
Helen Pedigo	Judicial Branch

JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 16, 2011

NAME	REPRESENTING
TED HALE	MYSELF
Janet Juhnke	Judicial Nominating Commission
James M Concannon	myself
Carol g. Green	Clerk of the Appellate Courts
Richard D. Greene	KANSAS Court of APPEALS
Fred N Six	KANSAS SUPREME COURT
Rebecca M. Brown	
Andrew P. Gray	LPKS
CALEB STEGALL	CHIEF COUNSEL, GOV. BROWNBACK
Josh Ney	Knutzen + Ney, P.A.
Megan Pinegar	AG
Mandy Miller	SCOTUS
Travis Lowe	Little Gov't Relations
Joe Molina	KS BAR ASSN.
SEAN MILLER	CAPITOL STRATEGIES
Jon Newman	Wichita Bar Association
MIKE BUSER	KS. CT. of APPEALS
Doug Smith	KLPG
Richard Hayse	self

JUDICIARY COMMITTEE GUEST LIST

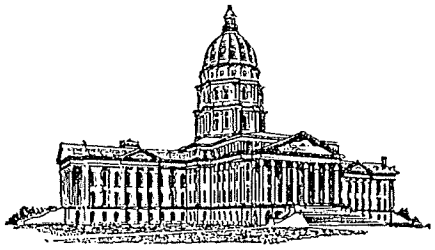
DATE: Feb 16, 2011

NAME	REPRESENTING
Derek Hew	Hew Law Firm
Charlotte Esau	self
Keith Esau	Self

MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee

From: Matt Sterling, Assistant Revisor of Statutes

Date: February 15, 2011

Subject: House Bill 2150

HB 2150 amends K.S.A. 50-617 which concerns the Kansas consumer protection act. Under current law, whenever a supplier delivers property or services not affirmatively ordered by the recipient, those services or property are treated as an unconditional gift. The bill would add continued services or automatically renewed contracts for goods or services to those items to be treated as an unconditional gift requiring no action by the recipient. Property or services provided by a business are considered to be unordered unless the recipient specifically requested, in an affirmative manner, the goods or services. Under current law, failure to respond to a negative option invitation or announcement to purchase goods or services is not considered an affirmative order. The bill would also include an automatic renewal of a business's goods or services as not constituting an affirmative order.

House Judiciary
Date 2-16-11
Attachment # 1

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PHONE (785) 296-2321 FAX (785) 296-6668 E-mail: Revisor'sOffice@rs.state.ks.us

STATE OF KANSAS

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TOPEKA
HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
PENSIONS AND BENEFITS-RANKING DEMOCRAT
COMMERCE AND ECONOMIC DEVELOPMENT
GOVERNMENT EFFICIENCY
JOINT COMMITTEE ON HEALTH POLICY OVERSIGHT

Hearing was originally Scheduled for 2-15-11; Rescheduled for 2-16-11

February 15, 2011

Re: Consumer Protection HB 2150

Chairman Kinzer and Committee:

Thank you for hearing the consumer protection bill HB 2150.

What this bill does is put the burden of notification for renewable contracts upon the vendor and removes it from the consumer.

Historically a company can automatically renew a contract providing a product, service or both without properly notifying the consumer. This currently allows the vendors access to bank account withdrawals from the customers funds until it is agreed a upon by both parties to terminate the contracts.

Most vendors require a thirty day notice in writing for a contract to become void, if the consumer meets all the notification criteria.

This bill would allow the consumer to nullify the contract when notice is given by the vendor in writing and the customer agrees to continue or terminate the contract at time of expiration.

There are currently bills in other states who have dealt with similar legislation because of health club contract renewals and have found that numerous health clubs have abused the access to bank accounts when asked to terminate contractual obligations by its members. This has resulted in fees for lack of funds and bad checks for consumers.

Please pass out favorably HB 2150 for the citizens of Kansas and their families.

Respectfully,

Louis E. Ruiz
Representative State of Kansas
District #32

House Judiciary
Date 2-16-11
Attachment # 2

John Peterse- Presented

Testimony to the House Judiciary Committee
HB2150
Greg Ferris
Kansas Health and Fitness Association
February 15, 2011

Mr. Chairman, members of the Committee; my name is Greg Ferris. I'm here today representing the Kansas Health and Fitness Association. KHFA represents tax paying health clubs throughout Kansas. I would like to bring to your attention a major issue in HB2150. If the intention of this bill is to prevent long term contracts that roll over into similarly long term contracts, then KHFA has no problem with that intention. We understand there are some businesses that have one and two year contracts that automatically roll over at the end of the term. This can happen without the person with the contract getting notice or realizing this is taking place. This is wrong and this legislation appears to correct this.

However this Bill has an unintended consequence. The way this is written it could be interpreted to prohibit any contract or agreement from rolling over. We operate on a system that rolls agreements over on a month to month basis. This protects the consumer as they know what their costs are going to be each month. This allows us, as an industry, to have a regular membership. If a member wants to cancel their membership they simply give us thirty days notice and their membership stops.

Imagine also health insurance, country club memberships, life insurance agreements, etc. that might be affected by HB2150. Most of these are agreements that renew monthly, unless cancelled. The exception, citing 16 C.F.R. 425, may or may not apply to us, or these other businesses that use month to month renewals. Trying to use a Federal Trade Commission regulation can be complicated and sometimes difficult.

This unintended consequence can easily be remedied by inserting the following additional exception at the end of Section 1 paragraph (d): ***"or to any automatic renewal of a contract or agreement if the renewal of the contract or agreement is for a period of 31 days or less."*** This addition does not change the impact of this Bill in stopping the practice of rolling over long term contracts or agreements. It eliminates any confusion caused by requiring the FTC regulation to be the only exception. Since no contract or agreement can be renewed for more than a month, it protects the consumer.

Without this exception it could create several issues to our member organizations as well as other businesses. It could increase expenses unnecessarily for us and other businesses. Businesses that must have these month to month operating agreements should not be penalized by an attempt to regulate others that may use questionable rollover tactics.

Please add this language to HB2150 for the protection of businesses and consumers alike. Thank you and I will be happy to answer any questions.

House Judiciary
Date 2-16-11
Attachment # 3

Session of 2011

HOUSE BILL No. 2150

By Committee on Commerce and Economic Development

2-4

AN ACT concerning consumer protection; relating to automatic renewals of business services; amending K.S.A. 50-617 and repealing the existing section.

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

Section 1. K.S.A. 50-617 is hereby amended to read as follows: 50-617. (a) Whenever any supplier shall, in any manner, or by any means, deliver property or *continue* services *or automatically renew a contract for goods or services* not affirmatively ordered or requested by the recipient, the receipt of any such unordered property or services shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner the recipient sees fit without any obligation on the recipient's part to the supplier. Property or services *provided by a business* are considered to be unordered unless the recipient specifically requested, in an affirmative manner, the receipt of the property or services according to the terms under which they are being offered. Property or services are not considered to have been affirmatively ordered or requested if a person fails to respond to a negative option invitation or announcement to purchase the property or services, *or by an automatic renewal of a business's good or services,* and the property or services are provided notwithstanding. In any action for the return of such property or for payment of the purchase price of such property or services or any other consideration, it shall be a complete defense that the property or services were delivered *or provided* to the recipient voluntarily and that the recipient did not affirmatively order or request the same.

(b) As used in this section, "negative option invitation or announcement" means any material sent by a supplier which identifies property or services which such supplier proposes to send or sends to recipients, and the recipients are thereafter billed for the property or services identified in the material, unless by a date or within a time specified by the supplier, the recipients, in conformity with the supplier's terms set forth in the material, instruct the supplier not to send the identified property or services.

(c) Any attempt to collect or bill for unordered property or services under this section is a deceptive act or practice under the Kansas consumer protection act.

(d) The provisions of this act do not apply to plans and arrangements

regulated by and in compliance with 16 C.F.R. 425 or ~~to contractual plans or arrangements such as continuity plans, subscription arrangements, standing order arrangements and series arrangements under which the~~*where a* supplier periodically ships property *or provides services* to a consumer who has affirmatively ordered or requested in advance to receive such property *or services* on a periodic basis.

(e) This section shall be part of and supplemental to the Kansas consumer protection act.

Sec. 2. K.S.A. 50-617 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

Comment [Amendment1]: Insert: "or to any automatic renewal of a contract or agreement if the renewal of the contract or agreement is for a period is 31 days or less"

The House Standing Committee on Judiciary

House Bill 2150

Written Testimony of Joe Moore, Executive Director
International Health, Racquet & Sportsclub Association (IHRSA)

February 15, 2011

Members of the Committee, thank you for the opportunity to submit testimony on House Bill 2150 (HB 2150), which would require that a consumer "affirmatively order" a contract's automatic renewal.

My name is Joe Moore. I am the Executive Director for the International Health, Racquet & Sportsclub Association (IHRSA), the leader in education, research and advocacy for the health and fitness industry. On behalf of the more than 9,400 health and fitness businesses represented by IHRSA worldwide, 43 of which are located throughout Kansas, I ask that the following testimony in opposition to HB 2150 be entered into the record and taken into consideration by this committee.

HB 2150 could decrease membership options for Kansas consumers. IHRSA supports automatic renewal provisions that allow for contract continuation at the end of the original term on a month-to-month, at-will basis. Provisions that allow for automatic renewal offer consumers the greatest choice and flexibility because clubs are not forced to sell long term contracts in order to avoid the costly process of renewing existing members.

In response to consumer preference for a wide variety of membership contract terms and payment plan options, the health club industry offers consumers several forms of membership agreements. The most common are month-to-month and one- and two-year commitments that can turn into at-will, month-to-month agreements. Based on industry data, 70-80% of health clubs nationwide offer a month-to-month agreement. These contracts can be cancelled at any time with 30 days' notice, and such notice is honored without hesitation or restriction.

HB 2150 could strain Kansas small businesses and raise costs for consumers. The proposed limitations on health clubs' ability to utilize automatic renewal provisions in membership contracts could impose prohibitive financial burdens on health clubs. HB 2150 could immediately raise operational costs for Kansas health clubs, the majority of which are single location businesses operating off thin profit margins. If enacted, the bill could require health clubs to expend greater resources and staff time, ultimately necessitating higher prices for Kansas residents attempting to engage in a healthy lifestyle.

Again, I offer my sincere thanks to this committee for the opportunity to weigh in on this important matter. IHRSA would welcome the opportunity to work with the Committee and to serve as a resource on this issue. If you have any questions, please contact me at 800-228-4772 or contact our Deputy Vice President of Government Relations, Amy Bantham, at aeb@ihrsa.org, or Tim Sullivan, Senior Legislative Analyst, at ts@ihrsa.org.

House Judiciary
Date 2-16-11
Attachment # 4

STATE OF KANSAS

HOUSE OF REPRESENTATIVES

9th District
State Capitol - Docking Office Complex
300 SW 10th Ave.
Topeka, KS 66612
785-296-7656
bill.otto@house.ks.gov

SERVING: ALLEN, ANDERSON, FRANKLIN
COFFEY, AND WOODSON COUNTIES

102 9th Street
LeRoy, KS 66857
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BILL OTTO

HB 2185 just gives the people a chance to do something about the violations of the open meetings law in Kansas. You will hear that there are no violations of open meetings, no there are no convictions because the law needs fixed. In my case I got a law passed that school boards would be subject to one person one vote (just like all the rest of us). The next year four members of my school board came to a meeting and fired me as drivers Ed teacher and had another teacher picked and hired, without the knowledge of the superintendent. All this was a done deal made outside the meeting before they arrived, NO violation of open meeting. Of course none of the four filed for re-election because they knew they would be beaten, under the new districts. With this law I would have had a cause of action. I ask for your support.

Bill Otto

House Judiciary
Date 2-16-11
Attachment # 5

Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

Feb. 16, 2011

To: Rep. Lance Kinzer, chairman, and members of the House Judiciary Committee
From: Richard Gannon, director of governmental affiairs, Kansas Press Association
Re: HB 2185

Mr. Chairman and members of the Committee:

I am Richard Gannon, director of governmental affairs for the Kansas Press Association. Thank you for the opportunity to discuss our association's support of HB 2185.

You're likely going to hear a lot of testimony today from opponents who will argue that this legislation will place an undue burden on government. They'll argue that in this time of economic recession, cities and counties should not have yet another "cost" added to their shrinking budgets.

However, I want to point out why such a piece of legislation has become necessary in Kansas. We have solid open records and open meetings acts in our state, but often we run into public officials who don't have the same respect for the spirit of the law that they should. They block our attempts to get at the records we need by making it a time-consuming and difficult process to get them or by charging so much for access that private citizens back off because they can't afford the cost of an attorney to move forward. Other times, they meet behind closed doors to discuss issues that are not exempt under the Kansas Open Meetings Act.

Yes, we already have a $500 penalty for any public agency that knowingly violates the provisions of the Kansas Open Records or Kansas Open Meetings acts. Do you know how many times that fine has been imposed? Zero. Zilch. What usually happens is that a county or district attorney or the Kansas Attorney General's Office finds that the mistake was not in bad faith, so they ask them to admit they were wrong, get open government training and then promise to go and sin no more. On those issues when an "honest" mistake has been made, we're generally OK with that outcome.

However, if reporters or private citizens believe strongly enough that a breach of justice has occurred, they have only one choice, and that is to file a complaint with the district court. At some point, an attorney gets involved, and costs mount. Even if the citizen or reporter wins the case, there is no provision for the awarding of attorney's fees to the plaintiff now, only court costs.

Consequently, you have the prospect of high costs with no reimbursement of expenses if you win the case. The law says a public official who "knowingly violates" or "intentionally fails" is subject to the fine. Those are phrases that indicate the presence of bad faith in the decision. This means they didn't just make an honest mistake; they intentionally or knowingly violated the law. This is a heavy burden of proof for anyone who files a complaint, so the chance of this opening a floodgate of complaints is a spurious one.

If a decision has been made in bad faith, it is our position that the agency that made the decision should shoulder the costs of a successful legal action. Without such protection, violations will go unchallenged because private citizens or news organizations will often be forced to drop their complaints.

Acting in bad faith, because it is so difficult to prove, should include the burden of picking up the expenses of the complaining party. After all, if the lawsuit is found to have been frivolous, the other side has to pay those costs. This is the only fair solution. If either side acts in bad faith, they pay the other side's attorney fees. Thank you.

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Date 2-16-11
Attachment # 6

LEAGUE OF KANSAS MUNICIPALITIES

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300 SW 8TH AVENUE 100
TOPEKA, KS 666[illegible]3951
P: (785) 354-9565
F: (785) 354-4186
WWW.LKM.ORG

TO: House Judiciary Committee

FROM: Sandy Jacquot, Director of Law/General Counsel

DATE: February 15, 2011

RE: Opposition to HB 2185

Thank you for allowing the League of Kansas Municipalities to testify in opposition to HB 2185. This bill would make changes to the Kansas Open Records Act and the Kansas Open Meetings Act. For a number of reasons the League opposes these changes, particularly the KOMA changes that allow "any person" to enforce the provisions of the act. In addition, the current system seems to be working well, with only a handful of violations being reported each year, and when a violation occurs it is addressed by the proper authorities.

First, the current system allows for the county/district attorney or the attorney general to investigate and adjudicate alleged violations of the KOMA. Thus, the enforcement is in the hands of a person who is subject to all ethical rules and duties owed to the judicial system, unlike an individual. This ensures that complaints will not be lodged arbitrarily or frivolously and, if the complaint is pursued, it will be with full understanding of the law. This would not be case with any person able to allege and pursue the enforcement of a perceived violation.

While the mandatory attorneys fees in Section 3 is one sided and probably not good policy, the most troubling aspect of this bill is found in Section 4. This section gives any person the right to subpoena witnesses, evidence, or documents; hold depositions under oath; examine any documentary material; and serve interrogatories in investigating whether a violation of KOMA has occurred. That means that any information, whether written or shared verbally in an executive session, would be able to be obtained by any person, regardless of whether KOMA was violated. This totally destroys any confidentiality or protection of information that the KOMA provides. This opens up information that could be used for embarrassment, harassment or worse, in the hands of the wrong individual. This could be confidential personnel information, attorney/client privileged material, and many other types of information to which the person could not ordinarily have access. Currently only the county/district attorney or attorney general may access that information to determine if the KOMA was violated. LKM believes that this level of enforcement is adequate to balance the needs of the public to information and the right of others to have their information treated in a confidential and professional manner. In addition to the referenced policy argument, this change will result in the public at large paying for the city to fight frivolous claims in district court to protect confidential information. There will inevitably be numerous actions for injunctions and motions to quash subpoenas if this bill were to become law.

For the reasons cited above, LKM urges the committee to reject the KORA and KOMA changes proposed in HB 2185.

House Judiciary
Date 2-16-11
Attachment # 7

OVERLAND PARK
KANSAS

ABOVE AND BEYOND. BY DESIGN.

8500 Santa Fe Drive
Overland Park, Kansas 66212

913-895-6000 | www.opkansas.org

Testimony Before The
House Judiciary Committee
Regarding House Bill 2185
By Erik Sartorius

February 16, 2011

The City of Overland Park appreciates the opportunity to present testimony in opposition to House Bill 2185, which would allow "any person" the ability to bring actions for alleged violations of the Kansas Open Records Act or Kansas Open Meetings Act. The legislation would create serious privacy issues for public employees and hamstring government actions, while not actually promoting the "openness in government" the bill's title suggests.

The City believes the enforcement provisions in both the Kansas Open Records Act (KORA) and the Kansas Open Meetings Act (KOMA) suitably protect the public's interest in seeing that government business is conducted in the open. The offices of the attorney general, as well as district and county attorneys, are well-equipped to investigate alleged violations of KORA and KOMA.

The Kansas Open Records Act assures public access to important public records. At the same time, the law allows essential exceptions to protect the privacy of citizens and allow the effective and efficient administration of government programs. In considering pursuing civil actions, the offices of the attorney general and district and county attorney will consider probable cause. Under Section 1 in HB 2185, granting the ability to "any person" to bring a civil action will not necessarily bring the same level of scrutiny to any alleged KORA violation. In fact, it opens the door to repeated nuisance actions which a local government will have to defend itself against.

The Kansas Open Meetings Act currently strikes a fair balance to create open and efficient government. Specific topics for which executive sessions are allowed are clearly spelled out, as is the requirement that no binding action be taken in executive session (K.S.A. 75-4319 (c)). The focus of the ability to go into executive session is, for example, to protect the privacy of individuals discussed in such sessions, to allow discussion of litigation strategies and other legal issues with the public entity's attorneys or to allow public entities to negotiate effectively for the purchase of land.

The district court in which the local government lies has jurisdiction when determining whether to bring an action for an alleged violation of KOMA. Opening this process to "any

person," no matter how well intentioned, will compromise the purpose of closed sessions, due to such person having access to powers currently reserved for the attorney general and district and county attorneys per Section 4 of HB 2185.

Section 4 grants "any person" the power to, among other things:

- Subpoena witnesses, evidence, documents or other material
- take testimony under oath;
- examine or cause to be examined any documentary material of whatever nature relevant to such alleged violations

Such power would place sensitive information in the hands of individuals who may not be or feel duty-bound to protect the integrity of what they examine in their "investigation." The privileged status of attorney/client privileged communications may be lost. If council members are concerned that privileged conversations with city attorneys will not remain privileged, or that other sensitive information will be exposed, will they ask the necessary questions, no matter how uncomfortable, in order to ensure that the city's interests are protected? Will they address personnel matters head on, or will discussions of possible action be tempered with concerns that the employee will eventually hear deliberations where they are mentioned in an unfavorable light? Human nature suggests that individuals tend to tame their conversations when they believe they are being overheard. At the same time, most would agree frankness is needed at times to address serious issues.

Additionally, compelling the courts to award attorneys' fees and costs in Section 3(c), when applied with the ability of "any person" to bring actions for alleged violations of KOMA, nearly begs a malcontented individual to bring action after action against the local government, in the hopes that an action may one day be successful.

The vast majority of government business is conducted in broad daylight, with public comment and involvement encouraged and expected. Further, the state has determined that the attorney general and county or district attorneys are best equipped to determine whether a civil action should be brought for an alleged violation of the Kansas Open Records Act or Kansas Open Meetings Act. The City of Overland Park sees no compelling reason for changing current law, and plenty of compelling reasons for opposing House Bill 2185. We ask the committee to recognize the shortcomings of this legislation, and reject House Bill 2185.

KANSAS ASSOCIATION OF COUNTIES

TESTIMONY OF THE KANSAS ASSOCIATION OF COUNTIES
TO THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 16, 2011
HB 2185

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify in opposition to HB 2185.

The Kansas Association of Counties is concerned about the expanded authority given by HB 2185 to individuals to bring actions pursuant to the Kansas Open Records Act and the Kansas Open Meetings Act.

Sections 1 and 2 allow any person, aside from the Attorney General and county/district attorneys, to bring an action alleging a violation of the Kansas Open Records Act or Kansas Open Meetings Act. We believe that those trained in law can better determine whether a violation of law has occurred, and the ability to bring a KORA/KOMA action should be reserved to them. The Attorney General and county/district attorneys are bound by rules of ethics, which require that only legitimate claims be taken to court. Opening up the authority to bring an action to any individual opens up the opportunity for misuse and abuse by the public.

We are very concerned about Section 4 of this bill, which allows a person to investigate open meeting violations. Current law only allows those in law enforcement to investigate an allegation: the Attorney General or county/district attorney. The Attorney General and county/district attorneys are obligated to keep client matters confidential under the ethical rules governing attorneys, and are also prohibited from pursuing claims that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person. These rules do not govern other individuals. If an individual were to subpoena witnesses and evidence from a closed meeting, and that meeting is ultimately determined to be a legitimate and properly closed meeting, the person would then have access to the very information that by law the governing body could close! A good example of this provision gone wrong is if a Board of County Commissioners closes a meeting relating to personnel issues, which is clearly warranted under KOMA, and discusses an employee's sensitive health issue. If an individual can access that information via the investigative process, he will have undone the entire purpose of the exemption, gaining information that he should never have obtained. In the hands of a law enforcement agency, the information would be kept confidential; in the hands of the wrong individual, the information can be used to embarrass or harass.

For these reasons, we oppose the legislation. We believe the current method of enforcement works and that HB 2185 creates an opportunity for misuse by the public.

Respectfully Submitted,

Melissa A. Wangemann
General Counsel & Director of Legislative Services

House Judiciary
Date 2-16-11
Attachment # 9

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MEMORANDUM

To: House Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 15 February, 2011
Subject: House Bill No. 2101, appointment of Court of Appeals judges

Under current law, upon a vacancy of a court of appeals judge position or enlargement of the court of appeals, the supreme court nominating commission nominates three persons to the position and the governor selects one person to fill the position. If the governor fails to appoint within 60 days, the chief justice of the supreme court makes the appointment. The judges then stand for retention election every four years.

HB 2101 amends the law to allow the governor to appoint a qualified person to serve as a judge on the court of appeals. Such person's appointment would be required to be consented to by the senate. A procedure is established whereby senate consent would occur within 30 days of receiving the appointment. If the senate does not consent by a majority vote, the governor would then select an appointment which would again go to the senate for consent. The same appointment and consent procedure would be followed until a valid appointment is made. If the senate fails to vote on an appointment within 30 days, it will be considered that the senate has consented to the appointment. Further, the court of appeals judges appointed on and after July 1, 2011, would hold the office during good behavior, be subject to the retirement provisions of K.S.A. 20-2608, and the discipline and removal for cause provisions of section 15 of article 3 of the Kansas constitution and would no longer be subject to a retention election. Judges holding office on June 30, 2011, would still be subject to retention elections every four years.

Caleb Stega

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Kansas

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Caleb Stegall, Chief Counsel

Office of the Chief Counsel

Sam Brownback, Governor

February 16, 2011

VIA HAND DELIVERY

Kansas House Judiciary Committee
Hon. Representative Lance Kinzer, Chair
Capitol Building
Hearing Room 346-South
Topeka, KS 66612

Re: Testimony Regarding House Bill No. 2101

Dear Chairman Kinzer & Members of the Committee:

On behalf of Governor Brownback and this administration, please accept this letter as testimony in strong support of House Bill No. 2101, a judicial selection reform measure that is vital to protect the democratic interests of all Kansans in their system of government.

The manner in which those who govern are selected and installed in positions of societal trust and authority is of fundamental importance. In fact, the particular mechanism of selection goes a long way towards defining the overall system of government—whether it is democratic or republican in form, or whether it is one form or another of authoritarian government. The guiding principle of democratic forms of government must be that every citizen stands equal before the law, with an equal opportunity and voice in the process of choosing those who will make, enforce, and interpret those laws. Without this, the people cannot truly be said to be governed by consent.

Unfortunately in Kansas, our current system of selecting our appellate judges fails the democratic test. Rather than providing an equal opportunity and voice to all Kansans to participate and consent in the selection of the judiciary through the actions of their duly elected representatives in the Governor's Office and in the State Senate, the so-called "Missouri Plan" cedes the authority to select one-third of Kansas's government to a small, select group of unaccountable specialists.

Because our judicial selection system fails the democratic test, it is in immediate need of reform. The system of executive appointment and senate confirmation devised by our founding fathers has withstood the test of time over the centuries, providing the

House Judiciary
Date 2-16-11
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United States with a federal judiciary that is the finest the world has likely ever known. H.B. 2101 is an important step towards the federal model for the selection of judges in Kansas and towards restoring to all Kansans the ability to have a voice in their government.

Without this democratic voice as an outlet for the will of the people as it pertains to the judicial branch of government, the confidence and respect that our courts must have will erode. Judicial independence is a vital and necessary characteristic of fair and just judgment. But judicial independence must rest firmly on the foundation of the consent of the governed. Public confidence is the strongest and best buttress available to protect judicial independence and the just judgments that flow from it.

The judiciary should serve all Kansans. All Kansans should have a voice in its selection. As such, I urge your support for House Bill No. 2101.

Yours Very Truly,

Caleb Stegall

AMERICANS FOR PROSPERITY
KANSAS

To: Members of the House Judiciary Committee
From: Alan Cobb, V.P., Americans for Prosperity
Date: February 16, 2011
RE: Support of HB 2101

- I was admitted to the Kansas bar in Sept 1992 and I am currently licensed to practice in Kansas.

- The KBA does not speak for all lawyers.

- The personal attacks on KU Law Professor Steve Ware by the members of the bar and several opponents of this legislation have been mean-spirited, pointless and incredibly lame. The opponents can't argue the veracity of his studies or the facts, so they lob personal attacks.

  They can't argue the merits of the bill because they know it is hard to defend lawyers dominating such an important part of our government.

  Two years ago the then-President of the Kansas bar had the brilliant observation that Professor Ware wasn't licensed to practice in Kansas. I am not exactly sure why that matters and the President of the Bar probably didn't either. But it sure did sound good.

  I suppose some of these assaults are actually kind of funny in a sad way, as if those making these points didn't take arguing class in law school.

- Many lawyers agree with the proponents but fear of reprisal mutes their public support. A partner of a major law firm in Kansas fears a reduction in compensation if that person were to publicly advocate for this resolution.

- Why do lawyers want to desperately maintain such tight control over this process? Is it because they want to pick the referees of their future battles? Or is it because they think they are just so dang smart?

- The notion that only lawyers are equipped with the necessary skills and knowledge to select justices is nonsense and the height of arrogance and elitism. *Doctors do not select the board of healing arts, accountants do not select the members of the board of accountancy and university professors do not select the board of regents.*

  And only one of those, the Board of Regents, even requires Senate confirmation.

  But here are some of the crucial State boards that require Senate confirmation:

Agricultural Remediation Board, the Corporation Commission, State Banking Board, the Human Rights Commission, the Mo-Kan Metropolitan Development District and Agency Compact, the State Court of Tax Appeals, and the Central Interstate Low-Level Radioactive Waste Commission, among others.

The last time I testified on this, the opponents apparently didn't understand this point, so I will repeat it.

- In fact, since this is one of the three legs or our democracy, more public accountability and openness is needed than those other public boards.

- The voters select our legislators, our Governor and other officials, yet somehow only lawyers control the process of selecting the members of our Supreme Court and Court of Appeals.

- We have around 9,000 lawyers and 2.8 million citizens in Kansas. Lawyers may or may not be smarter than citizens. However no one would argue they are 300 times smarter.

- The canard of the "Triple play" is meaningless to today's discussion as when that happened, the Governor had no check on judicial appointments. Let me repeat that the "triple play" could not happen if this bill is passed. Though the "triple play" is a red herring, I'll bet a $100 one of the opponents will drag that tired old story out anyway.

- The members of the Supreme Court nominating commission are in fact highly political. There are elections and campaigns to be members. It is lower key than running for a traditional elected office, but it is a campaign nonetheless. And the members elected to the nominating commission have engaged in a lot of political giving.

    - From 1992 - 2008, 167 Democrats have rec'd $117,682 from members of the Commission and 37 Republicans have rec'd $23,250

- One of our most recent Supreme Court appointees was the former law partner and current Democratic Party Chair. But, politics really have no part in the process.

- I understand why lawyers want to control the process. Many simply think that only they can understand what it takes to make a good Appellate Court Justice. Maybe that is what State Legislators thought until 1913 when direct elections of U.S. Senators were approved. Who else was equipped to decide who would represent their state in the Federal Government?

- It is foolish to think politics will be removed from any such process as we have today.

We should substitute the politics of all citizens for the politics of a select group of lawyers.

KANSAS APPOINTMENTS SUBJECT TO SENATE CONFIRMATION

Agency Appointing Authority	Authority	Total Number of Members	Number Subject to Senate Confirmation
Adjutant General	KSA 48-203	1	
Governor			1
Administration, Secretary of	KSA 75-3702a	1	
Governor			1
Aging, Secretary of	KSA 75-5903	1	
Governor			1
Agricultural Remediation Board	KSA 2-3709	7	
Governor			5
Agriculture, Secretary of	KSA 74-560	1	
Governor			1
Alcoholic Beverage Control, Director of	KSA 75-5117	1	
Secretary of Revenue			1
Bank Commissioner, State	KSA 75-1304	1	
Governor			1
Banking Board, State	KSA 74-3004	9	
Governor			9
Bioscience Authority, Kansas	KSA 74-99b04	11	
Governor			2
House Minority Leader			1
Kansas Technology Enterprise Corporation			1
Senate Minority Leader			1
Senate President			2
Speaker of the House			2
Central Interstate Low-Level Radioactive Waste Commission	KSA 65-34a02	2	
Governor			2
Civil Service Board	KSA 75-2929a	5	
Governor			5
Commerce, Secretary of	KSA 74-5002a	1	
Governor			1
Corporation Commission, State	KSA 74-601	3	
Governor			3
Corrections, Secretary of	KSA 75-5203	1	
Governor			1
Credit Union Administrator	KSA 17-2233	1	
Governor			1

Agency Appointing Authority	Authority	Total Number of Members	Number Subject to Senate Confirmation
Crime Victims Compensation Board	KSA 74-7303	3	
Attorney General			3
Electric Transmission Authority, Kansas	KSA 74-99d01	7	
Governor			3
Employment Security, Board of Review	KSA 44-709(f)	3	
Governor			2
Export Loan Guarantee Review Committee	KSA 74-5073	5	
Governor			5
Fire Marshal, State	KSA 75-1510	1	
Governor			1
Gaming Agency, State, Executive Director	KSA 74-9804	1	
Governor			1
Healing Arts, State Board of, Executive Director of	KSA 65-2878	1	
Board of Healing Arts			1
Health and Environment, Secretary of	KSA 75-5601	1	
Governor			1
Health Policy Authority, Kansas	KSA 75-7401	17	
Governor			3
House Minority Leader			1
Senate Minority Leader			1
Senate President			2
Speaker of the House			2
Health Policy Authority, Kansas, Executive Director	KSA 75-7402	1	
Kansas Health Policy Authority Board			1
Health Policy Authority, Kansas, Inspector General	KSA 75-7427	1	
Kansas Health Policy Authority Board			1
Highway Patrol Superintendent	KSA 74-2113	1	
Governor			1
Historical Society, State, Executive Director of	KSA 75-2701	1	
Governor			1
Hospital Authority Board of Directors, University of Kansas	KSA 76-3304	19	
Governor			13
Human Rights Commission, Kansas	KSA 44-1003	7	
Governor			7
Indigents' Defense Services, State Board of	KSA 22-4519	9	
Governor			9
Kansas Bureau of Investigation, Director of	KSA 75-711	1	
Attorney General			1

KANSAS APPOINTMENTS SUBJECT TO SENATE CONFIRMATION (CONT.)

Agency Appointing Authority	Authority	Total Number of Members	Number Subject to Senate Confirmation
Kansas Development Finance Authority, Board of Directors	KSA 74-8903	5	
Governor			5
Kansas, Inc.	KSA 74-8001	17	
Governor			9
Labor, Secretary of	KSA 75-5701	1	
Governor			1
Librarian, State	KSA 75-2535	1	
Governor			1
Long-Term Care Ombudsman	KSA 75-7304	1	
Governor			1
Lottery Commission, Executive Director	KSA 74-8703	1	
Governor			1
Lottery Commission, Kansas	KSA 74-8709	5	
Governor			5
Mo-Kan Metropolitan Development District and Agency Compact	KSA 12-2518	5	
Governor			5
National Guard General Officers	KSA 48-208	all	
Governor			all
Parole Board, Kansas	KSA 22-3707	3	
Governor			3
Pooled Money Investment Board	KSA 75-4221a	5	
Governor			4
Property Valuation, Director of	KSA 75-5105	1	
Secretary of Revenue			1
Public Employee Relations Board	KSA 75-4323	5	
Governor			5
Public Employees' Retirement Board of Trustees, Kansas*	KSA 74-4905	9	
Governor			4
Public Trust, State	KSA 49-512	5	
Governor			5
Racing and Gaming Commission, Kansas	KSA 74-8803	5	
Governor			5
Racing and Gaming Commission, Kansas, Executive Director of	KSA 74-8805	1	
Governor			1

* KSA 46-2201--Requires the Joint KPERS Committee to make recommendations regarding appointees to the KPERS Board of Trustees.

Agency Appointing Authority	Authority	Total Number of Members	Number Subject to Senate Confirmation
Regents, State Board of	KSA 74-3202a	9	
Governor			9
Revenue, Secretary of	KSA 75-5101	1	
Governor			1
Securities Commissioner	KSA 75-6301	1	
Governor			1
Social and Rehabilitation Services, Secretary of	KSA 75-5301	1	
Governor			1
Tax Appeals, State Court of, Judges and Chief Hearing Officer	KSA 74-2433	4	
Governor (Chief Hearing Officer)			1
Governor (Judges)			3
Technology Enterprise Corporation, Kansas, Board of Directors	KSA 74-8101	20	
Governor			10
Transportation, Secretary of	KSA 75-5001	1	
Governor			1
Water Authority, Kansas, Chairperson	KSA 74-2622	1	
Governor			1
Water Office, Director	KSA 74-2613	1	
Governor			1
Wildlife and Parks, Secretary of	KSA 32-801	1	
Governor			1

February 16, 2011

Comments on H.B. 2101
By James P. Rankin, Esq.

Mr. Chairman, members of the Committee –

Thank you for giving me the opportunity to speak in favor of Representative Kinzer's Bill, H.B. 2101, providing for Senate confirmation of judges nominated by the Governor for the Court of Appeals.

My name is Jim Rankin. I am a lawyer in private practice here in Topeka. I have practiced in Topeka and Wichita throughout my almost 35 year career. I am here today on my own behalf as a Kansas citizen. I am not representing any firm or group, only myself.

I was asked to testify by Professor Stephen Ware of KU Law School because he knew of my interest in the issue of judicial selection and because many lawyers are reluctant to testify in favor of a bill such as H.B. 2101. I cannot explain why I am one of the few lawyers in Kansas willing to speak – there must be many reasons. But, in any case, here I am.

I am not a constitutional scholar but I have read with interest the Washburn Law Journal Article authored by Joshua Ney (Fall 2009). The Article is exhaustive and helpful in drawing conclusions about whether the judicial selection system currently used by our state is constitutional under the "one-man-one-vote" doctrine

of the 14th Amendment of the federal constitution. I take from the Article that the *Wells v. Edwards* (Sup.Ct. 1973) exception to "1 man 1 vote" rule for judicial appointments does not remove the Kansas version of the so-called Missouri Selection plan from question under the federal constitution. I also take from the Article that the issue is not free from doubt. In other words, I conclude that the current "merit" approach may be constitutional. I am also aware of Judge Belot's recent decision in *Dool et al. v. Burke et al.*, which finds against a group challenging the merit selection system on constitutional grounds. However, the beauty of H.B. 2101 is that it does not precipitously wipe away the work of the State's Judicial Selection Committee. The new proposal only seeks to wear-away the existing practice in favor of a system that could not be questioned under the federal constitution. The system envisioned in H.B. 2101 is modeled on the best aspects of the federal system without carrying over its worst aspects (i.e., pocket vetoes of appointments and staged time delays to achieve postponements).

I do not think the current system has been mishandled. One of my deceased partners served on the Committee and a current partner, as well as, a law school classmate are presently serving. Also, one of my colleagues here at the Capitol, Jim Maag, served as a lay member of the Committee for many years. These are fine, honest and well-intentioned leaders in our state. I know their work has been well-considered and in the best interests of all Kansans. Frankly, the current

system is far superior to direct election of judges and the current system was implemented to prevent a repeat of the "triple play" abuse by the late Governor Hall. The current system has been an honorable enterprise. But, the current system involves intra-fraternal election of the professional members of the Committee and governatorial appointment of the lay members. The lawyer portion of the process recalls guildism and the lay portion of the process is entirely controlled by the executive.

In recent years, the general public has become aware of the obvious fact that judges have points of view driven, at least in part, by concerns which can only be described as political. Is the fact that judges are as much a part of the political world as any of the rest of us worrisome? I wouldn't think so since our nation's founding fathers saw the judiciary as an effective check on politicians in the executive realm and politicians in the legislative realm. From the prospective of political philosophy, all of us, including judges, are part of the polity engaged from time to time in political endeavors often driven by ideology. This is only natural and, I believe this interaction was well understood by the Constitution's framers. After all, in the late 18th Century down to 2009 the Highest Court of Appeal in England was a Committee of so-called "law lords" in the upper house of Parliament. But in our federal republic, unlike the English appellate tradition, it is the reasonable interests of the people not the Crown nor Crown in Parliament

which are to be served first by political actors, no matter whether they wear business suits or robes. If this is the case, then it makes sense that the peoples' representatives in the Senate are in the best and most appropriate position to confirm the leaders of the third (political) branch of government.

The current system is not clearly impaired. Those currently serving in the judiciary – given their almost universal array of outstanding credentials – would probably be chosen to serve no matter what selection/confirmation system were in place. However, a legitimate constitutional issue has now been raised and like all *concepts* once raised in the public consciousness, it will not go away and, therefore, must be addressed. The model of H.B. 2101 offers a chance to reassure the public that their will is an uppermost consideration of all those who have chosen and who have *been* chosen to serve in government. I think, the people's will is best reflected in their directly elected assembly and that assembly should confirm the peoples' judiciary.

Thank you for your kind attention.

TESTIMONY OF ALAN TARR

KANSAS HOUSE OF REPRESENTATIVES

FEBRUARY 2011

My name is Alan Tarr. I serve as Director of the Center for State Constitutional Studies and hold the position of Distinguished Professor of Political Science at Rutgers University in Camden, New Jersey. I have done research on state courts throughout my career, and I have served as the chief academic consultant on the American Bar Association's State Court Assessment Project. It is an honor to be invited to share my thoughts on this important bill.

For most of the 20th century, those who advocated the reform of state judicial selection championed what they called "merit selection," a system under which a nominating committee submits a list of names to the governor, who is obliged to appoint judges from that list. These reformers enjoyed considerable success, so that today 24 states choose some or all of their judges via a commission-based process, and another 10 use that system for filling midterm vacancies. Kansas, of course, is among those states, having first instituted merit selection in 1958. No state that has instituted a commission-based system has abandoned such a system, which is why the proposed legislation is attracting national attention. If this bill is enacted into law and works well, it can be expected that other states may follow Kansas's lead and reexamine their systems of judicial selection.

The proposal to switch from commission-based selection to appointment by the Governor with the advice and consent of the Senate is hardly radical. Gubernatorial appointment with confirmation was the dominant system in the American states during the late 18th and early 19th centuries. Even today, some "merit" systems incorporate Senate confirmation. The proposed system is of course similar to the one successfully used to select federal judges since the Founding. In my view such a system is superior to commission-based selection, and I support enactment of Representative Kinzer's bill.

I base my support on three crucial criteria. First, a system of judicial selection must be compatible with fundamental American political principles. Second, the judicial selection system must safeguard appropriate judicial independence. Third, the judicial selection system must elevate highly qualified judges to the bench. Selection via gubernatorial appointment and Senate confirmation seems superior to commission-based selection on all three criteria.

Fundamental Political Principles

Two fundamental principles of American government—republicanism and checks and balances--are particularly pertinent in comparing the proposed plan with the system currently in place in Kansas. As James Madison notes in *The Federalist Papers*, No. 39, republicanism requires that all government power be exercised by officials who are directly or indirectly selected by the people.[1] Yet the Founders recognized that popular government was not enough to

prevent the abuse of power by those in authority, and that experience had "taught mankind the necessity of auxiliary precautions."[2] Thus a division of power that promoted checks and balances within a republican government was deemed essential.

A major advantage of the proposed system of gubernatorial appointment and Senate confirmation is that it introduces a check on gubernatorial power. In elaborating the advantages of such a check, one can hardly improve on what Alexander Hamilton wrote in *The Federalist Papers*, No. 76: "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters. . . . The possibility of rejection would be a strong motive to care in proposing." Simply put, shared power is more conducive to good choices than power concentrated in a single set of hands.

Proponents of the current system of judicial selection in Kansas might dispute that the current system concentrates power in the hands of the governor, arguing that the judicial selection commission already serves as a check on gubernatorial abuse of power. However, because of their composition, "merit" commissions are not an adequate alternative check. Most states with commissions, including Kansas, recognize that the governor's perspective should be taken into account in the commission's deliberations and ensure this by giving the governor the authority to appoint some or all non-lawyer members of the commission.[3] Furthermore, unless it is required on law that membership on the commission be bi-partisan, governors tend to appoint members of their own party to commission slots. Many of those selected have been politically active prior to their appointment—according to one study, one-third of non-lawyer commissioners had served in a party office, and almost one-quarter had held public office.[4] A commission of this sort is unlikely to frustrate chief executives in their choices. The fact that governors in "merit" states overwhelmingly appoint fellow partisans to the bench confirms this point. Thus commission-based selection fails the checks and balances test.

One might argue that in Kansas the situation is different, because 5 of the 9 members of the commission that proposes candidates for the appeals court are chosen not by the governor but by their fellow lawyers. However, this raises a different issue. As James Madison notes in *The Federalist Papers*, No. 39, for a government to be considered republican, "it is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or favored class of it." Thus, to be legitimate, a system of checks and balances must be compatible with the baseline principle of republican government. If the attorney members of a merit commission are neither chosen by the people nor accountable to them, if they constitute merely "a favored class" within the society, then they should not have the power to check an official chosen by the people and accountable to them. Only an institution whose members are popularly elected, such as the Senate, can <u>legitimately</u> act as a check on the governor.

In sum, commission-based selection either fails to provide an adequate check on the power of the governor or, if it does, it then entails a check on popular government by a body that has no claim to legitimacy because it is neither directly nor indirectly answerable to the people. Thus, on both republican and checks-and-balances grounds, gubernatorial appointment with the advice and consent of the Senate is a far superior alternative.

Judicial Independence

Judicial independence requires that judges be free to decide cases according to law, insulated from illegitimate external influences. Consideration of federal judicial selection reveals how the current proposal enhances such independence. Whatever the political support drawn upon to secure appointment, federal judges retain their decisional independence, because given their tenure during good behavior, they will never have to draw upon that support again. This would also apply to judges on the Court of Appeals under the proposed reform.

The main threat to judicial independence comes when judges seek re-selection, which they are required to do in retention elections under Kansas's current system. Sitting judges may be targeted for defeat because of one or a few controversial decisions. For example, in 1996 Justice Penny White of the Tennessee Supreme Court and Justice David Lanphier of the Nebraska Supreme Court were defeated in retention elections because of their unpopular votes in controversial cases. More recently and closer to home, 3 members of the Iowa Supreme were defeated in 2010 because of their votes in a same-sex marriage case. In other instances, groups have mounted major but unsuccessful challenges in retention elections, failing to unseat Chief Justice Leander Shaw in Florida in 1990 and Justice Sandra Newman in Pennsylvania in 2005.

Although the intervention of interest groups in retention elections has been episodic, it has had effects that extend beyond the instances in which justices have been unseated. Their involvement has warned sitting judges that they can never be sure whether they will face an organized effort to defeat them when they seek retention, and this in turn has encouraged judges to take preemptive steps to avoid such opposition. Given the potential threat, justices facing retention elections may feel obliged to build up a campaign war chest, both to discourage efforts to unseat them and to ensure that if they are targeted, they will have resources available to respond to attacks. For example, fearful of opposition by anti-abortion groups that ultimately did not materialize, California Chief Justice Ronald George raised $886,936 and Justice Ming Chin $710,139 for their retention elections in 1998.[5] Thus the uncertainty about opposition in a retention election may lead to the same sort of fund-raising and campaigning found in contested elections, even when incumbents do not in fact face opposition. Kansas has so far avoided such politicization, but there is no guarantee that it will continue to do so.

Uncertainty about the likelihood of an electoral challenge may also affect judicial decision-making, because judges may seek to avoid decisions that will bring the wrath of interest groups down on them, and this could have a chilling effect on judicial independence. In a series of interviews conducted with judges who ran in retention elections from 1986-1990, 15 percent indicated that as the election approached, they sought to avoid controversial cases and rulings, while another 5 percent indicated that they became more conservative in sentencing in criminal cases.[6] Even judges who try to avoid being influenced by the prospect of a reelection campaign acknowledge that it may subconsciously influence their judgments. Thus, describing a judge's predicament in deciding controversial cases while facing reelection, former California justice Otto Kaus suggested that "[i]t was like finding a crocodile in your bathtub when you go to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[7] This danger has been recognized by the American Bar Association, which recently reversed its earlier support of retention elections, suggesting recently that judges should have extended terms but not stand for reelection, lest it affect their decision-making.[8]

The proposed legislation eliminates the concern about external influences affecting incumbent judges who wish to continue in office. Currently only 3 states—Massachusetts, New Hampshire, and Rhode Island--grant tenure during good behavior or until a mandatory retirement age specified in the state constitution. There is good reason for Kansas to become the 4th state to do so.

The Quality of the Bench

Proponents of merit selection insist that it attracts more qualified persons to the bench than do alternative selection systems. However, there is reason to be skeptical. The claim rests in part on the idea that "merit selection" eliminates politics from judicial selection, but all available evidence indicates this is not true. The classic study of judicial appointment in Missouri, the state that pioneered the merit system, concluded that commission-based appointment transformed the politics of judicial selection but did not eliminate politics.[9] More recent accounts have documented partisan conflict and competition between elements of the bar—for example, between plaintiffs' attorneys and defense attorneys--in several merit selection systems.[10] The seven justices of the Florida Supreme Court who decided *Bush v. Gore* were all Democrats, even though there was a merit selection system in place in Florida, because they were all appointed by a Democratic governor.[11] Today there are Republicans on the Florida Supreme Court, because Republican Governors Jeb Bush and Charlie Crist had the opportunity to make appointments.[12] Recent research confirms the continued influence of partisan politics under merit selection: governors overwhelmingly appoint fellow partisans to seats on state supreme courts and, one suspects, other courts as well.[13] Thus appointment via merit selection appears to be no less partisan in its results, than is appointment without a commission, as occurs in the appointment of federal judges, or selection by election.[14]

Determining whether there is a connection between mode of selection and the quality of those chosen is extraordinarily difficult. What research there is shows that judges chosen via merit selection do not differ appreciably in their qualifications from those chosen by other selection systems. For example, judges chosen by merit selection do not attend better law schools, they do not have greater legal or judicial experience, and they are just as likely to have had partisan political careers.[15] Although these findings are hardly dispositive, they caution against accepting claims that merit selection produces a better bench. In arguing against judicial elections, some proponents of merit selection have contended that attorneys who would make excellent judges fail to seek positions because they want to avoid the political process. If this is true, it actually supports the present bill. For if highly qualified attorneys are deterred from seeking judgeships by the prospect of having to run for office, appointment for service up to age 70 is more attractive than a system that requires periodic retention elections.

Finally, proponents of commission-based selection contend that the expertise of those on the commission will ensure that only qualified persons appear on the list transmitted to the governor, so only qualified persons will be appointed. This may in fact be true, but the real question is whether the governor will lack such sage advice if there were no "merit plan" commission. This seems unlikely. The absence of a commission hardly precludes governors from seeking out advice from legal and political experts in making their appointments, any more than it prevents presidents from seeking advice in appointing federal judges. Indeed, since governors in most "merit" states appoint some members of the commissions, they may well seek advice from the same persons whom they would have appointed if there was a commission.

Beyond that, elimination of a "merit plan" commission as a legal requirement does not preclude governors from establishing their own advisory commissions, if they think it would be helpful. Thus, Governor Jeanne Shaheen of New Hampshire created a judicial nominating commission by executive order in 2000, and her successor, Governor John Lynch, has continued the practice.

Conclusion

There is much talk these days about returning to the wisdom of the Founders. The bill proposed by Representative Kinzer does precisely that. It brings to Kansas a tried-and-true system developed in the Constitutional Convention of 1787, which was also the predominant system in the original 13 states. I believe that it represents an improvement over the current system of commission-based selection, and so I urge its adoption.

NOTES

[1] Thus James Madison in *The Federalist Papers*, No. 39 states: "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."

[2] *The Federalist Papers*, No. 51.

[3] In 17 states the governor appoints the non-lawyer commission members, and in Idaho the governor does so with the advice and consent of the Senate. In another 1-0 states the governor shares in the appointment of commission members with other officials, and in only 2 stats does the governor play no role in their appointment. See the website of the American Judicature Society at: www.ajs.org/js/JudicialMeritCharts.pdf .

[4] Beth Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 331-32 (1990).

[5] Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV.1407, n. 40 (2003).

[6] Larry T. Aspin and William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 32, tab. 4 (1994). Other studies have produced similarly troubling findings. See, for example, Paul Brace and Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RESEARCH Q. 13 (1995): 13-24; Carol Ann Traut and Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment*, 60 J. OF POL. 1177 (1998); and Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 AM. J. OF POL. SCI. 247 (2004).

[7] Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

[8] AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, at 26-27 (2003).

[9] RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 348-50 (1969).

[10] *See* Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 331-32 (1990); and Rebecca Mae Salokar & Kimberly A. Shaw, *The Impact of National Politics on State Courts: Florida after the Election of 2000,* 23 JUST. SYS. J. 57, 62-63 (2002).
[11] 531 U.S. 98 (2000).
[12] Rebecca Mae Salokar & D. Jason Berggren, *The New Politics of Judicial Selection in Florida: Merit*, 27 JUST. SYS. J. 123, 126 (2006).
[13] Aman McLeod, *The Party on the Bench: Party Politics and State High Court Appointments*, JUST. SYS. J. (forthcoming).
[14] On the role of politics in federal judicial selection throughout American history, see generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (1999); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); NANCY SHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005).
[15] Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges,* 70 JUDICATURE 228 (1987); Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered,* 6 LAW & SOC'Y REV. 579 (1972); Phillip L. Dubois, *the Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California,* 8 JUST. SYS. J. 59 (1983); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges,* 13 J. PUB. L. 104 (1964).

TESTIMONY OF CURTIS ROGGOW TO STATE HOUSE JUDICIARY COMMITTEE
RE: H B 2101

February 16, 2011

Good afternoon, Chairman Kinzer, and other members of the House Judiciary Committee. Thank you for inviting me to offer my testimony before you today. I appreciate the fact that you all have made your services available to serve our citizens and to do what you can to make the State of Kansas a better place to live and to raise our families.

My name is Curtis Roggow, and I am a partner with the law firm of Sanders Warren & Russell in Overland Park, Kansas. My wife and I, along with our three children, have lived in Kansas since 1991, and my wife and I live in Shawnee. I have been practicing law in Kansas and have been a member of the Kansas bar since 1991. I am licensed in both Kansas and Missouri and have appeared before trial and appellate courts in both states. I am a litigator, and my primary concentration is on insurance coverage, insurance defense and commercial litigation.

I am here to testify regarding H B 2101, which is under consideration before your committee. If enacted, this bill would modify the current system of selecting judges to incorporate confirmation by the Kansas Senate into the process of selecting judges for the Court of Appeals. While I am a lawyer and am proud to be a member of the legal profession in this state, I believe the current system gives undue weight to the bar in selecting judges to the Kansas courts and does not provide sufficient opportunity for the checks and balances of our state government to work in the process. Therefore, I support passage of H B 2101.

It is vital for all of us to consider the significance of the roles played by those who make up the judicial branch. Our judges on the appellate courts interpret our laws and regularly make rulings on legal issues that directly affect not only the lives of the parties to proceedings brought before them, but also the lives of others who live and work in this state. The citizens of our state should have assurance that the judges in our court system not only have the qualifications to sit on the bench but also share the values of those who live in our great state.

I would like to address the argument that the present system is non-political, as though to suggest that the current process for selecting members of our judiciary is free of any influence from politics. In my opinion, to describe the current system as non-political is disingenuous. Any system that is utilized to select judges will inevitably involve political influence in some form. While those who are involved in screening and interviewing candidates for a judicial position presumably seek to be fair and to weigh a person's credentials in an unbiased manner, personal philosophy and political views will inevitably influence how one views a candidate. None of us is totally objective; how we perceive the world and others around us is filtered through our experiences, philosophies and world views. This applies regardless of party affiliation. It applies regardless of whether one is a Republican, Democrat, Libertarian or Independent; or whether a person considers himself or herself to be a conservative, liberal or moderate.

Therefore, the current system of selecting our judges is not free from the influence of the political process. The attitudes and views of those who interview and screen judicial candidates will affect how the members of a nominating commission will view those candidates and which ones they will want to recommend to the governor. Members of a nominating commission will naturally be inclined to submit candidates who tend to reflect their views and philosophies. Likewise, the governor's own philosophies and political views inevitably will influence the appointment process. Therefore, changing the system for selecting judges will not necessarily make the process more political than it already is.

Therefore, the proper way to evaluate a proposal to change the means by which we select our appellate judges in Kansas should not be to argue that one process will involve politics while the other does not. Rather, the proper approach will be to weigh whether the system used to select our judges provides a means to evaluate not only a candidate's legal credentials and demeanor but also to afford a fair opportunity for the public to bring their values to bear on the process. The goal will be so that those who sit on the bench fairly reflect the common values and philosophies of the citizens of this state, the people who will be affected by the rulings handed down by the Court of Appeals.

That is why I endorse H B 2101. If enacted, this bill will allow for the checks and balances that are established in our form of government to come to bear on the process of determining who will sit on the Court of Appeals. There is a genius in our form of government -- where the executive, legislative and judicial branches are separated, and where both the governor and the members of the legislature are elected by popular vote. Allowing the state Senate a voice in the process will provide an opportunity for our Republican form of government, where the Senators who are selected through the democratic process, who represent the perspectives of the general public, and who are accountable to their constituents, may provide a check and balance in the selection of those who will interpret our laws and decide legal issues that arise in our state. This will provide a greater opportunity for the selection process to pass before the eyes of members of the legislative branch who have their own accountability to the public, independent of the governor's. The process will a greater opportunity to allow our citizens to have a greater voice in deciding who will sit on the Court of Appeals, a court that interprets our laws and hands down decisions that affect the lives of those who live and work in Kansas.

In practical application, I expect that if this bill becomes law, the majority of the candidates submitted by the governor will be confirmed by the Senate. I seriously doubt that very many of the choices for judicial candidates will result in a political free for all. By the same token, if a judge selects a candidate who does not reflect the values of our citizens, or who will seek to legislate from the bench, the checks and balances system should be afforded an opportunity for the senators who are directly accountable to their constituents to have a voice in the process. Let's allow a broader part of our governmental system, which reflects the division of powers and checks and balances system developed by our forefathers, to play an active role in determining those who will sit on the bench.

I am proud of my profession as a lawyer and have been privileged to practice in Kansas for nearly 20 years. If H B 2101 becomes law, I expect that members of the bar still will be able

to provide useful input in evaluating the credentials and demeanor of judicial candidates. By the same token, lawyers constitute only a very small segment of the citizens of this state. The present system is heavily weighted in favor of permitting a very small portion of the citizens of Kansas to determine who will sit on the bench.

Thank you for inviting me to testify before you today. I appreciate your time and attention on this.

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Legislative Testimony
Before the House Judiciary Committee
Rep. Lance Kinzer, Chairman
Feb. 16, 2011

MR. CHAIRMAN AND MEMBERS OF THE HOUSE COMMITTEE ON THE JUDICIARY:

My name is Clayton Barker. I am a graduate of the University of Kansas School of Law, Order of the Coif. I am a resident of Leawood, Kansas, licensed to practice law in Kansas (Bar # 18555, since 1998), Missouri (since 1997, inactive status since 2009), and in the Federal District of Kansas, Western District of Missouri, and several US Courts of Appeal. I practiced law at the firm of Spencer Fane Britt & Browne LLP as a litigation associate and partner for a little over 10 years. I am currently employed by the Kansas Republican Party as its general counsel, amongst other roles.

I submit this testimony in support of HB 2101, not on behalf of or as a representative of the Republican Party, but on my own as a concerned citizen and Kansas attorney.

TESTIMONY: There is a substantial difference between the theory and the reality of how the members of the Kansas Bar select the members of the Nominating Commission.

1. It is my opinion, based on personal experience and discussions with other attorneys over the years, that most members of the Kansas Bar do not participate in the elections for members of the Nominating Commission. This conclusion is illustrated by recent elections:

- In 2010, only 42% or 436, of the 1,039 potential lawyer voters in the 1st District returned a valid ballot.
  [Canvassers' Report: http://watchdogmedia.org/kansas/judiciary/supreme-court-nominating-commission/Report-of-Canvassers-2010-05-24-1st-CD.pdf]
- In 2009, there were two elections for commission chair, one in May the other in July, when no candidate received a majority in the May vote. Approximately 9,000 ballots were mailed statewide.
  - In July 2009, only 2,696 valid ballots were returned, or about 30%.
  - In May 2009, only 2,532 valid ballots were returned, or about 28%.

  [Canvassers' Report: http://watchdogmedia.org/kansas/judiciary/supreme-court-nominating-commission/Report-of-Canvassers-2009-05-18-Chair.pdf]
- I was unable to acquire reports of other Nominating Commission elections.

2. It is my opinion, based on personal experience and discussions with other attorneys over the years, that most eligible attorney voters:

a. Are unfamiliar with the organization and role of the Supreme Court Nominating Commission.

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b. Are unfamiliar with the attorneys whose names appear on the ballot.

c. Are lobbied for their vote through solicitations from candidates, usually by letter, and through internal e-mails in law firms urging lawyers to vote for a particular candidate.

3. Last, it is my opinion, based on personal experience and discussions with other attorneys over the years, that the voting decision criteria applied by many attorneys are not the wisdom and judgment of the commission candidate. Rather, the criteria are whether the commission candidate would likely favor selecting a judge who was inclined be *Pro-Plaintiff* or *Pro-Defendant* in cases involving, for instance, personal injury, medical malpractice, or product liability.

Although judicial disposition does not directly equate with political partisanship, they are not far removed. Even a cursory review of the political contributions recorded on the Receipts and Expenditure Reports filed with the Kansas Governmental Ethics Commission demonstrate that the plaintiffs' bar generally support Democrat candidates and party committees while the defense bar generally supports Republican candidates and party committees.

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Judicial Selection Reform in Kansas

Committee on the Judiciary
Kansas House of Representatives
February 16, 2011

Brian T. Fitzpatrick
Associate Professor of Law
Vanderbilt University

Thank you for inviting me to appear before you today. It is both an honor and a privilege to be here. The bills under consideration today would mark a significant improvement in the way appellate judges are selected in Kansas. There are many things to recommend about these bills, but I would like to focus my comments on one improvement in particular: reform or elimination of the commission that nominates judges to the governor.

If there is one lesson that can be drawn from centuries of experience with the judicial branch in the United States, it is this: the decisions judges make are a reflection of who picks them. Judges have a great deal of discretion over what the law says. Constitutions, statutes, and legal precedents all come with a great deal of ambiguity. The law is filled with vague phrases like "reasonable," "due process," and "equal protection." Judges have to decide what these vague phrases mean. They have to decide whether these phrases include things like the right to abortion or the right to gay marriage. Judges with a conservative outlook decide cases like these differently than judges with a liberal outlook. This phenomenon has been shown time and again by legal scholars and political scientists.[1] It may sound nice to say that judges should not be

[1] *See, e.g.,* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 245-55 (1993) (analyzing the ideological voting patterns of Justices on the Warren, Burger, and Renhquist courts); David Adamany, *The Supreme Court, in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 5, 11 (John B. Gates & Charles A. Johnson eds., 1991) (finding "highly consistent ideological voting and clear ideological divisions on freedom, equality, and economic issues" on the Supreme Court in the 1980s); John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259, 270-71 (1987) (finding that the Court most often struck down statutes from states in which the political majority was contrary to the Justices' political majority); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 562 (1989) (finding a correlation between ideological values and civil liberties decisions by the U.S. Supreme Court); Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law* 2 (Univ. of Harvard Pub. Law Working Paper Group, Paper No. 08-16, 2008), *available at* http://ssrn.com/abstract=1150404 (describing the "highly ideological voting patterns" on the Supreme Court); FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 38 (2007) (concluding in a study of voting patterns of court of appeals judges that ideology is associated with judicial decision-making); *See e.g.,* CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (concluding in a study of federal appellate judges that "[i]n numerous areas of the law, there is a substantial difference between the voting patterns of Republican and Democratic appointees"); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 40 (1996) (noting strong partisan divisions among district judges in

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making law, but the reality is that judges have little choice in many cases but to do so. The only question in these cases is what kind of law they will make.

What kind of law the judges in Kansas will make depends, as I noted, on who picks them. As things stand now, the power to select judges rests with the legal profession. No one can become an appellate judge in Kansas without the blessing of a commission that nominates candidates to the governor. By law, this commission is currently dominated by the legal profession. The commission includes nine people, and, by law, five of those people must be lawyers, and, by law, those five lawyers must be selected by the bar.[2] Thus, a majority of your commission is selected by the lawyers of Kansas and no one else. In other words, the Kansas legal profession more or less controls who sits on your Supreme Court and your Courts of Appeal.

Lawyers are fine people. I myself am one of them. But lawyers are a special interest group. They have ideological and financial interests just like any other group. They would like to see their interests vindicated in the court system just like any other group. If, as I suggested above, the decisions judges make are a product of who selects them, then the decisions judges make in a system like Kansas's will reflect the preferences of the legal profession.

What are the preferences of the legal profession? The conventional wisdom is that the legal profession is more liberal than the public at large. It is true, for example, that lawyers

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several areas of litigation); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 66-67 (1990) (finding in a study of state supreme court death penalty decisions that justices respond differently to case facts depending both on their individual partisan preferences and on the political climates in which they operate).

[2] *See* KAN. STAT. ANN. § 20-120 (one lawyer member is selected from each of the four congressional districts by the members of the bar in that district, and one chairperson is selected by the state bar).

affiliate with the Democratic Party more heavily on surveys than do other citizens.[3] For this reason, some people have become concerned that, when the legal profession is given control over judicial selection, the judges they pick will be more liberal than the judges that would have been selected by elected officials such as the legislature and the governor.

In order to test whether this is true, I studied two states—Tennessee and Missouri—that, much like Kansas, select judges using a commission dominated by the bar.[4] I studied the political affiliation of the appellate judges nominated by the commissions in those states between 1995 and 2008. I found that the commissions in these states nominated judges far to the left of the public. For example, in Tennessee, as measured by which party's primaries they voted in, two-thirds of the commission's judicial nominees were more affiliated with the Democratic Party than the Republican Party; yet, over the same time period, the electorate was evenly divided between Democrats and Republicans. In Missouri, almost 90% of the commission's nominees had donated more money to Democratic political candidates than Republican political

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[3] *See* Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 842-44 (1998) (surveying 234 partners from the "100 most prestigious law firms in the United States," and finding them more likely to describe themselves as Democrats, 42%, than Republicans, 33%, and that "large majorities favor[] . . . more 'liberal' social policies," including, for example, that 83% "agreed that women have a right to choose an abortion"); Frederick D. Herzon, *Ideology, Constraint, and Public Opinion: The Case for Lawyers*, 24 AM. J. POL. SCI. 233, 244 (1980) (interviewing 226 randomly-selected, Philadelphia-area lawyers in 1975, and finding 52.9% were to "some degree liberal, [while] 39.0 % [were] conservative"); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 509-10 (1985) (studying 224 lawyers drawn from four Chicago law firms, and finding that 38.5% were Democrats, 23.5% Republicans, and 38.0% Independent); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 19, 181-82 (University of Chicago Press 2005) (reviewing surveys of random samples of 800 Chicago lawyers in 1975 and 1995, and finding that Democrats outnumbered Republicans by approximately 56% to 29% in both years); ROBERT LERNER ET AL., AMERICAN ELITES 50, 142 (Yale University Press 1996) (interviewing a "random sample of elite corporate lawyers consist[ing] of partners from New York and Washington, DC, law firms with more than fifty partners" in 1982, and finding 32% identified themselves as conservative, 22% as moderate, and 47% as liberal).

[4] *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

17-4

candidates; yet over the same time period, the electorate in Missouri was evenly divided between Democrats and Republicans.

In light of studies like this, it is becoming more and more difficult for the bar in states like Kansas to defend its privileged role in judicial selection. Scholars agree that, despite our best efforts, commission systems like Kansas's are no less political than other methods of selecting judges; the only question is whose politics will drive the system.[5] When your commission is control by the bar, it is the bar's political preferences that drive the system. As public officials begin to realize this, they are reforming their commissions. For example, the legislature in my state of Tennessee recently enacted a statute completely removing the bar's role in selecting members of our nominating commission. Instead, elected officials now select all the members of the commission.

The bills before you today would either strip the bar of its role in selecting the commission's members and give that power to elected officials or eliminate the commission altogether. These reforms point in the right direction. But you need not take my word for it. Perhaps the most vocal defender of the commission method for selecting judges is former U.S.

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[5] *See, e.g.*, Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 466 (2007) ("Is ['merit selection'] nonpolitical? Of course not . . . . The politics come into play in determining who actually gets appointed to the commission . . . and in how the commission chooses to weigh various criteria in making both initial nominations and in doing the periodic evaluations. The system is not nonpolitical; it is simply differently political."); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 300 (2007) ("The classic study of the first merit selection system in Missouri concluded that appointment transformed the politics of judicial selection but did not eliminate politics. More recent accounts have documented either partisan conflict or competition between elements of the bar (e.g., plaintiffs' attorneys vs. defense attorneys) in several merit selection systems."); HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 167 (1988) ("far from taking judicial selection out of politics, ['merit selection'] actually tended to replace [electoral] [p]olitics, wherein the judge faces popular election . . ., with a somewhat subterranean process of bar and bench politics, in which there is little popular control."); Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 528 (1978) ("Lawyer-representatives on nominating commissions are *preoccupied* with the decisional propensities of potential judges.").

17-5

Supreme Court Justice Sandra Day O'Connor. Even Justice O'Connor has advocated removing the bar's dominant role in selecting members of nominating commissions.[6]

We cannot take politics out of judging. But we can make sure the politics reflect the preferences of all citizens, not just the preferences of a small special interest group. You should be commended for your reform efforts in this regard.

Thank you for your time.

[6] *See* Sandra Day O'Connor, Choosing (and Recusing) Our State Court Justices Wisely, 99 GEO. L. J. 151, 155 (2010) ("In Arizona's case, initially, we had quite a few lawyers on the commission. Today, we have very few lawyers on it . . . . [W]e can say to the public this is not dominated by lawyers.").

17-6

Legislative Testimony
February 16, 2011

MR. CHAIRMAN AND MEMBERS OF THE HOUSE COMMITTEE ON THE JUDICIARY

I want to thank the committee for this opportunity to speak in support of HB 2101. I seem to be a rarity at this hearing in the sense that I am not an attorney nor have any desire to become one. However, this doesn't dissuade my interest in this matter since I am a citizen of Kansas. My name is Andrew Gray. As Chair of the Libertarian Party of Kansas, and more importantly as a private citizen, I am speaking in favor of this bill.

All government must be in a flux of evolution if it remains within its' original framework and we should be no different. We must adjust when it becomes clear a process has clearly become undemocratic and reeks of potential elitism. In this vein it is time for Kansas to revisit our antiquated method of selecting appellate judges. You've heard testimony, and will hear from Dr. Ware, how the current system is used in the selection of these judges so I will speak more from a personal note.

I am appalled it is assumed a lawyer's vote from a small committee is considered more valuable than my vote as a citizen of Kansas. This idea diminishes not only my voice but the voices of every Kansan who cares deeply about our state. It also has a condescending tone that a select few has more wisdom than a democratic elected body. History has consistently showed this to be patently false on every level. It is a violation of the one person/one vote principle in which we as Kansans cherish for those we elect to govern and interpret our laws. HB 2101 will assist Kansas to move towards a more democratic approach as opposed to the extreme method it uses now. It must be stated again that Kansas is the only state in the Union which uses this method. The current process has an unparalleled power in how these judges are appointed. It will take this process from a few select individuals with a secret vote to at least a senate confirmation in which the 2.7 million people of Kansas helped to elect. In short, this will provide accountability to the people who confirmed the judges.

I am abhorred the secrecy involved in the selection of these judges and that the votes are never made public. Those who have the ability to scrutinize these votes such journalists or the citizens are never given that ability since there never is an open record. In these times where the cynicism of government is more rampant than ever it is vital the state of Kansas makes the necessary steps to provide as much transparency as possible. We see this cynicism present in the formation of many groups such as the Tea Party, Campaign for Liberty and the increased registration of the Party I represent. Not including the less organized groups or the plethora of individuals whom never speak up. It is important the workings of selecting our judges not only begin but be maintained under the watchful eye of Kansans. HB 2101 will assist the people of Kansas to become more confident in those we elect to govern us and interpret our laws which after all is the purpose of a representative government in which we participate in.

For the reasons that are stated above I implore you to support HB 2101. I want to thank you again for your time and attention.

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785.231.4367
Chair@lpks.org

House Judiciary
Date 2-16-11
Attachment # 18

DATE 16 February 2011

TO Representative Lance Kinzer, Chairman House Judiciary Committee
Capitol Building, Rm 346-S

FROM Donna R. Gillett (Mrs.), 517 S. 21st St., Leavenworth, KS 66048
913.682.5017, dgillettks@juno.com

SUBJECT: House Judiciary Committee Hearings on bills that would provide for senate confirmation of judicial nominees.

1
I believe that as self-governing people in a constitutional republic Kansans should elect all judges in their state; but since Kansas is so far from that ideal I came to speak for the next closest thing which is to have our APPELLATE COURT judges appointed by the governor with confirmation by the senate.
2
I am just a little ole' lady in Kansas but my vote should be worth as much as any bar member's vote. Our present system is unfair because my vote is worth less than a lawyer's vote.
3
The reason my vote has less value is because lawyers get to play a role in selecting ALL 9 members of the nominating commission but I only get to play an indirect role in selecting 4 of the members.
4
Going to the federal model will eliminate a nominating commission that was not elected by the people and in so doing will delete the word 'nonpartisan' which is untrue. I have statistical examples to back my assertion. When lawyers and nominating commission members register as Democrats or Republicans and when they donate money to Democrats or Republicans, that means they have a partisan point of view. Insertion of the word 'nonpartisan' into the Kansas Constitution and the Kansas Statutes to describe a nominating commission is inaccurate. That word on a district change of method ballot question violates KSA 25-2430(a) because it inserts into each polling place a false assertion that the process is nonpartisan.
5
A side benefit of enacting the bill is that the Kansas Commission on Judicial Performance will have less to do which presumably will give some relief to the taxpayers who fund it - $2,234,000 dollars for its first three years of operation.
6
I hope that you will pass this bill out of committee and work for its passage so that no Kansas citizens will have their votes devalued simply because they are not lawyers.

Testimony before the House Judiciary Committee
Regarding HB2101 – Court of appeals judges appointed by the governor…
Rep. Lance Kinzer, Chairman
February 16, 2011
Presented by Keith A. Esau

Mr. Chairman and members of the House Judiciary Committee,

My name is Keith Esau. I reside in Olathe, Kansas and work as a software engineer for PDF Solutions, Inc., a San Jose, California based company. I am also the Third District Chair for the Kansas Republican Party and have been involved in many political campaigns. However, I come before this committee today to submit testimony not as a representative of the company I work for, nor on behalf of any political party or candidate. The views expressed in this testimony are my own.

I support the adoption of House Bill 2101, a bill to change the selection of court of appeals court judges so they are appointed by the Governor and confirmed by the State Senate. This bill restores the power over selection to the people through the governor and the ballot box, instead of remaining with a select few behind closed doors.

The selection board does not uphold the principle of equal representation.

The principle of "one person, one vote" is widely recognized as essential to our form of government. No group of people should have more power in the choice of our governmental officials than any other group. However, the judicial selection committee is not designed around this principle.

As a typical citizen of Kansas, I get an equal vote with everyone in Kansas regarding who will be Governor. The Governor picks four of the nine selection committee members and in this selection, my vote counts equally with everyone in the state.

As a non-attorney however, I have no voice in the other five committee members. My neighbor who is an attorney has a voice in two members, the Chair of the selection committee (who must be an attorney), and a member from our congressional district (who must also be an attorney). The remaining three members are also chosen by attorneys in Kansas within the other three congressional districts.

An attorney's vote counts more than a typical Kansas voter's does in two ways. Not only does an attorney get a voice in selecting more members of the committee, but also there are far fewer attorneys than voters in Kansas that make the selections. Thus, a Kansas attorney has a much greater proportion of the choice in selecting our judges than the typical Kansas voter. Furthermore, attorneys as a group have complete control in the selection of judges because they control selection of a majority of the committee.

HB2101 solves this inequity by restoring the concept of "one person, one vote." Every voter in Kansas gets an equal choice in the election of both the Governor and the State Senators that confirm the nomination of appellate judges.

The appellate court does not currently reflect the general views of the citizens of Kansas.

A quick look at party affiliation in Kansas shows that approximately 45% are Republican, 27% are Democrat, 28% are Unaffiliated, and less than 1% are in other parties.[1] One would expect our judiciary to have similar proportions or party representation to the voters of Kansas or at the very least, have a similar proportion of Republicans versus Democrats (approximately 5 to 3). In addition, if there were a tilt toward any party, that slant would be expected toward the majority party – Republican.

However, when one looks at the affiliations of the appellate judges, a pattern different from the citizens of Kansas emerges. Out of the 11 current judges, only three are registered as Republicans. The other eight are all registered as Democrats and none are unaffiliated with a party. Regardless of the personal party choices of the judges, it is clear that the balance is far different from that of Kansas as a whole.

It is also troublesome that the balance is so far off. The only explanation that I can see is that the current process is excessively biased toward the Democratic Party. If it was slightly biased, we might expect to see nearly equal numbers of Democrats and Republicans on the bench. However, the 8 to 3 difference instead of a 3 to 5 difference (or even 4 to 7) demonstrates a wild skewing and favoritism toward the Democratic Party. The selection process should not inherently favor one party over another.

With the passage of HB2101, the same skewing might appear from time to time with appointment by the Governor. Again, one would expect the Governor to appoint judges from his or her own party, so when there is a Democrat Governor, Democrat judges would likely be appointed, and when there is a Republican Governor, Republican judges would likely be appointed. However, in this case the people of Kansas will have elected the Governor and the Senators that confirm the appointments. This result reflects of the choice of Kansas voters, not favoritism toward a single group or party.

Conclusion

For the reasons above, I ask you to support House Bill 2101 to restore the power of judicial selection to the people of Kansas. Thank you for your time and attention.

Keith A. Esau
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Olathe, KS 66061
913-599-6537
kaesau@sbcglobal.net

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[1] Voter totals from Secretary of State, September 7, 2010

Total Registration	1712509	
Republican	763646	44.59%
Democrat	459991	26.86%
Unaffiliated	477784	27.90%
Other	11088	0.65%

Legislative Testimony
Before the House Judiciary Committee
Rep. Lance Kinzer, Chairman
Feb. 16, 2011

MR. CHAIRMAN AND MEMBERS OF THE HOUSE COMMITTEE ON THE JUDICIARY:

My name is Stephen Ware. I am a professor of law at the University of Kansas. I have been a lawyer since 1991 and a law professor since 1993. I submit this testimony in support of HB 2101, not on behalf of KU, but on my own as a concerned citizen.

I began my scholarly research and writing on judicial selection and retention in the 1990's and have increasingly focused on the topic in the last few years. I published articles that researched how all 50 states select their supreme court justices.[1] Based on this research, I recommend that Kansas move toward the mainstream of states by removing the undemocratic aspects of the process for selecting Kansas appellate judges. HB 2101 would accomplish this goal with respect to the Court of Appeals.

I. The Kansas Appellate Court Selection Process is Simply Undemocratic

No one can become a judge on either of our state's appellate courts without being one of the three finalists chosen by the Kansas Supreme Court Nominating Commission. The Commission is the gatekeeper to the appellate courts. However, the Commission is selected in a shockingly undemocratic way.

Most of the members of the Commission are picked in elections open to only about 9,000 people, the members of the state bar. The remaining 2.7 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group into a powerful elite and treats everyone else like second-class citizens. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process."[2]

The following page of this testimony diagrams the undemocratic manner in which the Kansas Supreme Court Nominating Commission is selected.

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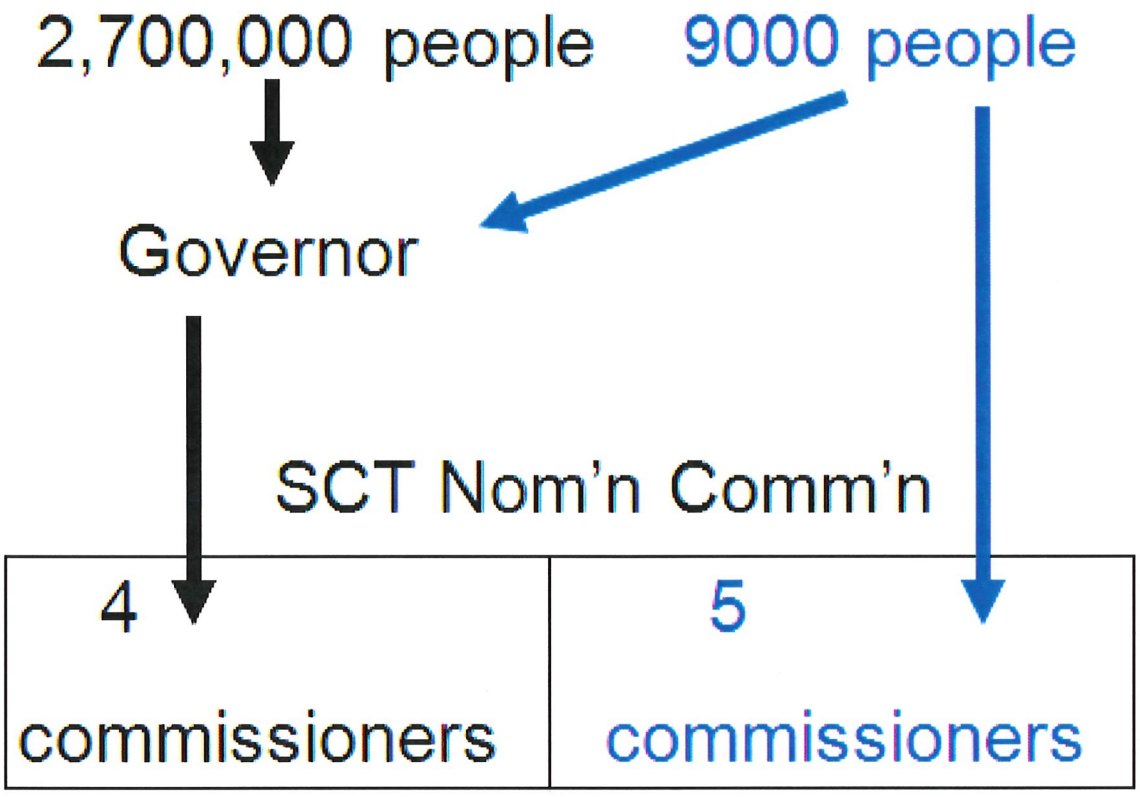
[1] Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386 (2008); Stephen J. Ware, The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court, 18 Kan. J. L. & Pub. Pol'y 392 (2009): Stephen J. Ware, The Missouri Plan in National Perspective, 74 Mo. L. Rev. 751 (2009).

[2] Jeffrey D. Jackson, Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System, 34 Fordham Urb. L.J. 125, 154 (2007).


2,700,000 people
9000 people
Governor
SCT Nom'n Comm'n
4
commissioners
5
commissioners

21-2

II. No Other State is as Undemocratic as Kansas

Kansas is the only state that gives its bar (the state's lawyers) majority control over the selection of appellate court justices. None of the other 49 states gives its bar so much power. Kansas stands alone.

Examining judicial selection elsewhere in the country reveals a variety of approaches. Nearly half the states elect their appellate judges. Elections are the most populist method of judicial selection because they give each voter equal power. A lawyer's vote is worth no more than any other citizen's. By contrast, Kansas' current system is the least populist and least democratic method of judicial selection because it most concentrates power in the bar. In between these extremes is the more moderate approach of having the governor's nominee win senate confirmation before joining the court.

Our Nation's Founders adopted this moderate approach in the United States Constitution, and today about a dozen states also select their appellate courts with confirmation by the senate or similar body. While some claim that senate confirmation in Kansas would be a political "circus," experience in the states that use it contradicts this claim. Experience in these states suggests that senate confirmation of judicial nominees works well.

In short, senate confirmation of Kansas appellate judges is a cautious, prudent reform. Rather than moving Kansas judicial selection from one extreme to another, it would move our state from one extreme toward the moderate mainstream of the country. As a lawyer who cares deeply about our court system, I believe that the legislators who crafted HB 2101 are to be commended for taking such a measured and thoughtful approach to an issue on which Kansas has for too long been so extreme.

III. Kansas' Current System Includes Much Secrecy and Little Public Accountability

The current process for selecting Kansas appellate judges is not only undemocratic but secretive. Not only does the bar currently exercise an inordinate amount of power, but that power is exercised in a largely-secret manner. The Kansas Supreme Court Nominating Commission's votes are secret. There is no public record of who voted which way. This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. By contrast, senate confirmation votes are public. By replacing the Commission with senate confirmation, HB 2101 would reduce the secrecy of the process and increase accountability to the public.

IV. Possible Counterarguments

I expect that opponents of HB 2101 will make the arguments that leaders of the Kansas Bar Association have made in the past. Several of these arguments are misleading.

A. The Empty Claim of "Merit"

Defenders of Kansas' current lawyer-favoring system often claim that it selects judges based on merit, rather than politics. But this is just an empty assertion. They provide no facts showing that Kansas does better than senate-confirmation states at selecting meritorious judges. Calling the current system "merit selection" is propagandistic rhetoric, rather than an accurate statement with factual support.

It is misleading to suggest that the bar must select members of the Nominating Commission in order to ensure that lawyers' expertise is brought to bear on judicial selection. In states with senate confirmation, the governor and senate avail themselves of lawyers' expertise with respect to potential judges.

B. The Misleading Phrase, "Non-Partisan"

Defenders of Kansas' current system often describe it with the word "non-partisan." But one of Governor Sebelius' appointees to the Kansas Supreme Court, Dan Biles, was a personal friend of, and campaign contributor to, the governor who appointed him. And nine of the previous 11 people appointed belonged to the same political party as the governor who appointed them. These are highly partisan outcomes from a system advertised as "non-partisan."

What makes Kansas' current system unusual is not that it's political, but that it gives so much political power to the bar. In both the current system and a senate-confirmation system, the governor has significant power. The difference between the two systems is who serves as the check on the governor's power and whether that check is exercised in secret or in public. Kansas' current system makes the bar the check on the governor's power and allows the bar to exercise that check in secret. HB 2101 would make the Senate the check on the governor's power and that check would be exercised in a public vote.

C. Senate Confirmation is not a "Circus" in the Many States that Use It

As noted above, some claim that senate confirmation in Kansas would be a political "circus." Rather than speculating about this, one can examine the experience of the twelve states that have senate confirmation or confirmation by a similar popularly-elected body. One of my articles researched the last two votes for initial supreme court confirmation in each of these twelve states.[3] In all twenty four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous. In only two of these twenty four cases was there more than a single dissenting vote. These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus. These facts suggest that governors know that senate confirmation of controversial nominees may be difficult so governors consider, in advance, the wishes of the senate in deciding who to nominate.

D. The Irrelevant "Triple Play"

[3] Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386, App. B (2008).

Some senior members of the Kansas bar like to recall the story of how Kansas got its current Supreme Court selection process, the story of the "triple play" in which a governor essentially got himself appointed to the Court in the mid-1950's. The moral of this story is that governors should not have unchecked power over the selection of supreme court justices. But neither Kansas' current system nor the senate-confirmation system of HB 2101 would give the governor such power so the "triple play" story is irrelevant to the issue now before your Committee.

E. Judicial Independence Would Not Be Weakened by HB 2101

In defending Kansas' current system for selecting justices, some members of the bar suggest that senate confirmation would reduce the independence of the Kansas appellate courts. By contrast, bar groups have not charged that senate confirmation of federal judges reduces the independence of federal courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure. By contrast, it is judges who are subject to reelection or reappointment that have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not by the system of judicial *selection*, but by the system of judicial *retention*, including the length of a justice's term.

V. Conclusion

For the reasons stated above, I urge you to support HB 2101.

Thank you very much for your time and attention.

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The Bar's Extraordinarily Powerful Role In Selecting the Kansas Supreme Court

Professor Stephen J. Ware

21-6

THE BAR'S EXTRAORDINARILY POWERFUL ROLE IN SELECTING THE KANSAS SUPREME COURT

*Stephen J. Ware**

In its summer 2008 issue, the Kansas Journal of Law and Public Policy published my article, *Selection to the Kansas Supreme Court*,[1] and three commentaries on it.[2] I appreciate the Journal now giving me an opportunity to reply to those commentators and to document the extraordinarily powerful role the Kansas bar has in selecting our state's highest court.

The first part of this article puts the Kansas Supreme Court selection process in national perspective by discussing the supreme court selection processes of all fifty states.[3] This discussion shows that, in supreme court selection, the bar has more power in Kansas than in any other state. This extraordinary bar power gives Kansas the most elitist and least democratic supreme court selection system in the country.

Members of the Kansas bar make several arguments in defense of the extraordinary powers they exercise under this system. The second part of this article shows that those arguments rest on a one-sided view of the role of a judge.

The bar's arguments rest on the view that judging involves only the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). The bar's arguments overlook the fact that judging also involves the exercise of discretion and that, within the bounds of this discretion, the judge makes law. At least since the Legal Realists, we have known that judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views.

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* © Stephen J. Ware. Professor of Law, University of Kansas. Thanks to Rick Levy for constructive criticism and to Caroline Bader for excellent research assistance.

1. Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J. L. & PUB. POL'Y 386 (2008).

2. Robert C. Casad, *A Comment on "Selection to the Kansas Supreme Court,"* 17 KAN. J.L. & PUB. POL'Y 424 (2008); Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission: A Response to Professor Ware's Article—From the Perspective of a Supreme Court Nominating Commission Member*, 17 KAN. J.L. & PUB. POL'Y 429 (2008); Janice D. Russell, *The Merits of Merit Selection: A Kansas Judge's Response to Professor Ware's Article*, 17 KAN. J.L. & PUB. POL'Y 437 (2008).

3. Much of Sections I.A-C and II.C-D of this article appears in Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. (forthcoming 2009).

The political/lawmaking side of judging is especially important with respect to state supreme courts because these courts are the last word on their states' constitutions and common law doctrines. So the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices. While Kansas has the least democratic supreme court selection system in the country, the accumulated wisdom of the other 49 states suggests that Kansas's system overvalues the technical/lawyerly side of supreme court judging and undervalues the political/lawmaking side of supreme court judging. Kansas can correct these problems and increase the democratic legitimacy of its supreme court by reducing the power of its bar.

I. KANSAS IS EXTREME - NO OTHER STATE GIVES THE BAR AS MUCH POWER

A. Democratic Selection Methods

Judicial *selection* should be distinguished from judicial *retention.* We should distinguish the process that initially selects a judge from the process that determines whether to retain that judge on the court. Judicial selection and judicial retention raise different issues.[4] In this paper, I primarily focus on selection.[5]

While some states have individual quirks, three basic methods of supreme court selection prevail around the country: contestable elections, senate

4. While differing views about judicial independence are central to the debate over judicial retention, they are at most peripheral to the issues involved in judicial selection. *See* Ware, *supra* note 1, at 406-07, 407 n.83; *see also* Alfred P. Carlton, Jr., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 72 (American Bar Association) (2003) ("Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. . . . In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection."); Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 460 (2008) ("Initial selections--whether by election or appointment--present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments."); id. at 453-54 ("[T]he threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judicial selection, but from the reelections that those judges are forced to contemplate and endure if they are to remain in office." (footnote omitted)); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 285 (2008) ("Prejudging judges may raise any number of problems, but it is the postjudging of them that systematically threatens individual and minority rights and the rule of law."); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) ("[U]nlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election.").

5. Although I discuss retention *infra* at Section II.D.

confirmation, and the Missouri Plan.[6] The most common method, used by twenty-two states, is the contestable election.[7] Allowing two or more candidates to run for a seat on the supreme court is the most populist of the three methods because it puts power directly in the hands of the people, the voters.[8] Importantly, members of the bar get no special powers: "[A] lawyer's vote is worth no more than any other citizen's vote."[9]

The second common method of selecting state supreme court justices is the one used to select federal judges: executive nomination followed by senate confirmation.[10] In twelve states, the governor nominates state supreme court justices but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly-elected body.[11]

Senate confirmation is a less populist method of judicial selection than contestable elections because senate confirmation is less directly dependent on the "wisdom . . . of the common people."[12] While contestable judicial elections "embody the passion for direct democracy prevalent in the Jacksonian era . . . senate confirmation exemplifies the republicanism of our Nation's Founders."[13] Senate confirmation is part of the Founders' "system of

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6. *See infra* notes 7, 11 & 35 and accompanying text. In two states, Virginia and South Carolina, supreme court justices are appointed by the legislature. Ware, *supra* note 1, at 388 n.9.

7. Ware, *supra* note 1, at 389, 389 n.13. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* American Judicature Society, Methods of Judicial Section, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 20, 2009). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

8. A populist is "a believer in the rights, wisdom, or virtues of the common people." Merriam-Webster OnLine Dictionary: Populism, http://www.merriam-webster.com/dictionary/populism (last visited Apr. 16, 2009).

9. Ware, *supra* note 1, at 390.

10. U.S. CONST. art. II, §2.

11. Confirmation is done by the state senate in Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Utah and Vermont, by the entire legislature in Connecticut and Rhode Island, and by the governor's council in Massachusetts and New Hampshire. Ware, *supra* note 1, at 388-89, 389 nn.11-12. A thirteenth state can be added, California. *Id.* at 389 n.12. Its confirmation body is a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *Id.*

The previous paragraph's categorization of states is similar to that found in Joshua C. Hall & Russell S. Sobel, IS THE 'MISSOURI PLAN' GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION 10-11 (Show-Me Institute) (2008). However, Hall and Sobel distinguish the "executive council[s]" used for confirmation in California, Massachusetts and New Hampshire from the legislatures used for confirmation in other states on the ground that those three councils are "usually governor-appointed." *Id.* at 11. In fact, however, Massachusetts and New Hampshire elect their councils. *See* MASS. CONST. amend. XVI; N.H. CONST. Pt. 2, art. 46, 60-61. And California elects its attorney general. CAL. CONST. art. 5, § 11.

12. Merriam-Webster OnLine Dictionary, *supra* note 8.

13. Ware, *supra* note 1, at 406. For 19th Century debates about contestable elections versus senate confirmation and legislative appointment of judges, see Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges*, 1850-1920, 1984 AM. B.

indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities."[14]

Although not as populist as the direct democracy of contestable judicial elections, senate confirmation does make judicial selection indirectly accountable to the people because, at the federal level, the people elect their senators,[15] and, through the Electoral College, the President.[16] Similarly, in states that use this method of judicial selection, the people elect their governors and state senators.

In other words, senate confirmation is—like contestable elections—fundamentally *democratic*,[17] although it is less populist than contestable elections. Senate confirmation is democratic because it facilitates the "rule of the majority"[18] by adhering to the principle of one-person-one-vote. At the federal level, one-person-one-vote is tempered by federalism, as both the U.S. Senate and Electoral College give disproportionate weight to voters in low-population states.[19] But at the state level nothing similarly tempers the democratic nature of senate confirmation. In those states in which the governor may appoint to the court whomever he or she wants,[20] subject only to confirmation by a popularly-elected body such as the state senate, judicial selection is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote. In these elections, members of the bar get no special powers. Again, a lawyer's vote is worth no more than any other citizen's vote.

FOUND. RES. J. 345 (1984); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. LEGAL STUD. 431, 445-48 (2004); Roy Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002).

14. Ware, *supra* note 1, at 406. Prior to the direct election of senators, they were chosen by the state legislatures, so popular accountability was even more indirect. *See* U.S. CONST. art. 1, § 3; *id.* Am. XVII.

15. U.S. CONST. amend. XVII.

16. U.S. CONST. art. 2, §1.

17. Democracy is "1 a: government by the people; *especially*: rule of the majority; b: a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections." Merriam-Webster OnLine Dictionary: Democracy, http://www.merriam-webster.com/dictionary/democracy (last visited Apr. 16, 2009). As Professor Jeffrey Jackson puts it:

> Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007).

18. Merriam-Webster OnLine Dictionary, *supra* note 17.

19. U.S. CONST. art. 1, §3 (Senate); *id.* art. 2, §1 (Electoral College).

20. *See infra* note 33.

B. Departures From Democracy: Varying Levels of Elitism in Judicial Selection

Some senate-confirmation states, however, have supreme court selection processes that do give special powers to members of the bar. As the bar is an elite segment of society,[21] states that give lawyers more power than their fellow citizens are rightly described as *elitist.* Indeed the rationale for giving lawyers special powers over judicial selection—lawyers are better than their fellow citizens at identifying who will be a good judge[22]—is openly elitist.[23] A mixture of this elitism (special powers for lawyers) and democracy (senate confirmation of gubernatorial nominees) characterizes the states discussed in the following four paragraphs.

While the President may nominate anyone to the U.S. Supreme Court, in some senate-confirmation states the governor is restricted in whom he or she may nominate to the state supreme court. For example, New York restricts whom the governor may nominate to its highest court, the Court of Appeals.[24] The New York Constitution provides that "[t]he governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission."[25] The judicial nominating commission in New York consists of twelve members: four appointed by the governor, four by the chief judge of the Court of Appeals, and four by leaders of legislature.[26] Of these twelve members, at least four must be members of the New York bar.[27] This special quota for lawyers is the only one in New York; no other

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21. Among the dictionary definitions of "elite" is "a group of persons who by virtue of position or education exercise much power or influence." *See* Merriam-Webster OnLine Dictionary: Elite, http://www.merriam-webster.com/dictionary/elite (last visited Apr. 16, 2009). In the United States, of course, lawyers tend to have above-average levels of education and income. According to the Bureau of Labor Statistics, the average lawyer in the U.S. earns $118,280, while the average person earns $40,690. Bureau of Labor Statistics, Occupational Employment Statistics, http://www.bls.gov/oes/2007/may/oes_nat.htm#b00-0000 (last visited Apr. 16, 2009). Nearly all lawyers have a post-graduate degree, while only 10% of Americans do. SARAH R. CRISSEY, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007 3 (U.S. Census Bureau 2009), *available at* www.census.gov/prod/2009pubs/p20-560.pdf. Lawyers tend to be powerful and influential. (Is it just a coincidence that every Democratic nominee for President or Vice President since 1984 has had a law degree?)

22. *See, e.g.*, Linda S. Parks, *No Reform is Needed*, 77 J. KAN. B.A. 4 (Feb. 2008) ("'Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers.' That's exactly why lawyers serve on the Commission. If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist.") (quoting Ware, *supra* note 1, at 396).

23. Among the definitions of "elite" is "the best of a class." Merriam-Webster OnLine Dictionary: Elite, http://www.merriam-webster.com/dictionary/elite (last visited Apr. 16, 2009). The argument is that lawyers are the best (among the class of citizens) at assessing potential judges.

24. N.Y. CONST. art. VI, § 2.

25. N.Y. CONST. art. VI, § 2(e).

26. N.Y. CONST. art. VI, § 2(d)(1).

27. *Id.* ("Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court

occupational group (or other group) is guaranteed representation on the state's judicial nominating commission.[28] The "lawyers' quota" guarantees that lawyers, compared to their percentage of the state's population, will be over-represented on the commission.[29] As a result, New York gives the members of its bar disproportionate power in the selection of the state's high court judges. In judicial selection, New York gives its lawyers a special power not given to other citizens.

New York is not alone. Three other states with senate confirmation of supreme court justices also (1) require their governors to nominate only someone recommended by a nominating commission, and (2) give lawyers a quota on that commission.[30] By introducing these two factors, these states make judicial selection less democratic and more elitist than it would otherwise be.[31] In these states (including New York), however, the movement from democracy to elitism is relatively small because all members of the commission are appointed by popularly-elected officials or by judges who have been nominated and confirmed by popularly-elected officials. In other words, the populace retains ultimate control over appointments to the judicial nominating commission. The democratic principle of one-person-one-vote is followed, albeit indirectly.

By contrast, two other states with senate confirmation go further down the road from democracy to elitism by allowing the bar to *select* some members of the nominating commission.[32] In these states, not all of the commissioners—who exercise the important governmental power of restricting the governor's choice of judicial nominees—are selected under the democratic principle of one-person-one-vote. Rather, some of the commissioners are selected by a small, elite group: the bar.[33]

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of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state."). No such restrictions are placed on the members appointed by leaders of the legislature. *Id.*

28. N.Y. CONST. art. VI, § 2.

29. As of the end of calendar year 2008, there were a total of 244,418 registered New York attorneys, and of that total, 153,552 reported an address within New York state. Email to Professor Stephen J. Ware from Sam Younger, Deputy Director, New York State Office of Court Administration, Apr. 21, 2009. New York State has over 19 million people. National State and Population Estimates, U.S. Census Bureau, http://www.census.gov/popest/states/NST-ann-est.html (last visited May 10, 2009).

30. *See* Ware, *supra* note 1, at 388 n.10. These states are Connecticut, Rhode Island, and Utah. As noted above, Connecticut and Rhode Island require confirmation by the entire legislature, not just the senate. *See supra* note 11.

31. Some states have one, but the other, of these two factors. *See infra* note 33.

32. *See* Ware, *supra* note 1, at 388 n.10. These states are Hawaii and Vermont.

33. More democratic and less elitist are states that give lawyers a quota on the nominating commission and/or allow the bar to select some of the commission but do not require their governors to nominate someone recommended by the nominating commission. In these states, the bar's disproportionate influence over the commission may give lawyers greater power than other citizens, but the greater power of lawyers is clearly subordinate to the power of the popularly-elected governor. The governor is not required to nominate someone recommended by the commission because the commission's existence derives, not from the state constitution, but

This is really quite startling. Where else in our federal or state governments are public officials selected in such an undemocratic way? Where else do members of a particular occupation have, by law, greater power than their fellow citizens to select public officials? When this sort of favoritism for an occupational group other than lawyers has been attempted, it has, in at least one instance, been found unconstitutional.[34]

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merely from an executive order which the governor may rescind. *See* Del. Exec. Order No. 4 (Mar. 27, 2009), available at http://governor.delaware.gov/orders/exec_order_4.shtml (commission consists of nine members: eight appointed by governor—four lawyers and four nonlawyers—and one appointed by president of bar association, with consent of governor); Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995) (five members, all appointed by the governor); Mass. Exec. Order 500 (March 13, 2008), *available at* http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders_executive_order_500&csid=Agov3 (twenty-one members, all appointed by Governor); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) *available at* http://www.gov.state.md.us/executiveorders/01.07.08JudicialNominatingCommissions.pdf (seventeen members, twelve appointed by governor, five by president of bar association); N.H. Exec. Order, 2005-2, *available at* http://www.nh.gov/governor/orders/documents/Exec_Order_Judicial_Selection_Comm2.pdf (eleven members, all appointed by governor consisting of six lawyers and five nonlawyers,); N.J. Exec. Order No. 36 (Sept. 22, 2006), *available at* http://www.state.nj.us/infobank/circular/eojsc36.htm. (seven members, all appointed by governor: five retired judges). Also, California probably belongs in this category of states that do not require their governors to nominate someone recommended by the commission. *See* Ware, *supra* note 1, at 388-89 nn.10 & 12.

34. *See* Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994). In *Hellebust*, the Tenth Circuit found that Kansas's statutory procedure for electing members to the Kansas State Board of Agriculture (Board) violated the Fourteenth Amendment of the U.S. Constitution. That Amendment's Equal Protection Clause requires states to follow the principle of "one-person, one vote" in most elections. Reynolds v. Sims, 377 U.S. 533 (1964). Kansas violated this principle by giving the power to elect the Board to delegates from private agricultural associations including:

> county agricultural societies, each state fair, each county farmer's institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer's organizations, and agricultural trade associations having a statewide character.

42 F.3d at n.1. As the Tenth Circuit explained, "In the line of cases stemming from *Reynolds*, '[t]he consistent theme . . . is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.'" *Hellebust*, 42 F.3d at 1333 (quoting Hadley v. Junior College Dist., 397 U.S. 50, 54 (1970)). "The Court has fashioned a narrow exception to this rule . . . . [T]he Court held the one person, one vote rule does not apply to units of government having a narrow and limited focus which disproportionately affects the few who are entitled to vote. *Id.* (citations omitted).

After the Kansas statute was declared unconstitutional,

> . . . much attention . . . focused on the possibility that agricultural groups might be given the power to provide the Governor a list of nominees from which the Board must be selected. Such an option appeared attractive to many legislators as a means of

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C. *The Most Elitism: The Missouri Plan*

While the states discussed in the previous section have departed from the democratic principle of one-person-one-vote (and from the U.S. Constitution's model) to give special powers to the bar, they have nevertheless retained senate confirmation of the governor's nominees for supreme court. In other words, they have introduced an element of elitism to the early part of the judicial-selection process (who can the governor pick?), while keeping the later part of the process (will the governor's pick be confirmed?) in the hands of democratically-elected officials. By contrast, the third common method of supreme court selection, the "Missouri Plan,"[35] has the early-stage elitism without the later-stage democracy.[36] The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor's pick be confirmed by the senate or similar popularly-elected body.[37] Thus Missouri Plan states are less democratic (and more elitist) than senate confirmation states.[38]

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preserving the essence of the former system. A similar method of selection is used for various professional organizations and, most prominently, the Kansas Supreme Court.

Richard E. Levy, *Written Testimony of Richard E. Levy Before the House Agriculture Committee, State of Kansas*, 42 U. KAN. L. REV. 265, 282 (1994) (footnotes omitted). Professor Levy opines that "this approach might pass equal protection scrutiny on the grounds that 'appointment' rather than 'election' is involved" because "[m]any cases suggest that the 'one person, one vote' principle does not apply to appointments." *Id.* at 282, n.118. However, he notes that "these cases involve appointments by elected officials who themselves are chosen in compliance with that principle." *Id.* Levy concludes that "[t]he example of private nominations that severely limit gubernatorial appointments is not necessarily controlled by those cases." *Id.* "So long as the Governor's appointment is not legally constrained by private nominations, there can be no conflict between their consideration and the 'one person, one vote' principle." *Id.* at 282 n.115.

35. The "Missouri Plan" states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Oklahoma, Nebraska, South Dakota, Tennessee and Wyoming. *See* Ware, *supra* note 1, at nn.4-8 and accompanying text. The "Missouri Plan" was named after the first state to adopt it, in 1940. Unfortunately, some people call this method of selecting judges "merit selection." *See infra* n.39 and accompanying text.

36. Some readers may wonder if the Missouri Plan's retention elections provide later-stage democracy. Here, then, we can remind ourselves of the crucial distinction between judicial selection and judicial retention. *See supra* note 4. The "later stage" discussed here is the later stage of judicial selection. Judicial retention is a separate topic and retention elections are discussed below. *See infra* Part II.D.

37. *See* Ware, *supra* note 1, at 386 nn.4-8 and accompanying text (citing constitutions of Missouri Plan states).

38. *See supra* notes 17 & 21 and accompanying text. In senate confirmation states, if the senate refuses to confirm any of the nominating commission's first group of nominees then the commission must propose one or more additional nominees to get someone appointed to the court. By contrast, in states lacking senate confirmation (Missouri Plan states) if the governor refuses to appoint any of the commission's first group of nominees then one of those nominees joins the court anyhow. *See, e.g.*, MO. CONST. of 1945, art. V, § 25(a)("If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."); KAN. CONST. art.3 §5(b)("In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees.") So even

This important distinction between Missouri Plan states and senate confirmation states is obscured when all judicial selection methods are reduced to two types: elective and appointive. In fact, the choice is not just between electing judges and appointing them. As this Article has shown, many appointive systems exist and they vary widely in the extent to which they depart from democratic principles to give special powers to the bar. Clarity requires distinguishing Missouri Plan states from senate confirmation states. Unfortunately, prominent bar groups use the term "merit selection" to describe all of these states so long as they use a nominating commission of any sort.[39]

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though governors, like state senators, are democratically elected, a commission/governor system is less democratic (more elitist) than a commission/governor/senate system because the latter system gives the commission less power to force one of its favorites on the democratically-elected officials.

The importance of this power was demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. *See* Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id.* By contrast, the commission lacks this power to ensure that one of its original nominees becomes a justice where appointment requires confirmation by the senate or other publicly-elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

39. The leader in this regard seems to be the American Judicature Society (AJS). Under the heading "Judicial Selection in the States . . . 'Initial Selection: Courts of Last Resort,'" AJS claims that at the supreme court level, three states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by non-partisan election, and twenty-five (including the District of Columbia) by merit selection.
AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (American Judicature Society) (2007), http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf. Among the 24 states, AJS claims for "merit selection" are ten states with confirmation by the senate or similar popularly-elected body: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, Vermont. *Id.*

> While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the 'efficiency' of the administration of justice.
>
> The founders of AJS shared the commonplace Progressive belief that the solution to most of the country's problems lay in more efficient public administration. The Society's negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 7-8 (1994).

This term, "merit selection," is "propagandistic"[40] and obscures important distinctions among appointive systems. Accordingly, I suggest that people reject the term "merit selection" in favor of the more-neutral "Missouri Plan," and that people reserve the term "Missouri Plan" for states that lack confirmation by the senate or similar popularly-elected body.

With this terminology established, we can then make a further distinction, a distinction among Missouri Plan states. These states can be placed into two categories, which I call "soft" Missouri Plan and "hard" Missouri Plan. (*See infra* pages 426-27, Table 1.) The four soft Missouri Plan states have a lawyers' quota on the nominating commission, but *all* members of the commission are selected by a process that includes popularly-elected officials.[41] In these states—Arizona, Colorado, Florida and Tennessee—the

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In 1928, AJS endorsed a process in which nominations presented to the governor would come from a committee of the bar. *Id.* at 9.

> Then, in 1937, the [American Bar Association] adopted the merit plan. It proposed:
>
> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
>
> (b) *If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body* of appointments made through the dual agency suggested.
>
> (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

Id. at 9-10 (emphasis added).

40. *See* Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803 (2004) ("merit selection--purely, so far as I can tell, a propagandistic misnomer").

41. *See* COLO. CONST. art. VI, § 24 (commission consists of fifteen voting members: seven lawyers appointed through majority action of governor, attorney general, and chief justice, eight nonlawyers appointed by governor); ARIZ. CONST. art. VI, § 36 (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. of 1968 art. V, § 11 (1998); FLA. STAT. ANN. § 43.291 (LexisNexis 2007) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer). Tennessee is the "hardest" of the soft Missouri Plan states because popularly-elected officials have the least power (relative to the bar) in selecting commissioners.

bar's role in selecting members of the commission is either non-existent or limited to "merely suggesting names for . . . the commission and those suggested do not become commissioners unless approved by the governor and/or legislature."[42] So the elitism of the lawyers' quota on the commission is balanced to some extent by the role of popularly-elected officials in appointing the commission.

Even that balance is lacking in the "hard" Missouri Plan states. These nine states go further than any others in maximizing the power of the bar. Not only do these states have a lawyers' quota on the commission, but the quota is a majority of the commission. Each of these states' constitutions requires that a majority of the commissioners be lawyers or judges.[43] More importantly, popularly-elected officials play no role in selecting *which lawyers* fill the lawyers' quota on the commission. Instead, the bar selects the lawyers on the commission.[44] To reiterate, the lawyer-commissioners (who exercise the important governmental power of restricting the governor's choice of judicial nominees) are not selected in accordance with democratic principles of equality. These commissioners are not selected by officials elected under the democratic principle of one-person-one-vote. Rather, they are selected by a small, elite group: the bar.[45]

For this reason, judicial selection under the Missouri Plan lacks democratic legitimacy.

Professor Jeffrey Jackson explains:

> A commission system [of judicial selection] carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.
>
> Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission

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42. Ware, *supra* note 1, at 388.

43. *See* Ware, *supra* note 1, at 387 nn.4-5 (Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Wyoming).

44. *Id.*

45. Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not, in* THE ANALYSIS OF JUDICIAL REFORM 79, 87 (Philip L. Dubois ed., Lexington Books 1982) ("Officials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench."). Perhaps they have admitted this less readily in recent years as bar control over judicial selection has become more controversial.

> system are appointed by a popularly-elected official, the official's choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.[46]

As Professor Jackson says, contestable elections and senate confirmation (at least of the sort found in the U.S. Constitution) have democratic legitimacy. And even commission systems have democratic legitimacy insofar as members of the nominating commission are appointed by a popularly-elected official. Democratic principles are violated, however, when members of the commission are selected by "a minority of the persons, i.e. lawyers in their area."[47] This, of course, is the core of the Missouri Plan–allowing the bar to select some of the commission and then declining to offset that bar power with confirmation by the senate or other popularly-elected body.[48] And it is this core that deprives the Missouri Plan of democratic legitimacy.

Professor Jackson continues:

> The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate.[49] . . . .
>
> Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members. From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.[50]
>
> Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor's choices are generally limited to the slate given to her

46. Jackson, *supra* note 17, at 146 (footnotes omitted).
47. *Id.*
48. *See supra* notes 35-39 and accompanying text.
49. Jackson, *supra* note 17, at 148.
50. *Id.* at 153 (footnote omitted).

> by the commission, the system can be perceived as vulnerable to "panel stacking," wherein the commission submits a combination of nominees that offers the governor little real choice. Even if lay members are added to the process, there is the problem that a large part of the selection system is being delegated to persons who are not subject to the democratic process.[51]

So the Missouri Plan's lack of democratic legitimacy is not cured by the fact that the governor gets to choose among the commission's nominees and gets to appoint some members of the commission. The Missouri Plan nevertheless violates basic democratic principles of equality because some members of the commission are selected by the bar. The problem is not that there is a nominating commission, nor even so much that lawyers get a quota of seats on that commission. The core problem with the Missouri Plan is how those lawyers are selected.

Professor Jackson rightly concludes that democratic legitimacy

> would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government.[52]

To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly-elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in Missouri Plan states because these states fail to offset the commission's power with confirmation of judges by the senate or other popularly-elected body.

D. Kansas Alone At the Extreme

The Missouri Plan's lack of democratic legitimacy is most pronounced in Kansas. Kansas is the "hardest" Missouri Plan state of all because it gives the bar more power than even the other hard Missouri Plan states. The Kansas bar selects five of the nine members of the Kansas Supreme Court Nominating Commission.[53] As I explained in *Selection to the Kansas Supreme Court*,

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51. *Id.* at 153-54 (footnote omitted).
52. *Id.* at 154.
53. KAN. CONST. art. 3 § 5(e).

> No other state in the union gives its bar majority control over its supreme court nominating commission. Kansas stands alone at one extreme on the continuum from more to less bar control of supreme court selection. Closest to Kansas on this continuum are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority. In these eight states, members of the commission not selected by the bar are selected in a variety of ways. Six of them include a judge (and a seventh includes two judges) on the nominating commission. In six of these eight states, as in Kansas, all the non-lawyer members of the commission are selected by the governor, while in two of these states the governor's selections are subject to confirmation by the legislature.[54]

In sum, Kansas is the only state that allows the bar to select a majority of "a nominating commission that has the power to ensure that one of its initial nominees becomes a justice."[55]

II. DEFENSES OF KANSAS'S EXTREME DEGREE OF BAR POWER

A. Introduction

The previous section of this article showed that Kansas has the least democratic and most elitist supreme court selection system in the country. In supreme court selection, the Kansas bar has more power than the bar has in any of the other 49 states. This degree of power can be put in perspective with some statistics. While members of the Kansas bar constitute less than one percent of the state's population, they have over fifty-five percent of the power in selecting the Kansas Supreme Court Nominating Commission. Kansas has about 2,000,000 adults,[56] about 9000 of whom are licensed to practice law in Kansas.[57] Yet in selecting the Nominating Commission, those 9000 people have more power than everyone else in the state combined.[58] In other words, a member of the Kansas bar has more than 200 times as much power as his or

54. Ware, *supra* note 1, at 387 (footnote omitted).

55. *Id.* at 391.

56. U.S. Census Bureau, State & County Quickfacts: Kansas, http://quickfacts.census.gov/qfd/states/20000.html (last visited Apr. 17, 2009) (according to the Census Bureau, in 2007 Kansas had 2,775,997 people, and 25.1% were under the age of 18).

57. Casad, *supra* note 2, at 425 ("On March 13, 2008 the 'bar' had 8,900 members.").

58. Of course, members of the Kansas bar (like other Kansans) may vote for the governor. So the governor's selections to the Commission are the (indirect) selections of lawyers as well as non-lawyers. Even leaving this point aside and treating all four of the governor's selections to the Commission as non-lawyers' selections, members of the Kansas bar alone select a larger proportion of the Commission. KAN. CONST. art. 3 § 5(e). So in selecting the Commission the 9000 Kansas lawyers have more power than the remaining two million adults in the state. Two million divided by 9000 is over 222.

her neighbor. This is not just a slight departure from the democratic principle of one-person-one-vote; this is elitism with a vengeance. In this extremely undemocratic system, a lawyer's vote is not only worth more than any other citizen's vote; it is worth over 200 times more.

Who defends this extremely undemocratic system? Kansas lawyers, by and large. Among the members of the Kansas bar defending the system that gives them so much power are (1) Robert C. Casad, an emeritus professor at the University of Kansas School of Law;[59] (2) Patricia E. Riley, a bar-selected member of the Kansas Supreme Court Nominating Commission;[60] (3) Janice D. Russell, a recently-retired trial-court judge in Kansas;[61] and (4) Linda Parks, former president of the Kansas Bar Association.[62]

B. Kansas is Not Colorado (or Even Missouri)

What arguments do these Kansas lawyers make in defense of their extraordinary powers? They often start by denying that their powers are extraordinary. For example, Professor Casad objects to my "suggest[ion] that Kansas somehow stands alone among the states."[63] According to Professor Casad, my statement that "Kansas is the only state in the union that gives the members of its bar majority control over the selection of state supreme court justices" is "contradicted by [one of my own footnotes] which points out that lawyers comprise a majority of the nominating commissions in Alaska, Indiana, Iowa, Missouri, Nebraska, South Dakota and Wyoming as well."[64]

In fact, there is no contradiction. Professor Casad is off point because he is discussing how many members of the bar are on the commission, while my point about Kansas' uniqueness is about how many commissioners are *selected by* the bar.[65] This distinction may be easily overlooked by those whose experience is limited to Kansas[66] because in Kansas all the members of the bar

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59. *See generally* Casad, *supra* note 2, at 424 n.a1 (biographical information of author).

60. *See generally* Riley, *supra* note 2, at 429 n.a1 (biographical information of author).

61. *See generally* Russell, *supra* note 2, at 437 n.a1 (biographical information of author).

62. Parks, *supra* note 22, at 4 n.a1 (biographical information of author); Linda Parks, *Judicial Selection Counterpoint*, 77 J. KAN. B.A. 7 (Apr. 2008); Linda Parks, *Keep Selecting Justices on Merit, Not Politics*, THE WICHITA EAGLE, Dec. 6, 2007, at 7A.

63. Robert C. Casad, Letter to the Editor, *Court Selection*, LAWRENCE JOURNAL WORLD, Jan. 22, 2008, at A7, *available at* http://www2.ljworld.com/news/2008/jan/22/court_selection/.

64. Casad, *supra* note 2, at 425.

65. *See* Ware, *supra* note 1, at nn.4-5 and accompanying text.

66. *See, e.g.*, Parks, *Judicial Selection Counterpoint*, *supra* note 22, at 7 (asserting that my "contention that Kansas gives more power to the lawyers than any other state is just plain wrong. Twelve states have the same balance of power as that followed by Kansas. The only difference is that one of the 'majority' lawyers is also a judge. Newsflash, judges are members of the bar."). Ms. Parks is, like Professor Casad, off point because she is discussing how many members of the bar are on the commission, while my point about Kansas' uniqueness is about how many commissioners are *selected by* the bar. *See* Ware, *supra* note 1 at nn.4-5 and accompanying text. Ms. Parks has conflated the number of commissioners selected by the bar with the number of lawyers on a commission. Even had she not made this mistake, though, it still would have been she who "is just plain wrong" due to her erroneous assertion that "[t]welve states have the same balance of power [between lawyers and non-lawyers on the commission] as that followed by

on the Nominating Commission are selected by the bar and none of the other commissioners are selected by the bar.[67] But a nominating commission does not have to be set up this way. As explained above, in many states some members of the bar on the commission are selected by individuals or groups other than the bar.[68] For example, in Colorado, members of the bar on the commission are selected through majority action of the governor, attorney general, and chief justice.[69]

This difference between Colorado and Kansas is especially pertinent in light of Professor Casad's accusation that my point about Kansas' uniqueness "is very misleading. Our merit selection system, often called the Missouri Plan, is basically the same as that of 12 other states, including our sister heartland states of Colorado, Indiana, Iowa, Nebraska, Oklahoma and, of course, Missouri."[70] In other words, Professor Casad misleadingly asserts that Kansas (in which a majority of the commission is selected by the bar) and Colorado (in which none of the commission is selected by the bar) have "basically the same" system.[71]

Similarly, what of the other states in Professor Casad's group of twelve that he say are "basically the same" as Kansas?[72] In addition to Colorado, they include one in which the governor can effectively pick which members of the bar to put on the commission,[73] one in which the governor picks among

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Kansas." In fact, among the twelve Missouri Plan states (besides Kansas) are Colorado and Arizona, neither of which have lawyer majorities on their commissions. *See* Ware, *supra* note 1, at 388 nn.7-8.

67. KAN. CONST. art. 3, § 5(e).

68. *See supra* Part I.B and note 41.

69. COLO. CONST. art. VI, § 24.

70. Casad, *supra* note 63, at A7; *see also* Casad, supra note 2, at 425.

71. Kansas would move away from its tops-in-the-nation level of bar control and toward the national mainstream if it replaced bar-selection of lawyer commissioners with Colorado's system of selection by majority action of the governor, attorney general and chief justice. That move to Colorado's "soft" Missouri Plan would increase the democratic legitimacy of Kansas Supreme Court selection, although not as much as if Kansas adopted that reform plus senate confirmation of supreme court justices. *See supra* note 38.

72. He does not name all twelve of the states to which he refers. Presumably, they are the eight hard Missouri Plan states (Alaska, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming) plus the four soft Missouri Plan states (Arizona, Colorado, Florida and Tennessee). *See infra* pp. 426-27, Table 1.

73. *See* FLA. STAT. ANN. § 43.291 (LexisNexis 2007).

> (1) Each judicial nominating commission shall be composed of the following members:
>
> (a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but *the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list*

lawyers nominated by the bar for the commission,[74] and one in which the governor appoints, with the "advice and consent of the senate," the minority of the commission nominated by the bar.[75] These four "soft" Missouri Plan states differ from Kansas in that they reduce the power of the bar and increase democratic legitimacy by allowing popularly-elected officials to play a role in selecting *all* members of the commission, including the lawyer-members. None of them supports Professor Casad's attempt to show that Kansas is in the national mainstream.[76]

"Closest to Kansas," as I wrote in *Selection to the Kansas Supreme Court*, ". . . are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority."[77] In these eight states, members of the commission not selected by the bar are selected in a variety of ways. "Six of them include a judge (and a seventh includes two judges) on the nominating commission."[78] In six states, for example, a supreme court justice is on the commission and the justice plus the bar-selected members comprise a majority of the commission.[79] How does supreme-court selection in these states differ from Kansas? In other words, what is the difference between having a justice on the commission and having another bar-selected member on the commission?

There is some difference because supreme court justices are different from other members of the bar. Even in "hard" Missouri Plan states, to become a justice one must be chosen (over other nominees) by the popularly-

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of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.

(b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law.

Id. (emphasis added).

74. TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer).

75. *See* ARIZ. CONST. art. VI, § 36; 1987 Op. Att'y Gen. Ariz. 81, No. I87-043 (Mar. 26, 1987) ("pertaining to the appointment of attorney members of the Commission on Appellate Court Appointments . . . who, under [this section], are nominated by the Board of Governors of the State Bar. . . . [T]he Governor has the discretion to accept or reject the nominations submitted to him by the Board of Governors.").

76. Professor Jeffrey Jackson has previously highlighted the differences among Kansas, Colorado and Arizona. Jackson, *supra* note 17, at 153.

77. Ware, *supra* note 1, at 387. These states are Alaska, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming. *Id.* n.5

78. *Id.*

79. *See* Ware, *supra* note 1, n.5. In Alaska, Indiana, Iowa, and Wyoming, it is the Chief Justice. In Nebraska and Missouri it may be another justice. *Id.*; NEB. REV. STAT. § 24-2804.

elected governor and to remain a justice one must win a retention election open to all registered voters.[80] So although these factors do not confer upon justices as much democratic legitimacy as advocates of the Missouri Plan sometimes claim,[81] they do confer some degree of democratic legitimacy. Thus the states whose nominating commissions include a justice (rather than another bar-selected commissioner, as in Kansas,) do have a supreme-court selection process with a bit more democratic legitimacy than Kansas.[82] They are, as my *Selection to the Kansas Supreme Court* says, close to the end of the bar-control continuum[83] but not at the end.[84] There, Kansas stands alone, the one state in which the bar selects a majority of the supreme court nominating commission. Despite the claims of Kansas lawyers to the contrary, Kansas has the least democratic and most elitist system of supreme court selection in the country.

C. Judges Are Lawmakers, Not Just Technicians

1. Judges' Political Views Matter

So members of the Kansas bar are wrong when they deny that the system giving them so much power differs from the systems used in all of the other 49

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80. ALASKA CONST. art. IV, § 5 (governor shall fill any vacancy on supreme court "by appointing one of two or more persons nominated by the judicial council"); *see also id.* § 6 (justice subject to approval or rejection at first general election held more than three years after his appointment, and thereafter every ten years); IND. CONST. of 1851, art. VII, § 10 (1970) (governor shall fill vacancy on supreme court "from a list of three nominees presented to him by the judicial nominating commission"); *see also id.* § 11 (justice subject to approval or rejection at general election two years after appointment, and thereafter every ten years); IOWA CONST. of 1857, art. V, § 15 (1962) (governor fills vacancies on the supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 17 (justice subject to retention or rejection at first judicial election held more than one year after appointment, and thereafter every eight years); MO. CONST. art. V, § 25(a) (1976) (governor shall fill vacancy in supreme court by appointing one of three persons nominated by judicial commission); *see also id.* §§ 25(c)(1), 19 (justice subject to approval or rejection at first general election held more than twelve months after appointment, and thereafter every twelve years); NEB. CONST. art. V, § 21(1) (2008) (governor shall fill any vacancy in the supreme court "from a list of at least two nominees presented to him by the . . . judicial nominating commission"); *see also id.* § 21(3) (justice subject to approval or rejection at next general election more than three years from the date of appointment, and thereafter every six years); OKLA. CONST. art. VII-B, § 4 (1967) (governor shall fill vacancy on supreme court with one of three nominees chosen by Judicial Nominating Commission); *see also id.* § 5 (justice subject to approval or rejection at first general election more than one year after appointment, and thereafter every six years); S.D. CONST. art. V, § 7 (governor shall fill vacancy on supreme court from list of nominees chosen by the judicial qualifications commission); *see also id.* (justice subject to approval or rejection at "first general election following the expiration of three years from the date of his appointment," and thereafter every eight years); WYO. CONST. art. 5, § 4(b) (1976) (governor shall fill vacancy on supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 4(f), (g) (justice subject to approval or rejection at next general election more than one year after his appointment, and thereafter every eight years).

81. *See supra* n.38 & *infra* Part II.D.

82. *See supra* Part I.D.

83. *See infra* pp. 426-27, Table 1; Ware, *supra* note 1, at 390 (Tbl. 1).

84. Ware, *supra* note 1, at 387.

states. Kansas is at the undemocratic extreme, that is, the extreme of bar power. But why is that a reason to reform? So what if Kansas has the least democratic system of supreme court selection in the country? So what if Kansas is extreme in giving power to the bar? "Extremism in the defense of liberty is no vice," proclaimed Barry Goldwater.[85] Perhaps extremism in the defense of bar power over judicial selection is no vice, either.

The problem with bar-power extremism in judicial selection is that it rests on a one-sided view of the role of a judge. It emphasizes the judge's role as legal technician at the expense of the judge's role as lawmaker. Of course, judging does involve the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). But judging also involves the exercise of discretion. Within the bounds of this discretion, the judge makes law.

This point is not new or controversial. Our common law system—going back centuries to England—rests on judge-made law.[86] And judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views. This, of course, is the basic reality exposed by Legal Realism nearly a hundred years ago.[87] And it is virtually impossible to find anybody who disputes it today. That "we are all realists now" is so thoroughly accepted as to be a cliché.[88] "It is a commonplace that law is 'political.'"[89]

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85. GREGORY L. SCHNEIDER, CADRES FOR CONSERVATISM: YOUNG AMERICANS FOR FREEDOM AND THE RISE OF THE CONTEMPORARY RIGHT 83 (New York University Press) (1999).

86. *See, e.g.*, Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 680 (2007) ("For many centuries in England, and well into the twentieth century there and in other English-speaking jurisdictions, the law of tort and contract—the heart of private law—was mostly judge-made common law, with statutes few and far between. Even today, much of the law of tort is common law, and although contract law in the United States is substantially governed by the Uniform Commercial Code, the UCC itself is largely a codification or restatement of common law doctrines and rules."); James E. Herget, *Unearthing The Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59, 64 (1995) ("unlike the continental legal tradition, the common law tradition recognized and accepted as authoritative, the proposition that judges make law").

87. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 169-212 (Harvard University Press) (1992) (positing that legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) ("[T]he program of unmasking law as politics [was] central to American Legal Realism. . . ."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decision-maker."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006)("Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as "formalists." It is thus no longer especially controversial to insist that common law judges make law.").

88. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

89. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985).

So let us bring the debate over Kansas judicial selection into the modern, Realist world. Let us frankly acknowledge that judges are not merely technicians; they are also lawmakers. Just as it is one-sided to denigrate the technical, lawyerly side of judging by claiming that judges are simply "politicians in robes,"[90] so it is one-sided to denigrate the lawmaking side of judging by claiming that the political views of a judge are irrelevant to his or her job as a judge.

Yet claiming that the political views of a judge are irrelevant is what leaders of the Kansas bar often do in defending their extraordinary powers under the state's un-democratic and elitist system of supreme court selection. For example, former Kansas Bar Association President Linda Parks stated:

> Ware seems particularly upset by the fact that there is a bare majority of lawyers serving on the Commission. Imagine that, lawyers on a commission that discusses lawyers and their qualifications for a job about which lawyers know the most. Even Ware admits, "Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers." That's exactly why lawyers serve on the Commission. If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist.[91]

Here, Parks analogizes a judge to a medical doctor. In selecting among doctors, we should consider their technical skills, not their political views, and so (Ms. Parks suggests) we should do likewise when selecting among potential judges. This analogy suggests that a judge's politics are no more relevant to judging than a doctor's politics are to reading an X-ray. In other words, this analogy rests on the myth that the Realists exposed nearly a century ago, the myth that judges never make law, but rather are mere technicians applying law made by others.[92]

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90. *See, e.g.,* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing "two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical 'umpires,' and another that views Justices as pervasively ideological 'politicians' in robes."); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419 (2003) (referring to "the cynical view that judges are merely 'Politicians in Judges' Robes'").

91. Parks, *supra* note 22, at 4.

92. The arguments of other Kansas bar leaders, such as Professor Robert Casad and Judge Janice Russell, are similarly flawed. These arguments emphasize judging's technical/lawyerly side while minimizing (perhaps even denying) its political/lawmaking side. *See e.g.*, Casad, *supra* note 2, at 428 ("The fact that none of our appellate judges has ever lost a retention-election is strong evidence that our selection system has produced the kind of *competent, unbiased judges* the people of Kansas want and need.")(emphasis added); Russell, *supra* note 2, at 441 ("Judges from municipal courts right up through the Supreme Court must follow the rule of law in deciding cases.").

2. Supreme Court Justices Have the Most Lawmaking Discretion

In contrast, more balanced discussions of judicial selection recognize not only that judging consists of both a technical/lawyerly side and a political/lawmaking side, but also that the relative mix of these two sides depends on the judge's level in the court system. The political/lawmaking side of judging is especially important for state supreme court justices because they are the final word on their state constitutions and common law.[93] Accordingly, the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices because justices' lawmaking powers far exceed those of the "professional technicians who sit on lower courts."[94] As Professor Paul Carrington explains, so-called "merit selection" of judges

> was popular in numerous states in the twentieth century, but *in its application to courts of last resort* it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.[95]

Similarly, Professor Michael Dimino concludes:

> Public involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.[96]

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93. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

94. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002).

95. *Id.* (emphasis added) (footnote omitted).

96. Dimino, *supra* note 4, at 451-52. *See also* John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499, 511 (2002) ("Perhaps, then, different judges should be chosen in different ways. Judges who decide cases that lack interest to the People could be chosen by simple executive appointment or merit selection; judges who rule on the most

So the case for democracy is strongest (and the case for elitism weakest) with respect to supreme court justices because the political/lawmaking side of judging is especially important at the supreme court level. Yet Ms. Parks and other leaders of the Kansas bar defend the extreme elitism of Kansas's supreme court selection process by relying on arguments refuted nearly a century ago.[97] Parks et al. defend the least democratic judicial selection method in the country as used to select the level of court at which the case for democracy is at its strongest.

For this reason alone, the case made by leaders of the Kansas bar fails. The elitism of the Missouri Plan (as used in Kansas and several other states) may be somewhat defensible in the context of trial courts. But at the supreme court level, the vastly unequal power between a member of the bar and her fellow citizens is unacceptable in a democracy. Whether the bar's extraordinary power affects the political leanings of the court is beside the point. With respect to judges who have the political power of a state supreme court justice, a system that counts a lawyer's vote more than 200 times as much as her neighbor's vote simply lacks democratic legitimacy.

That said, leaders of the Kansas bar often deny that their extraordinary power has any effect on the Kansas Supreme Court's political leanings. They strenuously assert that members of the bar have a wide variety of political views.[98] So, although it matters not for the (il)legitimacy of the Kansas Supreme Court's selection process, we can ask whether the extremely undemocratic nature of that process affects the political direction of that court.

3. Empirical Data, Scholarly Studies and Self-Serving Assertions

There is some evidence that the political views of the lawyers on the Kansas Supreme Court Nominating Commission are more liberal than the political views of their fellow Kansans. While Democrats regularly receive less than 40% of the total federal campaign contributions from Kansas,[99] a recent study found that Democrats received over 83% of the federal campaign

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controversial questions affecting social policy could be elected or appointed by the executive with legislative confirmation designed to probe judicial philosophy."); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 299 & n.42 (2007) ("In most civil law countries in Europe, the judiciary is a career service, akin to the American civil service system. . . . Competitive examinations are used to banish political considerations and personal favoritism from the selection process . . . . Yet even these countries use an overtly political process in selecting the members of their constitutional courts.").

97. *See supra* notes 86-96 and accompanying text.

98. *See, e.g.*, Casad, *supra* note 2, at 425-26 (the bar "is a diverse group of persons who have in common an interest in competent and unbiased judges."); Russell *supra* note 2, at 442-43 ("Are lawyers a unified faction? As anybody who has actually spent time with lawyers can tell you—NO!. . . Lawyers occupy the entire spectrum of political positions and beliefs, from ultraconservative to moderate to liberal.").

99. Open Secrets.Org: The Center for Responsive Politics, http://www.opensecrets.org/bigpicture/statetotals.php?cycle=2006 (last visited Apr. 17, 2009). The Center for Responsive Politics tracks contribution data by state over two-year election cycles. *Id.* (see drop-down menu next to "Election cycle.").

money contributed by lawyers on the Nominating Commission.[100] This startling difference raises intriguing questions about whether the Kansas bar is pushing supreme court selection to the Left of the state as a whole, as argued in an op-ed by Professor Kris Kobach.[101]

But at least two members of the Kansas bar are apparently not intrigued. In response to Professor Kobach, Professors James Concannon and Robert Casad wrote an op-ed pointing out that most of the lawyers on the Nominating Commission are registered Republicans and that the bulk of contributions to Democrats were made by a just a few lawyers.[102] Professors Concannon and Casad conclude that: "Total dollars contributed and the number of contributions made by one member, or even four members, are not rational measures a *reputable scholar* would use to determine the 'political allegiances' of the 22 lawyers who were members on the commission."[103] What then would be rational measures a "reputable scholar" would use to determine political allegiances? Concannon and Casad do not say.[104]

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100. SAMSON R. ELSBERND, KANSAS SUPREME COURT NOMINATING COMMISSION LAWYERS, 1987-2007 (2009), http://www.fed-soc.org/doclib/20090211_KSWPFeb2009.pdf (The Elsbernd study of Nominating Commission lawyers was prepared by running each individual's last name and state through the "Advanced Transaction Query by Individual Contributor" search engine on the Federal Election Commission's website. For purposes of this article, the individual contributions were then added by individual and by political affiliation to arrive at the totals cited).

101. Kris W. Kobach, Op-Ed., *Budget Woes Linked to How Justices are Chosen*, WICHITA EAGLE, Mar. 3, 2009, at 7A, *available at* http://kansasprogress.com/wordpress/index.php/2009/03/08/kris-w-kobach-budget-woes-linked-to-how-justices-are-chosen/.

102. James M. Concannon & Robert C. Casad, Op-Ed, *Data Does Not Support Claim of Radical Lawyers*, WICHITA EAGLE, Mar. 11, 2009, at 9A. In fact, of those lawyer commissioners for whom party affiliation was available, there were seven Democrats, twelve Republicans and zero Independents or members of third parties. *See infra* note 109. This translates into 37% Democrats, 63% Republicans and 0% Independents or members of third parties. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006). So the lawyers on the Commission differ from their fellow citizens in that the lawyers are less likely to be Independents or members of third parties.

103. Concannon & Casad, *supra* note 102. (emphasis added).

104. Do Professors Concannon and Casad live up to their own "reputable scholar" standard? Their reply to Kobach begins by describing him as "a law professor at a school outside Kansas." *Id.* Does the fact that Kobach's university is outside Kansas somehow undercut his interpretation of the data? If not, why would a "reputable scholar" mention it in a Kansas newspaper op-ed?

Perhaps Concannon and Casad believe that only those immersed in the Kansas legal system can know enough about Kansas Supreme Court selection to speak about it. For example, another of Casad's writings cites as authority the fact that he has "been a member of the Kansas bar for over fifty years." *See* Casad, *supra* note 2, at 426 (emphasis added). But if Casad's membership in the Kansas bar is relevant, would not the fact that Kobach is also a member of the Kansas bar be relevant, too? Although Casad and his co-author choose to mention that Kobach works outside Kansas, they choose not to mention that Kobach is a member of the Kansas bar and lives in Kansas. *See* THE AALS DIRECTORY OF LAW TEACHERS 692 (2007-08).

If Professors Concannon and Casad believe that only those immersed in the Kansas legal system can know enough about Kansas Supreme Court selection to speak about it then they are

In fact, federal campaign contributions are a telling indicator of political allegiances because actions speak louder than words. If I claim to support one political philosophy or another, a skeptic can rightly ask me to "put my money where my mouth is." And that is what several lawyers on the Kansas Supreme Court Nominating Commission have done. Of the twenty-two lawyer-commissioners from 1987-2007, thirteen made contributions reported in the database studied.[105] Of these, nine contributed more to Democrats while only four contributed more to Republicans.[106] So even leaving aside the drastic difference in dollar amounts (83% for Democrats and 17% for Republicans) and just counting heads, nine Democrats to four Republicans is a striking result in a state whose population as a whole is heavily Republican[107] and whose overall federal campaign contributions are heavily Republican.[108]

Interestingly, of the twenty-two lawyer-commissioners studied, seven were registered to vote as Democrats, while twelve were registered as Republicans.[109] In other words, the Nominating Commission's Democratic lawyers were more likely than its Republican lawyers to contribute to their party's federal candidates. And, in fact, some of the Republican lawyers made more contributions to *the other party's* federal candidates,[110] while none of the Democratic lawyers did this. See Table 2.

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not alone. For example, retired Kansas Judge Janice Russell says my views should "be entitled to very little weight" because I am licensed to practice law in a state other than Kansas. Russell, *supra* note 2, at 449. This belief–that only the views of Kansas lawyers deserve significant weight–exhibits disdain for the views of non-Kansas lawyers and for the views of Kansans who are not lawyers. The disdain for the views of non-Kansas lawyers risks insulating the legal system of Kansas from that of other states and thus inhibiting the interstate communication from which states can learn from each others' experiences. The disdain for the views of Kansans who are not lawyers feeds the impression of some non-lawyers, such as the former Speaker of the Kansas House, that the Kansas bar's extraordinarily powerful role in supreme court selection is a "good old-boy club." *See* Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL-JOURNAL, Jan. 6, 2007, at A1 (quoting Rep. Melvin Neufeld). The views of those who are not members of the club are, according to insiders like Judge Russell, "entitled to very little weight". Russell, *supra* note 2, at 449. Of course, debate would be biased in favor of the status quo if only views expressed by members of the powerful in-group were entitled to significant weight.

105. ELSBERND, *supra* note 100.

106. *Id.*

107. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006).

108. *See supra* note 99.

109. Ware, *supra* note 1, App. A (Democrats: Shamberg, Palmer, Johnson, Bradshaw, Woodard, Wright, and Riley; Republicans: Linville, Patterson, Gillen, Lively, Dalton, Achterberg, Hahn, McAnany, Hite, Bath, Rebein, and McQueen).

110. These lawyer-commissioners are Thomas J. Bath and Dennis L. Gillen.

Table 2
Federal Campaign Contributions by Lawyer Members of the Kansas Supreme Court Nominating Commission

	Democratic lawyers on Commission	Republican lawyers on Commission	Lawyers on Commission with no party affiliation available	Total
Contributions primarily to Democrats	7	2	0	9
Contributions primarily to Republicans	0	4	0	4
No contributions	0	6	3	9
Total	7	12	3	22

This data suggests that the Commission's Democratic lawyers tend to be more politically active and partisan than its Republican lawyers. In fact, this data suggests that the Democratic lawyers are *all* politically active and partisan. While only a small percentage of Americans make federal campaign contributions,[111] all of the Democratic lawyers made federal campaign contributions during the period studied. And they all made their contributions primarily to their own party's candidates. In fact, of the 162 studied contributions made by these individuals, 161 went to Democrats. Only 1 of these 162 contributions went to a Republican.[112] In sum, this data suggests that the Democratic lawyers on the Commission tend to be deeply and actively partisan Democrats.

By contrast, the data suggests that the Commission's Republican lawyers are much more of a mixed bag. These Republican lawyers include many who made no campaign contributions in the database studied. These lawyers presumably tend to be less politically active and partisan than those who do make contributions. Second, some of the Republican lawyers who did make contributions in the data studied, made their contributions primarily to Democrats.

111. According to the Center for Responsive Politics, less than 1% of Americans made contributions to political candidates, parties or PACs in 2008. *See* OpenSecrets.org, http://www.opensecrets.org/overview/DonorDemographics.php.

112. ELSBERND, *supra* note 100.

So the data presents the picture of lawyers on the Commission consisting of two relatively large groups (9 contributors to Democrats and 9 non-contributors) and one smaller group (4 contributors to Republicans).[113] This data supports the hypothesis that the political views of the lawyers on the Commission are more liberal than the political views of their fellow Kansans. Perhaps the Kansas bar's majority control over the Commission results in a more liberal Kansas Supreme Court than would result from a more democratic selection process, in which the bar had less power.[114]

Of course, leaders of the Kansas bar maintain that, even if the lawyers on the Nominating Commission tend to be more liberal than their fellow Kansans, this does not affect supreme court selection because these lawyers are always able to put aside politics and focus entirely on merit. For example, one of the Democratic lawyers on the Commission, Ms. Patricia Riley, writes that "the focus of the entire process is upon merit selection, without regard to political issues and without any attempt to determine how the applicants would vote on issues that might come before the court."[115] But this statement is consistent with the hypothesis that a liberal (for Kansas) Commission tends to result in more liberal applicants being selected by the Commission. It is possible that liberal commissioners tend to see more merit in liberal applicants than conservative ones (and that conservative commissioners tend to see more merit in conservative applicants than liberal ones.) In other words, it is possible that commissioners honestly believe that they invariably succeed in disregarding applicants' political views when in fact their subconscious sometimes gets the best of them.[116]

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113. Note that this picture is not refuted by assertions that the Kansas Bar is politically diverse, i.e., one can find Kansas lawyers at all points in the political spectrum. *See, e.g.*, Casad, *supra* note 2, at 425-26 (the bar "is a diverse group of persons who have in common an interest in competent and unbiased judges."); Russell *supra* note 2, at 442-43 ("Are lawyers a unified faction? As anybody who has actually spent time with lawyers can tell you—NO!. . . Lawyers occupy the entire spectrum of political positions and beliefs, from ultraconservative to moderate to liberal."). Why does Judge Russell describe the spectrum as "ultraconservative" to "liberal"? Why add "ultra" to the former but not the latter?

114. As noted above, a more democratic process is warranted regardless of whether it would change the political leanings of the court. *See supra* notes 97-98 and accompanying text.

115. Riley, *supra* note 2, at 436. In fact, the most recent appointment to the Kansas Supreme Court is a campaign contributor to, and personal friend of, the governor who appointed him. *See* Stephen J. Ware, Op-Ed, *Open Up the Process of Picking Justices*, WICHITA EAGLE, Jan. 23, 2009. And nine of the previous eleven justices appointed to the court belonged to the same political party as the governor who appointed them. Ware, *supra* note 1, at 393. Furthermore, a study of all gubernatorial appointments to the Nominating Commission over a period of twenty years showed that all twenty two individuals appointed during that period belonged to the same political party as the governor who appointed them. *Id.* at 392.

116. In conducting interviews, lawyers, like other humans, must guard against the tendency to process the information they are acquiring in a way that confirms their preconceptions. *See, e.g.*, Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).

> Social psychologists have shown that "preconceptions can be important to interpreting data and therefore can strongly influence all other tasks that depend on this most basic

So in assessing the role of politics within the Commission, one might want better evidence than self-serving claims by members of the Commission. An empirical test of such claims would benefit from data showing which members of the Commission voted for and against which applicants for positions on the Kansas Supreme Court. Unfortunately, that data is unavailable because of the Commission's secrecy.[117] We do, however, have the conclusions of scholars who have studied judicial nominating commissions around the country. I quoted some of them in the following two passages from my *Selection to the Kansas Supreme Court* where I wrote:

> Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very

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> inferential undertaking." Specifically, preconceptions and expectations can influence how information is labeled and understood, how ambiguous information is interpreted, and the degree to which information is scrutinized.
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> . . .
>
> Relatedly, psychology also teaches that individuals tend to exhibit a confirmatory bias in the ways in which they seek out and evaluate information. As a general matter, people unconsciously tend to seek out additional information that confirms their already existing views and disregard conflicting information, rather than attempting to systematically gather accurate information. Moreover, when evaluating information once it is obtained, there is a tendency for assessments of the information to be influenced by the extent to which the information is consistent with the attitudes or expectations of the person doing the evaluation-a tendency known as biased assimilation. Information that is inconsistent with expectations or beliefs is discounted and scrutinized more carefully than is expectation-congruent data.

Id. at 452-53 (quoting RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 67 (1980)).

117. Ware, *supra* note 1, at 391. Because of the secrecy of Commission's votes, we cannot know what sort of voting blocs form on the Commission. For example, Patricia Riley says "[s]upport for applicants has never broken down along lawyer/non-lawyer lines, or along issues unrelated to merit." Riley, *supra* note 2, at 435. But she cites no data to support this claim.

Professor Casad asserts that data on the party affiliation of members of the Commission "shows quite clearly that the commissioners do not vote in blocs." Casad, *supra* note 2, at 425. But blocs can divide along many lines. And even with respect to ideological blocs, party affiliation may not be as telling as campaign contributions.

As to blocs dividing along many lines, one recent letter on behalf of a candidate for the Commission is telling:

> As chair of the Supreme Court Nominating Commission, Anne can be counted on to serve the interests of all lawyers of the State of Kansas. She would not discriminate between plaintiff or defense attorneys, female or male attorneys, private practitioners or public sector attorneys. Her interest in and devotion to the profession are the reasons for her interest in this position.

Letter attached to email from Susan G. Saidian to listserv of Kansas bankruptcy lawyers (April 13, 2009). This letter clearly contemplates the possibility of blocs along lines such as plaintiff v. defense, female vs. male or private vs. public sector. This letter also includes the campaign promise that "[a]s chair of the Supreme Court Nominating Commission, Anne can be counted on to *serve the interests of all lawyers* of the State of Kansas." *Id.* (emphasis added). No mention is made of serving the interests of Kansans who are not lawyers.

> political, but that their politics—rather than being the politics of the citizenry as a whole—are "a somewhat subterranean politics of bar and bench involving little popular control."[118]

This passage quotes Political Science Professors Harry Stumpf and Kevin Paul, as does the following:

> [F]ar from taking judicial selection out of politics, the Missouri Plan actually tended to replace Politics, wherein the judge faces popular election (or selection by a popularly elected official), with a somewhat subterranean politics of bar and bench involving little popular control. There is, then, a sense in which merit selection does operate to enhance the weight of professional influence in the selection process (one of its stated goals) in that lawyers and judges are given a direct, indeed official, role in the nominating process. On close examination, however, one finds raw political considerations masquerading as professionalism via attorney representation of the socioeconomic interests of their clients.[119]

Professor Robert Casad seems uncomfortable with these conclusions. He does not like me attributing them to "scholars," and says I "should have said, '*Some* scholars,'"[120] implying that he is aware of other scholars who disagree with these conclusions. Indeed, Professor Casad asserts that "[c]ertainly not all [scholars] have reached that conclusion."[121] Yet he cites not even one scholar in support of his claim.[122] Instead, he offers his own unsupported, personal assertion: "I have been a member of the Kansas bar for over fifty years, and I have never encountered any underground 'politics of bench and bar.'"[123]

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118. Ware, *supra* note 1, at 396 (quoting HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998)).

119. *Id.* at 396 n.36 (quoting STUMPF & PAUL, *supra* note 118, at 142).

120. Casad, *supra* note 2, at 426 (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.* For an example of the campaign literature circulated among members of the Kansas bar, *see supra* note 117.

As a member of the Kansas bar, Professor Casad has more power in supreme court selection than he would have in any of the other forty-nine states. *See supra* section I. In selecting the Nominating Commission, his vote is worth over 200 times as much as a non-lawyer's. *See supra* section II.A. Yet he says that it is me, not him, who can have "no claim of objectivity" in assessing this system. Casad, *supra* note 2, at 424. He says this because my *Selection to the Kansas Supreme Court* was originally published by the Federalist Society. He goes on to say that I "come[] up with the Federalist Society's recommendation of state senate confirmation of all appellate judges." *Id.* at 427.

For the record, Professor Casad is wrong in asserting that senate confirmation is the Federalist Society's recommendation. "The Federalist Society takes no position on particular legal or public policy questions," http://www.fed-soc.org/doclib/20071126_KansasPaper.pdf. In fact, the Federalist Society has published papers taking a variety of positions on judicial selection.

Although Professor Casad may not be interested in Ph.D political scientists and their studies, my *Selection to the Kansas Supreme Court* did quote one more:

> This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges . . . . Finally, there are no significant, systematic differences between merit-selected judges and other judges.[124]

That is from Malia Reddick, of the American Judicature Society, which is perhaps the leading organization in favor of the Missouri Plan.[125]

4. Summary

So does the bar's extraordinary power over Kansas Supreme Court selection affect the political leanings of that court? In assessing this question, we can examine objectively-verifiable data (like campaign contributions), we can read the conclusions of scholars who have studied judicial nominating commissions around the country and we can contrast these with the unsupported assertions of those who exercise extraordinary power in the Kansas Supreme Court selection process. But however one assesses this issue, one's assessment does not alter the conclusion that the process lacks democratic legitimacy.[126] Giving a member of the bar far more power in selecting the supreme court than her fellow citizens have is unacceptable in a

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Some favor contestable elections, while others oppose them. *Compare, e.g.*, Michael DeBow, et al., *The Case for Partisan Judicial Elections*, Jan. 1, 2003, *available at* http://www.fed-soc.org/publications/pubID.90/pub_detail.asp; Brian T. Fitzpatrick, A Report on Reauthorization of the Tennessee Plan, *available at* http://www.fed-soc.org/doclib/20080225_ReauthorizationofTennesseePlan.pdf
with Stephen B. Presser, et al., *The Case for Judicial Appointments*, Jan. 1, 2003, *available at* http://www.fed-soc.org/publications/pubID.89/pub_detail.asp; Ware, *supra* note 1.

Strikingly, there is far more diversity of opinion among authors published by the Federalist Society than among the leaders of the Kansas bar who have published on the subject. Among the former group one can find support for contestable elections and senate confirmation, systems used by about 75% of the states in selecting their supreme courts. By contrast, among leaders of the Kansas bar one finds nearly unanimous support for a system used by only one state.

124. Ware, *supra* note 1, at 397 n.38 (quoting Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002)) (citation omitted).

125. *See supra* note 39.

126. *See supra* section I.C-D.

democracy, regardless of whether this inequality results in a more liberal or conservative court than would result from a more democratic selection process.[127]

To recap, the Kansas Supreme Court selection process lacks democratic legitimacy because of "the influence of the state bar and its members over the nominating commission."[128] To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly-elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in a state like Kansas that fails to offset the Commission's power with confirmation of judges by the senate or other popularly-elected body.

D. Retention Elections and Democratic Legitimacy

When confronted with the lack of democratic legitimacy in the supreme court selection processes of Kansas and other Missouri Plan states, lawyers defending this elitist selection system often assert that it is offset by the popular elections used to retain sitting judges.[129] In other words, advocates of the Missouri Plan portray it as a mix of elitism (which they would call "professional merit") at the initial selection stage and democratic legitimacy at the retention stage.[130] This argument, however, vastly overstates the degree of democratic legitimacy provided by retention elections. In fact, retention elections are largely toothless and thus rarely provide significant democratic legitimacy.

The retention elections used by Kansas and other Missouri Plan states are unusual in that the sitting judge does not face an opposing candidate; instead, the voters choose simply to retain or reject that particular judge.[131] For this and other reasons, retention elections are nearly always rubber stamps, and no Kansas Supreme Court justice has ever lost one.[132]

Predictably, members of the Kansas bar argue that this is because no Kansas justice has ever deserved to be removed from the bench; they have always been so meritorious. For example, Professor Casad says, "The fact that none of our appellate judges has ever lost a retention-election is strong

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127. *See supra* section II.C.1-2.

128. Jackson, *supra* note 17, at 154.

129. *See, e.g.*, Casad, *supra* note 2, at 427 ("In Kansas, our judges have fixed terms of office. The judges of the supreme court and courts of appeals must face retention elections periodically. Their 'accountability' is thus publicly tested directly before the people. Since we cannot provide the kind of independence protections that federal judges enjoy, we have to take steps to provide some measure of independence from partisan politics at the nomination level.").

130. *See id.*

131. *See supra* note 80. *See also* Ware, *supra* note 1, at 407.

132. In fact, only one Kansas judge at any level has ever lost one. *See* Eric Weslander, *Lyon County Judge Faced Assorted Allegations in 1980 Ouster Campaign*, LAWRENCE JOURNAL WORLD, Oct. 28, 2004, *available at* http://www2.ljworld.com/news/2004/oct/28/lyon_county_judge/.

evidence that our selection system has produced the kind of competent, unbiased judges the people of Kansas want and need."[133] But this "disingenuous"[134] argument conveniently ignores the fact that retention elections are nearly always rubber stamps everywhere they are used and that this outcome was intended by those who invented them.

Data on retention elections around the country (as summarized by Professor Brian Fitzpatrick) indicate that sitting judges win retention 98.9% of the time,[135] while—in stark contrast—incumbent supreme court justices running for reelection in states that use partisan elections win only 78% of the time.[136] This rubber-stamp aspect of retention elections is intentional. As Professor Charles Geyh puts it, "[I]t is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."[137] Professor Michael Dimino explains:

> [R]etention elections protect incumbency in multiple, related ways: They minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.[138]

Dimino concludes that "retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."[139] In other words, retention elections are something of a fraud.[140] They create a false

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133. Casad, *supra* note 2, at 428.

134. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003).

135. *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008). ("Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench. Removing the Illinois defeats from the data where the judges won more than 50% but less than 60% of the vote yields a retention rate of 99.5%.") (footnotes omitted).

136. *Id.*

137. Geyh, *supra* note 134, at 55.

138. Dimino, *supra* note 40, at 807-08.

139. *Id.* at 811.

140. *See* Fitzpatrick, *supra* note 135, at 495 ("[T]he architects of merit selection came up with what some scholars have concluded was a 'sop' to the public: the retention referendum. That is, the retention referendum was designed to make the public feel as though they had a role

veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.[141]

That said, retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy. Unfortunately, they do this at the judicial-retention stage, when it does the most harm to judicial independence. A wide array of scholars and other commentators agree that "the primary threat to [judicial] independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."[142] This problem is especially acute when a few of the judge's decisions, although well-reasoned in a technical, lawyerly sense, are easy to caricature in a "sound bite" television ad.[143] Accordingly, as Professor Dimino says, "[J]udicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits."[144] In sum, retention elections, like other forms of judicial re-selection, do not protect judicial independence.

So the Missouri Plan and its retention elections may be the worst of both worlds. While contestable elections threaten judicial independence (especially at the retention stage[145]), contestable elections at least have the virtue of conferring significant democratic legitimacy on the judiciary.[146] By contrast,

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in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.") (footnotes omitted).

141. For example, an op-ed by former Kansas Bar Association President Linda Parks refers to my mention of the federal system of judicial selection and retention as follows: "Ware mentions the option of changing the system by taking the retention vote away from the citizens and instead giving the power to decide the qualifications of the justices to politicians. More power to politicians? That's not what most Kansas citizens support." Parks, *Keep Selecting Justices on Merit, Not Politics*, *supra* note 62, at 7A.

142. *See supra* note 4.

143. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 650 (1999) ("[In retention elections,] voters have removed from the bench several judges after high-profile campaigns focusing on the judge's votes on a single issue, often the death penalty."); Shepherd, *supra* note 4, at 644 (citing examples); Jackson, *supra* note 17, at 133-34 ("Justice White's experience shows a danger of the commission system that should be addressed: the possibility that one decision, because of unfortunate timing or a highly coordinated special interest attack, could cause a judge to lose her position."); Roy A. Schotland, *New Challenges to Judicial Selection*, 95 GEO. L.J. 1077, 1099 (2007) ("California's Justice Kaus memorably described the dilemma of deciding controversial cases while facing a retention election, comparing it to 'finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.'") (quoting Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997)).

144. Dimino, *supra* note 4, at 451.

145. *Id.* at 457.

146. *Id.* at 459-60.

retention elections also threaten judicial independence but without the upside of conferring significant democratic legitimacy on the judiciary. So the Missouri Plan (as used in Kansas and other states) initially selects judges in a manner more elitist than democratic and then brings in a sliver of democratic legitimacy at the retention stage, precisely when it does the most harm to judicial independence.

By contrast, the best of both worlds can be attained with a more democratic (less elitist) method of initially-selecting judges followed by terms of office that are long and non-renewable. Such a system avoids the elitism of the Missouri Plan (taken to the extreme in Kansas) while best preserving judicial independence. Such a system is found in the United States Constitution.[147]

III. CONCLUSION

In supreme court selection, the bar has more power in Kansas than in any other state. This extraordinary bar power gives Kansas the most elitist and least democratic supreme court selection system in the country. While members of the Kansas bar make several arguments in defense of the extraordinary powers they exercise under this system, these arguments rest on a one-sided view of the role of a judge.

The bar's arguments rest on the view that judging involves only the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). The bar's arguments overlook the fact that judging also involves the exercise of discretion and that, within the bounds of this discretion, the judge makes law. At least since the Legal Realists, we have known that judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views.

The political/lawmaking side of judging is especially important with respect to state supreme courts because they are the last word on their states' constitutions and common law doctrines. So the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the

147. Professor Casad may agree with me on this point. He writes:

> The Framers provided a politically partisan system for selection of federal judges, but once the political hurdle of Senate confirmation has been overcome, the judges are independent of partisan politics. Judicial independence provided by life tenure and irreducible salary is an essential feature of the Framers' plan. A Senate-confirmation requirement makes sense if the judges are to become, as the federal judges are, free of any further "accountability" (to use the Federalist Society's buzzword). It does not follow, however, that state senate confirmation would make sense in a state setting where judges do not have independence protections of life tenure and irreducible salary.

Casad, *supra* note 2, at 427. Does this express Professor Casad's preference for the "Framers' plan" over the Missouri Plan? If so, then we agree on at least that much.

judges in question are supreme court justices. While Kansas has the least democratic supreme court selection system in the country, the accumulated wisdom of the other forty-nine states suggests that Kansas's system overvalues the technical/lawyerly side of supreme court judging and undervalues the political/lawmaking side of supreme court judging. Kansas can correct these problems and increase the democratic legitimacy of its supreme court by reducing the power of its bar.

TABLE 1
BAR CONTROL OF SUPREME COURT SELECTION

More Elitist, High Bar Control 				
"Hard" MO Plan, majority of comm'n selected by bar	"Hard" MO Plan, near majority of comm'n selected by bar	"Soft" MO Plan, sub-ordinate role for bar in selecting mm'n	"Senate" Confirm., bar selects some of comm'n	"Senate" Confirm., "lawyers' quota" on comm.'n
KS	AR IN IA MO OK NE SD WY	AZ CO FL TN	HI VT	NY CT RI UT

			More Populist, Low Bar Control
"Senate" Confirm., comm'n does not restrict Gov.	"Senate" Confirm., comm'n w/o special power for bar	Legis. Appt.	Contest-able Elections
CA DE ME MD NH NJ	MA	SC VA	22 states

Before the House Judiciary Committee
Wednesday, February 16, 2011

Testimony in Opposition to HB 2101
Anne E. Burke, Chair
Supreme Court Nominating Commission
913-498-8080
aburkejd@aol.com

I appear today on behalf of the Supreme Court Nominating Commission and its members, past and present, to speak in opposition to the passage of House Bill 2101.

Collectively, over nearly 50 years, members of this Commission have sent 174 names of highly qualified individuals to 10 Kansas Governors for consideration for appointment to 58 positions on the appellate bench. From Governor John Anderson's appointment of John Fontron to the Supreme Court in 1964 to Governor Mark Parkinson's appointment of Karen Arnold-Burger to the Court of Appeals this year, Kansans have been well-served by the Supreme Court Nominating Commission.

When the current Court of Appeals was established in 1977, the legislature invested this Commission with the responsibility for nominations to the Court of Appeals as well as Supreme Court. House Bill 2101 asks you to consider a dramatic change to that Court of Appeals selection process. I invite you to consider the system which you contemplate abandoning.

The Commission has a rigorous merit selection process for appellate judges. The Commission consists of nine dedicated members. Four are lawyers elected by lawyers who reside in each of the state's four congressional districts. Four are lay members appointed by the Governor. The Chair is a lawyer, elected by lawyers statewide. Questions have been raised in recent years regarding the constitutionality of the composition of our Commission. Federal Judge Monti Belot, in a case captioned *Dool v. Burke*, recently upheld the constitutionality of that composition. Although the *Dool* case is currently on appeal to the Tenth Circuit, I would note that the Ninth Circuit has upheld a similar holding in an Alaska case captioned *Kirk v. Edstrom.*

I turn now to the process which the Commission employs when a vacancy occurs on the appellate courts. A post card notice announcing the vacancy is mailed to each active attorney admitted to practice in Kansas. That means every individual eligible to apply for the position receives actual notice of the vacancy. A deadline is established for submitting application forms to the Commission. A copy of the application form is attached to my testimony and reveals the detailed information requested of each applicant. Particularly significant are the writing samples required to be submitted. An appellate judge spends his or her days researching the law and writing opinions. An appellate judge must be an excellent writer and possess the intellect and legal knowledge to decide not only cases which are controlled by existing precedent but also those which raise issues of first impression.

After the application period closes, members of the Commission receive copies of all applications and begin making background inquiries regarding those applicants. Any member of the Commission can make background inquiries about any of the applicants; however, individual assignments are also made to ensure that each applicant is thoroughly investigated. Criminal and credit checks are run in addition to the background inquiries.

Personal interviews are then scheduled, allowing each of the nine Commission members an opportunity to ask questions and engage the applicant in discussion regarding his or her qualifications for the job. We do not ask applicants where they stand on issues or how they would decide an issue as an appellant judge. We simply try to submit to the Governor the names of three (3) of the best thinkers, the best writers and the best researchers who are of even temperament, good demeanor and high ethical standards. The system has worked well so far.

Interviews are being conducted tomorrow and Friday for a current open position on the Court of Appeals. In an effort to create greater transparency in the process, the Commission is opening interviews to the public for the first time. They will be conducted in the Court of Appeals Courtroom in the Kansas Judicial Center, beginning at 9:00 AM. I invite you to attend.

The Commission is committed to an independent judiciary, selected on merit rather than political considerations. The Commission is equally committed to retention votes which allow the people of Kansas to periodically review the performance of our appellate judges.

On behalf of the Commission, I urge you to reject HB 2101.

Respectfully submitted,

Anne E. Burke, Chair
Supreme Court Nominating Commission

SUPREME COURT NOMINATING COMMISSION

Date _____

Full Name _____

Residence Address _____

City, State, Zip _____ Telephone No. _____

Office Address _____

City, State, Zip _____ Telephone No. _____

Email address _____ Cell Phone No. _____

Are you between the ages of 30 and 75 (yes or no)? _____

Place of Birth _____

Are you a citizen of the United States? _____

Are you a resident of Kansas? _____

How many years have you been a practicing lawyer and/or judge of a court of record or any court in the state of Kansas and/or a full-time teacher of law in an accredited law school? See K.S.A. 20-105 and K.S.A. 20-3002(a). _____

If requested to do so, are you willing to be personally interviewed by members of the Supreme Court Nominating Commission? _____

If you should be one of three nominated for one of the Kansas Appellate Courts, would you agree to serve if appointed by the Governor? _____

[NOTE: The Kansas Bureau of Investigation release form authorizes an investigation should you be one of three nominated. One notarized copy must be attached to the original of your application form. The Commission will conduct a preliminary investigation of credit, criminal, and traffic history of all applicants.]

The personal data information shown on the attached form is incorporated herein.

I hereby waive any privilege of confidentiality I may have concerning information which the Supreme Court Nominating Commission may desire to obtain from any source concerning my qualifications.

_____
Signature of Applicant

December 2010

An original and **ten** copies of this form and its attachments should be submitted to:

Carol G. Green
Clerk of the Kansas Appellate Courts
Kansas Judicial Center
301 SW 10th Avenue, Room 374
Topeka, Kansas 66612-1507

Letters in support of the nomination are encouraged. They should be addressed to the Commission Chair Anne E. Burke and mailed to the attention of Carol G. Green at the above address. Such letters may accompany the application form or may be submitted separately. Letters will be accepted until one week prior to interviews.

Please answer the following questions on 8 ½ x 11 paper. State the question, then give the answer.

Personal Data of:_____

1. List each college and law school you attended, degrees and dates earned, scholastic honors, and major academic activities. Please also state your class ranking and grade point average on graduation from law school.

2. List all state bars, courts, and administrative bodies having special admission requirements to which you are presently admitted to practice, specifying the dates of admission, whether you are currently a member in good standing, and whether there have ever been any restrictions on your practice.

3. (a) List chronologically your employment since becoming a member of any state bar. As to legal employment, include names and addresses of all law offices, firms, companies, or government agencies with which you have ever practiced, the nature of your affiliation with each, the general nature of your practice, and any other relevant particulars. Also, please provide the name, current address, and telephone number of a person, preferably your supervisor, who can verify your employment for each position listed.

   See K.S.A. 20-105 and 20-3002, which require a potential nominee to have been engaged in the "active and continuous practice of law" for at least ten years prior to the date of appointment. Include in your list the months and years of legal employment to verify that you meet this statutory requirement.

(b) List published articles on legal subjects as well as continuing legal education courses which you have presented during the past five years.

(c) Attach to this application form a writing sample which reflects your own work product, preferably containing legal analysis and citation to authority.

4. If in private legal practice, describe your typical client(s). If not in private legal practice, describe your employer or work arrangement, your position within the structure (are you supervised, how is work assigned, who receives your work product), and other information you feel would assist the Commission in understanding the nature of your current professional responsibilities.

5. What percentage of your court appearances in the last five years was in:

____% Federal district court
____% Federal appellate court
____% State general jurisdiction court
____% State appellate court
____% State limited/special court (Specify the court.)
____% Administrative bodies

6. (a) If your practice includes litigation, list and describe the five most significant cases which you personally litigated, giving case caption, number, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried, and the names of other attorneys involved.

(b) If your practice does not include litigation, describe the five most significant legal matters in which you were involved. Describe the nature of your participation in the matter and the reason you believe these experiences are relevant for consideration by the Commission. Provide the name of the client and the names of other attorneys involved.

7. Describe any additional arbitration, mediation, or other alternative dispute resolution experience that you would like to bring to the attention of the Commission.

8. (a) Have you ever held judicial office? If so, provide copies or give citations to significant opinions.

(b) Have you ever submitted your name for a vacancy on one of the Kansas Appellate Courts? If so, when?

9. (a) State your approximate individual net worth and the nature of your substantial financial interests.

(b) Are you a director or officer of any business or corporation? Do you hold an ownership interest of more than $5,000 in value (stock, partnership or proprietorship equity, or otherwise) in any business or corporation?

(c) Are you a member of any partnership or joint venture?

(d) If appointed, would you be willing to resign or divest yourself of any business interests, offices, or positions you now hold, if required by the Canons of Judicial Conduct?

10. Have you ever been charged or convicted of a violation of any law except traffic offenses? [DUI violations and reckless driving offenses should be included.] If you answer "yes" to this question, please supply the information requested in the Footnote.

11. (a) Have you, within the last ten years, failed to **file** any applicable local, state, or federal income tax return, schedule, or report required by law? If "yes," provide the name and address of the taxing authority, the tax year(s) for which you failed to file the return, schedule, or report, and the date you finally filed the return, schedule, or report.

(b) Have you, within the last ten years, failed to **pay** any taxes owed pursuant to state or federal law? If "yes," provide the name and address of the taxing authority, the tax year(s) for which you failed to pay, and the date you finally paid the taxes. If you continue to owe past due taxes, list the current balance of the taxes by tax year and by taxing authority.

(c) Has a tax lien or other collection procedure ever been instituted against you by local, state, or federal authorities? If "yes," supply the information requested in the Footnote.

12. Have you ever sued or been sued by a client or been a real party defendant in interest in any other legal proceedings? If "yes," supply the information requested in the Footnote.

13. Have you ever been disciplined or cited for a breach of ethics or professional conduct by any professional disciplinary body? If you are a judge, have formal proceedings ever been instituted against you by the Commission on Judicial Qualifications? If "yes," provide the information requested in the Footnote.

14. List all bar associations, professional associations, or professional societies of which you are or have been a member. Give the titles and dates of any offices which you have held and committees on which you served.

15. For the last ten years, list all civic, service, charitable, or other community organizations of which you have been a member, including the titles and dates of any offices which you have held and the activities in which you have been or are engaged in each such organization.

16. If you have been in the military service, state the length of service, the branch and dates you served, your rank on discharge, and the type of discharge.

17. List the names, addresses, and telephone numbers of five persons who are well acquainted with your legal ability.

    In addition, if you are a practicing attorney, list the names, addresses, and telephone numbers of three judges before whom you have made an appearance in the last five years and three lawyers who have been adverse to you in litigation or negotiations within the last five years.

18. If you are a judge, list the names, addresses, and telephone numbers of at least five lawyers who have appeared before you within the last five years.

    Include relevant case names and numbers.

19. State any other information which you believe should be disclosed in connection with the Commission's consideration of your potential nomination to one of the Kansas Appellate Courts.

Footnote

- The title of the proceedings.
- If formal proceedings have been filed, the caption of the case and the court or tribunal in which the case was filed and the location of same.
- The date of the alleged violation or incident giving rise to the charge.
- A statement of the relevant facts.
- The identity of the principal parties involved.
- The outcome of the proceedings, specifying any sentence, decision, and/or judgment entered.

Before the House Judiciary Committee Hearing
on HB 2101
Wednesday, February 16, 2011
Hearing Room 346-S.

Testimony of Debbie L. Nordling
Past Member 1998-2006 of the
Supreme Court Nominating Commission

Thank you for the opportunity to appear today to give testimony in opposition to House Bill 2101. My name is Debbie L. Nordling. I appear today as a past lay member of the Supreme Court Nominating Commission.

I am here today to testify in support of our current merit selection process for the appointment of Appellate Judges. I feel very passionate about our current system.

In 1998, I was appointed by Governor Graves to represent the 1st Congressional District. I served six years under Governor Graves and two years under Governor Sebelius.

During my eight years of service I participated in 14 appointments, which I believe to be the Kansas Records for people who have served on the commission. I have first hand experience that our current selection process consistently delivers excellent Appellate Judges to the State and is the most fair and non-threatening system.

The Commission consists of nine members. Four are attorneys, elected by attorneys from each of the State's four Congressional Districts. Four are lay members, appointed by the Governor. The Attorney Chair is elected by attorneys statewide. The Commission represents a balance and fairness for the whole state of legal and lay persons.

All nine members of the Commission receive instruction on the application process, backgrounds and investigations. We reviewed guidelines for interview questions, with an emphasis on confidentiality concerns and ADA guidelines. Three members of the Appellate Court spoke with us on the nature of our task, along with two law professors. We had great training for the review process.

Chief Justice Kay McFarland was very clear that the selection of judges should be based on their abilities. I was very aware of how important the effects our recommendations would have on the people who live and work in Kansas.

House Judiciary
Date 2-16-11
Attachment #23

Our current system does not select someone to be picked for a judge because of politics, nationality, gender, religion, money, power or geography. Our current system does select persons with a full range of qualities, self restraint, self-discipline, thoroughness of legal research, power of logical analysis, a sense of justice, a knowledge of the world, a clear writing style, common sense, fair mindedness, realism, hard work, foresight, modesty, a gift for compromise, candor and a commitment to reason.

The Commission's job to find candidates with the full range of qualities is not easy. Each application is reviewed, legal writings are read and discussed, background information is gathered and reviewed. Background information is gathered from colleagues, the community, and the judiciary. All nine members of the Commission activity work hard to gather all possible information on a candidate. Each member of the Commission represents a different part of the State, and a broad and diverse interview process for every candidate occurred. I want to publicly clarify that not once in the 14 appointments in which I participated did the attorneys on the committee try to control or dominate the selection process. The Commission focused on finding the most qualified candidates.

A good Kansas friend of mine always said, "Cream rises to the top." I have brought along a visual aid for you, as I taught school for ten years and sold insurance for 20 years. Consistently, in 100's of interviews we conducted, I saw the cream of Kansas rise to the top.

When the Governor received the names of three successful candidates from the Commission, from each pool, they were the cream of Kansas. I knew when the Governor picked, they could not go wrong. The three qualified persons to come before them were independent persons who would make decisions based on facts and the law of each case. I knew that the three persons would make hard decisions. They would not be swayed by politics or unpopular decisions.

I think to change the system to a Senate Selection Process is to invite the circus to town. I believe you will not have as qualified attorneys and judges consider such a position. I think there will be a hesitation to put a person and their families and communities through a highly political Senate confirmation process.

When I read HB 2101 I recognized this to be a radical change in our legal system. In the present system there is a check and balance. The "check" is that interested applicants express an interest in the job by filling out an application for an appellate court position and the best candidates are submitted to the Governor for selection to the vacant position; and the "balance" is that under

the current system the justices must be retained in office by the voters of Kansas. Any system of selection will have some level of politics, but I believe our current system has the least and a balanced political influence.

My first hint that the nominating commission might be controversial and political came in February of 2003. Governor Sebelius scolded the Commission for not sending more minority candidates to fill the bench. I have attached the article from the Kansas Legislature dated February 10, 2003. I thought Richard Hite, our chairman on the Commission, did an excellent job. He basically replied we were given a job, we did the job, so don't change the rules.

I started collecting articles from different papers across the state. I found it interesting to read the brewing argument. I found humor in the articles written that said the Commission was secretive, elitist, controlled by attorneys and out of touch. Not once in my eight years and 100's of interviews did any reporters call me and ask how the process worked.

I have attached another article from the Hutchinson News, dated August 1, 2005. The article helped me understand the repeated attacks on the Court and the Commission. The last paragraph in the article opened my eyes. It said, "That's likely to make the selection process an issue every time the Supreme Court issues a decision legislators don't like." Now, I finally understand some want this process to be about politics.

In 2006, just as my time on the Commission was winding down, different bills were proposed in the Legislature to change the selection process. It became very clear to me that some people in our State want to have appellate judges who are beholden to special interest groups. If we make the courts political, we can say goodbye to public trust and confidence.

In closing, I request that you not pass HB 2101. The current selection system is not broken or flawed. Merit selection has churned out the cream of Kansas to serve the laws of Kansas not the politics of Kansas. Our current judiciary selection process needs to remain independent of politics.

Respectfully submitted,

Debbie L. Nordling

DLN:ckh
Enclosures

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The Hutchinson News August 1, 2005

Little public discussion

Process for selecting Kansas Supreme Court justices has advantages – but flaws, too

By John Hanna
AP Political Writer

TOPEKA – Justice Eric Rosen will join the Kansas Supreme Court without much public discussion of his background, and legislators won't get a chance to weigh in on what they think of him.

That's the norm for any new justice for nearly a half century, but of late it has had conservative Republicans whining like children ordered to clean up their room.

But is their discontent reason enough to change a process that drains much of the politics out of selecting justices, a process that has applicants screened based on legal education, work history, judicial temperaments and even their ability to write clear decisions?

Rosen brings to the court a reputation for thoughtfulness and evenhandedness as a Shawnee County district judge, and his appointment by Gov. Kathleen Sebelius received widespread praise.

"The last thing we want to do is interject more politics into the process," said Bill Rich, a law professor at Washburn University of Topeka.

But the process also has its flaws.

It gives a small group of attorneys and gubernatorial appointees strong influence over court appointments, and there's no opportunity for the general public to weigh in on various candidates before an appointment. When applicants fail to make the cut, people typically don't find out why.

"There's no public scrutiny, and the public doesn't know what it's getting," said Kris Kobach, a University of Missouri-Kansas City law professor and a vocal conservative Republican.

The current process is dictated by a 1958 constitutional amendment. A nine-member commission – five elected by attorneys, four appointed by the governor – screens applicants for positions on the Supreme Court and Kansas Court of Appeals.

The commission names three finalists, and the governor has 60 days to choose among them. If the governor fails to make a decision, the appointment is made by the chief justice.

Voters do have a role. Supreme Court justices face a retention vote by the voters every six years and Court of Appeals judges every four years.

Republican legislators, particular-

# of picking Kansas justices

Focus on justice selection

ly conservatives, talk about having the Senate confirm new justices or having them run in elections.

It's no secret why. They don't like what the justices have been doing of late.

In December, a divided Supreme Court struck down the state's death penalty law.

In January, a unanimous court told the Legislature to fulfill its constitutional duty and spend more money on public schools. In June, the court set a figure – and its demand for an additional $143 million in aid forced a special session.

With education funding, conservatives said nothing justified the judiciary giving specific instructions to legislators, even a constitutional duty to fund a suitable education for every child. They fear court decisions will lead to large tax increases.

And conservatives everywhere are quick to howl like a scalded dog about "activist" courts whenever they see a ruling they don't like.

"This is a challenge and debate going on in Kansas and in a number of other states," said Grover Norquist, president of Americans for Tax Reform, the conservative anti-tax group.

Yet conservatives are correct that appointees get to Kansas appellate courts without having much public discussion of their records.

Also, the Supreme Court has never had a black or Hispanic justice, an unsettling fact for a state whose birth helped lead to the extinction of slavery and where the Hispanic population doubled in a decade.

Could those issues be addressed without changing the selection process itself, by getting a larger and more diverse pool of applicants, and if news organizations devote more attention to scrutinizing finalists?

"You need to have some accountability when offices of this importance are being filled," Kobach said.

Yet others are right to suspect conservatives' motives in seeking change.

Ultimately, they want courts that will let their legislators work unhindered and permit long-standing social mores to go unchallenged. Because they've won elections, some assume making the selection process more political will result in a judiciary far more likely to issue rulings they like.

"They're looking to find somebody who is not independent, not impartial, who favors a certain viewpoint," said Richard Hite, a Wichita attorney and chairman of the Kansas Supreme Court nominating commission.

Advocates of change also must confront the ghost of the infamous "Triple Play."

Before the 1958 amendment, Supreme Court justices ran in partisan elections; governors filled vacancies between elections.

In 1956, Gov. Fred Hall failed to win the GOP nomination for a second term. Supreme Court Chief Justice William Smith became ill and resigned shortly before Hall was to leave office in January 1957.

With only 11 days left in his term, Hall resigned as governor. It took his successor, John McCuish only minutes to appoint Hall to the Supreme Court.

The resulting furor helped give the 1958 amendment enough support to get on the ballot and into the constitution. No similar furor has occurred since.

However good the process, it's not as open and accessible to the public as systems with legislative confirmation or election of justices.

That's likely to make the selection process an issue every time the Supreme Court issues a decision legislators don't like.

23-4

Sebelius seeks minority judges

12:51 a.m.
- 2/10/2003

Gov. Kathleen Sebelius has told judicial nominating commissions she wants to appoint more minority judges. But the first nominees she received after the request were white men.

"The bottom line is this: The Kansas bench should look like Kansas," she said in a letter sent Jan. 23 to several groups, including the Supreme Court Nominating Commission and the district court nominating commissions.

The letter was distributed about a month after news reports showed former Gov. Bill Graves filled 55 vacancies on Kansas courts during his eight years in office. All of his appointees were white.

Last week, the Supreme Court Nominating Commission gave Sebelius the names of the three white nominees for an appointment to the Kansas Court of Appeals. Under state law, Sebelius must pick one of those three candidates or give up the selection to the state's chief justice.

Richard Hite, of Wichita, chairman of the Supreme Court Nominating Commission, said Friday that he hadn't yet received Sebelius' letter. But even if he had, Hite said he would have nominated the same three men because they were the most qualified out of 47 applicants.

"The job assigned to us is to select those we believe would be the best appellate judges, the ones most Kansans would like to have if they had a case in the appellate courts," Hite said.

One of the people passed over was Jennifer Lynn Jones, a black female municipal court judge from Wichita who in the past had been a district judge.

In her letter, Sebelius said Kansas' minority population was growing every year.

"Having a judiciary that reflects this changing racial and ethnic makeup is critical to maintain the credibility of our system," she said.

Sebelius said she didn't blame Graves for failing to nominate a minority candidate to the bench. Graves was given only one minority candidate from the nominating commissions.

"One of the fundamental problems is a lack of applicants from underrepresented communities," Sebelius said in her letter. She said she would work hard to reach out to those communities, and she urged the nominating commissions to do the same.

State Sen. Anthony Hensley, D-Topeka, said he was shocked that the nominating commission would not listen to the governor's wishes.

"If she runs into obstacles, we may have to take legislative action," he said. Hensley said he had no specific plan of action, but added, "if the message is delivered by the Legislature and the executive branch that we are serious about having a more responsive selection process, hopefully things will change."

Kansas Court of Appeals
Kansas Judicial Center
301 SW 10th Ave
Topeka, KS 66612-1507

Richard D. Greene
Chief Judge

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COMMENTS IN OPPOSITION TO HB 2101
Before the House Judiciary Committee
February 16, 2011

On behalf of a unanimous Court of Appeals, I offer a host of reasons why the proposed legislation would dilute the quality of judicial personnel on our court, politicize if not polarize the process of judicial selection, and create two classes of judges on the court, one of which would be insulated from accountability to the people of Kansas both before and after selection.

1. **The people of Kansas are best served by a judicial selection process that will find the best and brightest lawyers to fill vacancies on the Kansas Court of Appeals.** Our Court of Appeals decides approximately 1700 cases annually, consisting of appeals from our district courts in criminal, civil, probate, domestic, juvenile, and other matters. Additionally, our Court sits in review of all state agencies, including the Kansas Corporation Commission, the State Court of Tax Appeals, the Workers Compensation Appeals Board, the State Civil Service Board, and many others. Our Court plays a critical role in the state justice system and thus deserves a selection process that will send the best and brightest lawyers in Kansas to the appellate bench. The current merit-based system achieves this goal; the proposed legislation would not.

2. **The current system of judicial selection has worked well for the past 38 years.** The current nomination by the Supreme Court Nominating Commission and appointment by the Governor has served our State well. Each of our 13 judges was appointed by the Governor only after a thorough and rigorous nominating process established by the Commission, applying the statutory criteria of integrity, character, ability, experience, and judicial temperament, as well as allegiance to the rule of law. And from as many as 42

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applicants considered for each vacancy--after this demanding process--only the names of 3 are sent to the Governor. Today, as a result of this merit selection process, Kansas enjoys one of the best intermediate courts in the nation, as confirmed by extensive surveying both within our State by the Commission on Judicial Performance and by national rating agencies. More than 92% of those surveyed by the Commission consistently recommend retention of the current judges. For the last 8 years, the U.S. Chamber of Commerce ranked Kansas on average as 12th among 50 States for best legal climate, and our Court of Appeals has played a key role in that rating.

3. **The proposed "Federal Model" would politicize or polarize the process and deprive the voting public of any opportunity for involvement before or after the selection.** Without the Nominating Commission, the Governor would have unbridled discretion to select whomever he or she might choose, without regard to qualifications. The proposed legislation does not require any application process, investigation or vetting of credentials, or attempt to determine the best qualified person for appointment. Governors may be inclined to make such selections based purely on political considerations or favoritism rather than judicial qualifications. Furthermore, given the life tenure proposed, the people of Kansas would have no opportunity to vote for or against retention of judges chosen.

4. **The "Federal Model" has politicized the federal bench in a manner inconsistent with the people's interest in fair and impartial courts.** We need only examine the current health care debate to see evidence of this disturbing trend. Of the four federal district courts ruling on the constitutionality of the national health care reform legislation, two judges appointed by Democrats have ruled it constitutional, and two judges appointed by Republicans have ruled it unconstitutional. The people of Kansas would prefer their appellate judges to have no allegiance to a political party, to a political ideology, to a political constituency, or to political contributors. Because of our current merit selection process, our judges have allegiance solely to state law enacted by our legislature and to the federal and state constitutions.

5. **This Bill eliminates ALL criteria for service as a Judge on the Court of Appeals.** This Bill repeals K.S.A. 20-3004, which provides in part that a

person serving in this position shall be "of recognized integrity, character, ability, experience and judicial temperament, to the end that persons serving as judges of the court of appeals will be the best qualified therefor." Not only does the proposed legislation eliminate this set of merit-based criteria, it substitutes no criteria at all, thus opening the way for appointment of persons who may be selected for partisan political views rather than true judicial qualifications.

6. **Senate Confirmation adds nothing of value to the selection process.** Any capable federal judicial nominee has learned that saying nothing of substance, and dodging questions on important issues because the nominee might be called upon to rule thereon has reduced this process to a useless exercise that we do not need in Kansas. Astute observers have noted that the federal confirmation process has become a mere opportunity for senators to display their political viewpoints rather than a constructive part of the selection process.

7. **Objections to the composition of the Nominating Commission are not best addressed by its elimination.** First, the Commission has recently opened its process to the public with public interviews. Second, those voices objecting to attorney influence on the Commission can be silenced by merely changing the composition of the Commission, either in the Constitution for both appellate courts, or by legislation changing the composition for the Court of Appeals. Such changes might include either a change in the majority to lay members or to a full statewide election of some or all of the Commission members. The proposed legislation "throws the baby out with the bath water" by eliminating the vital role of the Commission in vetting the credentials of potential nominees.

8. **Lifetime tenure for appellate judges makes them less accountable to the people and deprives the people of any opportunity to vote for or against the performance of the judge.** Our current system gives to the people of Kansas numerous opportunities to vote on the retention or rejection of appellate judges, beginning with the next general election after appointment and every four years thereafter. The proposed legislation deprives the people of Kansas from any such involvement, and makes the lifetime appointee

unaccountable to the people. Moreover, why should any lifetime appointee pay attention to the results of statewide performance evaluation?

9. **Lifetime tenure would create two classes of judicial personnel for the next several decades.** The proposed legislation would keep in place the judges currently on the court and make them subject to retention elections, but would allow new lifetime appointees to serve without any such requirement. These two classes of judges would have little in common because the judges subject to retention would remain accountable to the people, whereas the new judges could sit back without any such concern and conduct themselves in a manner most pleasing to their partisan political allegiance or appointment authority. Not only will this compromise collegiality on our Court, it will polarize and potentially slow if not gridlock the appellate process.

10. **The people of Kansas chose our current merit selection system for good reasons and their will should not be overridden by a contemporary act of the legislature.** Our legislature should honor the vote of Kansans, who chose in 1972 to create a constitutional nominating commission for selection of Supreme Court Justices. The voters chose this system of selection over alternatives because they felt that it protected our judiciary from favoritism and best reflected a democratic process. A complete overhaul of this system without a similar vote of the people and without any justifiable basis is contrary to the principles of democratic government.

11. **Kansas will not be best served by a purely political system to select appellate judges.** Judges should be chosen based on the criteria set forth in K.S.A. 20-3004 to bring intelligent, experienced, well-reasoned, and impartial justice to every case before them. Their politics---their allegiance to a Governor or to the Senate—are not only of no relevance, but should never take the front seat to merit based qualifications. The people of Kansas deserve a fair and impartial appellate bench, and the current merit-based system has achieved this goal.

12. **There is no good reason to "fix" what is not broken.** As noted above, Kansas has one of the best intermediate courts in the nation, in large part due to our current selection process. The Nominating Commission sends to the Governor only the 3 best nominees based on true judicial qualification criteria

and absent any political allegiance. The Governor selects one of these nominees using his or her choice of political or other criteria---and represents the people in this process. The judge remains accountable to the people of Kansas through our retention elections, and thus assures an appellate bench that is qualified and accountable. The system is clearly superior to the proposed legislation for all of the reasons outlined above.

Thank you for the opportunity to express our views on this legislation. Our entire court joins me in requesting that you defeat this legislation and keep our court free of partisan politics, accountable to the people, and dedicated to justice promised by our state and federal constitutions.

Richard D. Greene, Chief Judge
Kansas Court of Appeals

TESTIMONY BY JAMES M. CONCANNON
DISTINGUISHED PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW
HB 2101
FEBRUARY 16, 2010

My name is Jim Concannon. I have taught courses on appellate practice, civil procedure, and evidence for 39 years. Proposals similar to HB 2101 have been presented in most sessions of the Legislature since 2005. Each time, the legislature has refused to change the Kansas method of selecting appellate judges which has worked effectively, and it should refuse to do so again.

While I was Dean of Washburn Law School, I had the privilege to serve as Co-Reporter, with Michael Hoeflich, then-Dean of the K.U. Law School, of the Kansas Citizens Justice Initiative, a 46-member, bipartisan Commission appointed by the Governor, leaders of the judiciary committees of the Legislature, and the Kansas Supreme Court to make recommendations to improve the Kansas justice system. The Commission included four sitting members of the Legislature. Not only did the Commission not recommend changing the way Kansas selects appellate judges, its 1999 report recommended, without a dissenting vote, that merit selection, together with judicial performance evaluations, replace partisan election in those districts still electing judges.

I have served as a member of the Kansas Commission on Judicial Performance since its creation. The Commission posted on its website evaluations of each Judge of the Court of Appeals, eleven in all, subject to election by Kansas voters in 2008 or 2010 to decide whether the judge should be retained in office, or not. The evaluations are based on confidential surveys of attorneys who appear before the court, both winners and losers, and all Kansas District Judges who must implement the court's decisions. They evaluate the appellate judges on 18 different criteria, including whether the judge is fair and impartial, is prepared for oral argument, writes clear opinions, and appropriately follows established legal precedent. I urge you to visit the Commission's website and review the survey results. The overall scores in the surveys, ranging from 3.32 to 3.64 on a 4.0 scale among attorneys, and from 3.48 to 3.68 among District Judges, together with the overwhelming percentages of attorneys and district judges who recommended retention of each Court of Appeals Judge attests that the Nominating Commission has consistently nominated highly qualified candidates for judicial vacancies and that the perception of their performance is very high.

Today, no doubt, we once again will hear the proponents argue that liberal lawyers have dominated the Nominating Commission. Data in Professor Ware's own study of the eleven appointments to the Kansas Supreme Court between 1987 and 2007 refutes that argument. Of the 22 lawyers who served on the Commission, 15 were registered Republicans, compared to 7 Democrats.[1] For 10 of the 11 appointments, there were more Republican lawyers on the Commission than Democrats. The only time there were more Democrat lawyers than Republicans, the Commission nominated two Republicans and one Democrat, and Republican

[1] I have confirmed the party affiliation of the three lawyer member to whom Professor Ware was unable to assign an affiliation, by calling family members and former law partners.

Ed Larson was appointed as a Justice. For eight of the 11 appointments, there were more Republican members of the entire Commission than Democrats. In two of the three instances in which Democrats outnumbered Republican on the entire Commission, there were two Republican nominees and one Democrat, and a Republican was appointed - Justice Larson and Justice Lee Johnson, the latter by a Democrat governor. Republican lawyers outnumbered Democrat lawyers in all five instances in which two Democrats were nominated, including the one instance in which all three were Democrats. In four of those instances, Republicans outnumbered Democrats on the entire Commission, the only exception being the oldest of the appointments, in 1987. For the most recent appointment, the Commission nominated one Republican, one Democrat and one candidate who was not affiliated with a party, and the Governor appointed the unaffiliated nominee.

HB 2101 would reduce the accountability of Court of Appeals judges to the electorate. Under current law, voters determine whether or not to retain a newly selected judge in an election one or two years after appointment, then every four years thereafter. As the non-retention of Supreme Court Justices in Iowa this past election shows, retention elections do hold judges accountable. Under HB 2101, that accountability will go away. It is not easy to balance the need for accountability against the need to protect the judiciary so that a judge will make legally correct decisions, even though they are unpopular, that are essential to preserve the rule of law. However, I believe our current law strikes the appropriate balance.

There simply is no public groundswell to change the way we select our judges. In the last 25 years, voters in four different judicial districts have been asked whether they wanted to continue having their judges appointed after nomination by a non-partisan nominating commission or instead change to a method that would eliminate screening by the commission of the qualifications of those seeking to become a judge. In every instance, they have voted to continue merit selection, often by overwhelming margins. In Johnson County in 2008, 59% of voters voted for merit selection, little changed from the 62% that voted for merit selection in 1984. In Lyon and Chase counties in 2002, the margin was 65%-35%. In Shawnee County in 2000, it was 62% for merit selection, comparable to the 64% who voted that way in 1984. Most recently, in 2010 in Leavenworth and Atchison counties, 56% voted for merit selection, up from 50.5% in 2000. When voters focus on how the role of a judge differs from that of a public official who is supposed to represent constituents, how a judge must decide cases impartially and without political influence, and on the special qualifications a judge must have, by a large margin they favor the greater assurance that the nominating commission gives that our judges will be qualified.

HB 2101 will increase the risk that we will have unqualified judges on our Court of Appeals. We should not adopt it.

HOUSE JUDICIARY COMMITTEE

Hearing on HB 2101
February16, 2011, 3:30 PM
Hearing Room 346 S

Submission of Justice Fred N. Six (Ret.)
1180 East 1400 Road, Lawrence, KS 66046
785-843-8445
newtonsix@aol.com

1. **Judicial Experience:** One year, Kansas Court of Appeals, 1987-88; Fourteen years, Kansas Supreme Court, retiring 2003.
2. **Education:** BA, History, University of Kansas, 1951; JD, University of Kansas 1956; LLM, Masters in the Judicial Process, University of Virginia, 1990.
3. **Military:** United States Marine Corps, 1951-1953; Korean War Service, 1952-1953.
4. **Professional:** Private practice of law, 1956-1987; Assistant Attorney General, Kansas, 1957-1958. An attorney member of the Commission on Judicial Qualifications from the Commission's creation in 1974 until appointment to Kansas Court of Appeals in 1987. Two terms as Chair. Member, Kansas Commission on Judicial Performance, 2006 – 2009, (Commission created by the Legislature in 2006 House Substitute for SB 337, K.S.A. 20-3201, *et seq.*)

COMMENTS IN OPPOSITION TO HB 2101

1. HB 2101, a Radical Change in a Basic Institution, Our Court of Appeals

The Kansas Court of Appeals was not in existence in 1957, the year of the "Triple Play", but was created by statute 20 years later. Since its creation the Court, functioning by merit selection under the Supreme Court Nominating Commission, has issued as of February 1, 2011, 4,017 published opinions.

Anyone who urges radical changes in basic institutions must bear a heavy burden of proof on two points. **First**, they must show by solid evidence that the existing system is broken and irreparable. **Second**, they must show that the proposed changes would make the institution better rather than worse. The proponents of HB 2101 have provided no evidence that our present system for selection of Judges for the Kansas Court of Appeals does not work well.

A. WHAT IS THE PROBLEM? IF IT ISN'T BROKEN, DON'T STRUGGLE TO FIX IT. HB 2101 IS A SOLUTION SEARCHING FOR A PROBLEM.

The Kansas Court of Appeals was created by statute in 1977 with seven judges; the number of judges was expanded to ten in 1987. Today the Court has 13 judges with a 14th position authorized in the future.

The Supreme Court Nominating Commission will be meeting on February 17-18, 2011, in open session to select three names to submit to the Governor for the 13th position.

Why HB 2101? Is there an opinion of the Court of Appeals that offends? If so WHAT OPINION? Are there judges that offend? If so, WHO, What is "the beef"?

B. HB 2101 BANS THE CITIZENS OF KANSAS FROM THE "JUDICIAL PLAYING FIELD;" THERE IS NO CITIZEN INVOLVEMENT, UNDER HB 2101, IN THE COURT OF APPEALS JUDGE RETENTION PROCESS.

Under the current selection system every four years the citizens of Kansas play a major role in determining whether or not a Judge of the Court of Appeals standing for retention is retained.

Reflect on the State of Iowa , November 2, 2010, three members of the Iowa Supreme Court were "not retained" by the vote of the citizens of Iowa, four members of the Kansas Supreme Court and nine members of the Kansas Court of Appeals were retained. Kansas voters "had their say." Nine Court of Appeals judges submitted their judicial performance to the will of the people of Kansas, and Kansas said, "Yes." The current selection and retention system for Court of Appeals Judges is an exercise in democracy at the "grass roots" level.

HB 2101 abolishes citizen participation in the retention process for Court of Appeals Judges.

C. HB 2101 CREATES A TWO TIER CLASSIFICATION OF JUDGES, THOSE WHO SERVE FOR "GOOD BEHAVIOUR" AND THOSE WHO STAND FOR RETENTION EVERY FOUR YEARS, THUS TOSSING A "WET BLANKET" ON COLLIGEALITY, AN IMPORTANT ASPECT OF A THREE JUDGE PANEL INTERMEDIATE COURT STRUCTURE.

2. Kansans Desire a Court of Appeals that Is Fair, Impartial, and Accountable.

A. WE NOW HAVE SUCH A COURT

A nine-member Supreme Court Nominating Commission of laypersons and lawyers examines, investigates, interviews, and ponders. The Governor must appoint one of the three names submitted by the Nominating Commission. Judicial accountability is tested at the next general election and again at the end of each Judge's four-year term. The Judge's name is on the ballot. The voters give either a "thumbs up" or "thumbs down" for retention.

B. THE KANSAS SUPREME COURT NOMINATING COMMISSION IS A CONSTITUTIONALLY VALID BODY.

Three recent Federal District Court opinions, including Kansas and the Court of Appeals for the Ninth Circuit have upheld the constitutionality of the lawyer -lay-person make up of nominating commissions.

1. KANSAS: *Dool et al v. Burke et al* No 10-1286-MLB, 2010 WL 4568993, Nov 3, 2010, [Fed. Dist Ct. Kan,] on appeal to the Tenth Circuit

2. IOWA: *Carlson et al v. Wiggins et al,* 4:10-cv-00578, Jan 19, 2011, [Fed. Dist Ct, Iowa]

3. ALASKA: *Kirk v. Edstrom*, 3:09-cv-00136-JWS, Sept. 15, 2009, [Fed. Dist. Ct. Alaska], affirmed on appeal in a published opinion, 623 F. 3rd at 898 [Ninth Circuit Court of Appeals, Sept. 30, 2010]

Federal Judge Monti Belot, for the District of Kansas, in *Dool*, said, among other things, "It is not this court's job to weigh in on the debate except to point out that Kansas voters approved the present system and the absence of evidence that Kansas's system has not worked and will not continue to work to ensure that qualified individuals are appointed to the Kansas Supreme Court and the Kansas Court of Appeals."[P.12]

Judge Belot noted in foot note 8, p. 12 of his opinion, "Yesterday, by margins of 60% or better, Kansas voters retained all four justices of the Kansas Supreme Court who were up for retention." [And the nine Court of Appeals judges as well]

Dool and the other plaintiffs asserted in paragraph 2 [page 1] of their Complaint:

"Plaintiffs challenge Kan. Const. Art. 111 Sec. 5(e) and Kan. State. Sec. 20-119 to-123 because the system they establish excludes Kansas voters from participation in the election of the Chairman and Attorney members of the Kansas Supreme Court Nominating Commission and, therefore, denies Kansas voters the right to equal participation in the selection of the Justices of the Kansas Supreme Court and denies them the right to vote for these officials."

This contention has been rejected in Kansas and by every court that has been asked to embrace it.

3. HB 2101Will Discourage Judges and Lawyers in Kansas from Becoming Nominees for Consideration as Members of the Court of Appeals

Under HB 2101, if a majority of the Kansas Senate declines to consent to the Governor's appointment, the potential of damaging the appointed person's professional reputation becomes a reality. Also, failure to consent will discourage other persons from submitting their names for a future vacancy. The result will be fewer Court of Appeals applicants.

Reflect, please on the contentious and battering U.S. Senate confirmation hearings of Judge Robert Bork and Justice Clarence Thomas, the nomination and withdrawal of Harriet Miers, and the confirmation hearings for Justices Samuel Alito, Sonia M. Sotomayor, and Elena Kagan.

Also, please consider the enormous time delays between the date of appointment and the date of the consent hearings encountered by lower court federal judicial appointees of both President Clinton and President Bush and now President Obama.

4. HB 2101Has the Potential For Damaging the Working Relationship Between the Executive Branch and the Legislative Branch.

In the event the Senate should fail to "consent" under HB 2101to an appointment, the failure of the appointment will reflect directly on the Governor. Is not such a denial of a Governor's appointment also an affront to the Governor? Is not the working relationship between the Legislative and the Executive impaired? Is not a harmonious relationship between the Legislature and the Executive a goal of good government for Kansas?

Under our current merit selection system, because of the vetting done by the Nominating Commission at the front end , the evaluation process of the new Kansas Commission on Judicial Performance, and the retention election after each four-year term, a requirement of Senate consent is unnecessary.

5. The Current Merit Selection System, as the Kansas Judicial Vehicle, Has a "Track Record" of Decisions Based on the Law, the Facts, and the Record From the Trial Court -- My 15 Years on the Kansas Appellate Bench:

During my time on the Court of Appeals and Supreme Court, I served with colleagues appointed by Governors Bennett, Hayden, Carlin, Finney, and Graves. My observation is that, at all times, each judge and justice approached the task at hand earnestly. The black robe worn by each judge and justice spoke for an independent Third Branch of Government, the Judiciary, free from political ebbs and flows. We came to the Court of Appeals and Supreme Court with past party affiliations appointed by both Republican and Democrat governors. We served on the Court as judges, not as Republicans or Democrats. Kansas has a recent history of electing governors from both parties. Grafting a requirement of Senate consent to an ongoing working system of judicial selection and abolishing the nominating commission has the potential of politicizing the selection process.

6. The Kansas Current Merit Selection System Is in "Good Mid-West Company."

Our surrounding sister states, Missouri, Nebraska, Colorado, and Oklahoma, as well as Iowa, all have adopted a "merit selection" method similar to that used in Kansas for Court of Appeal selection. ["Judicial Selection in the States", American Judicature Society [AJS] and "Judicial Merit Selection: Current Status, AJS, See the AJS web site, http.//www.ajs/home.asp

7. The Kansas Tradition, a Citizen Legislature, What is the Staff Employee Situation for Each Member of the Kansas Senate?

HB 2101 requires confirmation by a majority vote of "all members" of the Senate.

The Kansas tradition is that of a citizen legislature. The 40 members of the Senate serve the people of Kansas part time as Senators and not as full time government employees. Members of the United States Senate are full time federal government employees.

The United States Constitution, Art II, Sec 2 (powers of the President) requires a presidential judicial appointment to be made "with the advice and consent" of the Senate. The federal Senate Judiciary Committee has 18 members. Consider the confirmation hearings of

Justices Samuel Alito, Sonia Sotomayor, and Elena Kagen. "Squads" of full time Senate employees were utilized to prepare the 18 Senate Judiciary Committee members for the confirmation hearing vetting process. In addition, each of the other 82 Senators had his or her own staff team.

Query: What is the staff employee situation for each member of the Kansas Senate?

8. HB 2101 Suspends a Judge Designate "in air" Waiting for Senate Confirmation.

Assuming HB 2101had been in place, the work of the Court of Appeals could be unnecessarily impacted by the shadow of a judge designate suspended "in air" waiting for a Senate confirmation hearing. The legislature is only in session January to April, three months [with some days in April]. It is logical to assume that three-fourths of the vacancies on the Court of Appeals will occur during the remaining nine months when the legislature is not in session.

Also note that HB 2101 imposes no time limit on the Governor making an appointment. [Lines 14-24, P. 1, HB 2101.] The work of the Court could be adversely impacted by the "no time line" appointment discretion granted to the Governor.

WHAT IS THE FISCAL IMPACT ON KANSAS TAXPAYERS WHEN THE SENATE IS IN SPECIAL SESSION?

The cost of bringing the Senate back to Topeka for a special session of two days is estimated at approximately $28,000. If three-fourths of the Court of Appeals vacancies occur during the nine months the legislature is not in session, what is the fiscal impact on the State's budget deficit?

9. The Legislature Showed Wisdom in Drafting the Language Creating The Kansas Supreme Court Nominating Commission [NC], as an Independent Constitutional Body.

Your predecessors and Kansas voters showed wisdom by insulating the Judiciary from involvement in the Supreme Court selection process. Missouri's experience in 2007-2008, involving controversy between the Missouri Nominating Commission, "Appellate Judicial Commission" [Chief Justice Laura Denvir Stith was Chair of the Nominating Commission] and Governor Matt Blunt is Exhibit "A" supporting the wisdom of the KSCNC independent approach. If a similar controversy were to arise in Kansas the Governor would be dealing with the Chair of an independent Constitutional entity, thus, the Court of Appeals would be free to continue its important business of deciding cases as the judiciary would not become bogged down in a public controversy with the Governor.

A majority of the Missouri Nominating Commission members are members of the Missouri bar. [Mo. Const. of 1945, art V, Sec 25(a)-(d) (1976)], Mo. Sup. Ct. R. 10.03 [Seven members, one Supreme Court judge chosen by members of the court; three lawyers elected by members of the bar, three nonlawyers appointed by the governor.]

The independence of the NC guaranteed by our Constitution [Kan. Const., Art 3, Sec 5] removes the opportunity for a claim of judicial influence in the selection process to arise.

10. Composition of State Court Nominating Commissions.

The Tally, by State: L=lawyer, NL=Nonlawyer, E=Either, L or NL, and J=Judge.

A. The list of states where members of the Bar, excluding judge members, comprise a majority.

Six States in addition to Kansas

Delaware [5L, 4NL, 0J] The governor appoints four lawyers, the state bar president appoints the fifth lawyer.

Florida [6L, 3E, 0J] The governor appoints all members, but four of the lawyers are chosen from lists submitted by the state bar.

New Hampshire [6L, 5NL] All members appointed by the governor.

New Mexico [8L, 3NL, 3J] Four lawyers are appointed jointly by the state bar president and the judge members. The remaining members are chosen by the governor, the speaker of the house, and the president pro tempore of the senate. The dean of the state law school serves as chair.

South Dakota [3L, 2NL, 2J] The state bar president, rather than bar members, chooses the lawyer members.

Tennessee [10 L, 1NL, 6 E] The speakers of the house and senate each appoint eight members, and jointly appoint one member.

West Virginia [6L, 4NL, 1 E] The governor appoints four lawyer members; the remaining lawyer members are the president of the state bar and the dean of the state law school.

B. The list of states where members of the bar, including judges, comprise a majority.

Eight in Number
Alaska, Idaho, Indiana, Iowa, Missouri, Nebraska, Nevada, & Wyoming.

C. The list of states where there CAN be a majority of members of the bar, some positions may be held by members of the bar or by non-lawyers.

Ten in Number
D.C., Georgia, Maryland, Massachusetts, Minnesota, New York, North Dakota [District Court], Rhode Island, and Utah

24 States, in addition to Kansas, in which members of the bar either are a majority or could be a majority.

See website of the American Judicature Society, "Judicial Merit Selection: Current Status," charts and the current version is posted on the Judicial Selection in the States website: http://www.judicialselection.us/uploads/documents/Judicial Merit Charts OFC20225EC6C2.pdf

11. A New Player on the "Kansas Judicial Block." The Kansas Commission on Judicial Performance. [KCJP] **See, K.S.A. 20-3201 *et seq.* Support for Judicial Accountability.**

Kansans now have a judicial report card for a non-partisan evaluation system of Kansas Court of Appeals Judges, based on independent confidential surveys of lawyers, jurors, witnesses and others who have had direct experience with a judge's professional performance. All Justices of the Supreme Court and Judges of the Court of Appeals are subject to the public evaluation by the KCJP. See www.kansasjudicialperformance.org

To improve the performance of justices and judges and the judiciary as a whole, the Kansas Legislature has authorized an evaluation system based on surveys of persons who have had experience with the courts. The system enables voters to make informed retention election decisions about justices and judges who are appointed to the bench.

The evaluation of each Court of Appeals Judge was widely disseminated throughout the State. The KCJP provides "judicial accountability" to the judging equation, thus supporting a fair and impartial judiciary. Kansans now have detailed information on which to base a retention vote for a member of the Court of Appeals thanks to the Kansas Legislature's 2006 enactment of the evaluation legislation. The nine members of the Court of Appeals who were retained by Kansas voters in November 2010 were subject to published evaluations by the KCJP. Under HB 2101, the judicial evaluations prepared by the KCJP would be rendered meaningless because judges serving for good behavior would not be subject to voter approval.

1. **Vetting by the Nominating Commission**
2. **Appointment by the Governor**
3. **An evaluation made public before the retention vote each November .**
4. **A retention vote opportunity for all Kansas voters blend to create the finest procedure for selection of Court of Appeal Judges.**

12. 2010 U.S. Chamber of Commerce State liability Systems Ranking Study. A high ranking for the Kansas Court of Appeals.

The latest ranking report from the U. S. Chamber, March 9, 2010, ranks Kansas 14th in "Overall rankings of State liability Systems," The Chamber study reports the "legal climate" by state on civil liability. Kansas was ranked 10th in 2008 in overall ranking. For the last eight years of the Chamber rankings, Kansas has an average overall ranking of 12th out of the 50 States. **A large percentage of the civil cases decided on appeal in Kansas are decided by the Kansas Court of Appeals. [ie]**

For 2009: Supreme Court Civil – 76
Court of Appeals – 498
For 2010: Supreme Court Civil – 54
Court of Appeals – 484

Ten times as many civil cases decided by the Court of Appeals in 2009, and nine times as many in 2009.

The current method of judicial selection has produced a "winning" Court of Appeals team. A national average ranking of 12th out of 50 for the past 8 years is a record all Kansans can be proud of. A full copy of the Chamber report is found at: www.InstituteForLegalReform.com

13. HB 2101Does Not Support the Independence of the Judiciary.

Why Impose the Senate Consent Requirement in 2011 after thirty-four years of Merit Selection for Court of Appeal Judges?

HB 2101 is a Paper Solution Chasing a Non-Existing Problem. "You Don't Fix it, if it isn't Broken"

Thank you for the opportunity to appear before the Committee. I appear as a retired Supreme Court Justice and a former Judge on the Kansas Court of Appeals. The comments in this submission are my own.

Respectfully Submitted,
Fred N. Six

League of Women Voters® of Kansas

February 16, 2011

Honorable Lance Kinzer
House Judiciary Committee
Kansas House of Representatives

Chairman Kinzer and members of the committee:

Thank you for allowing me to present testimony on behalf of League of Women Voters of Kansas in opposition to HB 2101. Frankly, we see no point in changing a judicial selection process that has served Kansans honorably and effectively for many years. A non-partisan Nominating Commission has ensured that candidates for the Appeals Court have been chosen because of their merit, not their politics. Those selected by the governor from their recommendations have served with distinction, free from any political obligations to party or public officials.

The proposal for Senate confirmation of the Governor's appointment introduces a political element League believes unnecessary and perhaps counter-productive. Furthermore, League maintains that judges at every level - District, Appeals, and Supreme - should be held accountable to the public through regular retention elections. Creating a two-tiered system in which sitting judges are required to stand for re-election, and newly appointed judges do not, does not make sense to us common sense Leaguers. Further we object to the extra expense incurred should senators be called back into special session only to approve an appointee. The judicial system in Kansas, unlike in some other states, is highly respected nationwide for its fairness and independence. Yes, attorneys may comprise the majority of the Nominating Commission, but we argue their professional experience uniquely qualifies them to understand the demands of the position and to assess merits of judicial applicants. They, together with their non-attorney colleagues, can focus solely on upholding the integrity of the judiciary without regard to any political agenda. Kansans deserve the assurance that any judge before whom they appear is seated because of his merit, not his or her politics.

League maintains a non-politicized court system promotes an independent third branch of government, ensuring the necessary checks and balances of our democracy. **Judges must be servants of the law and the constitution, not of politicians or special interest groups.**

League urges you **not** to support HB 2101. We have an effective, non-political selection system. Let's keep it.

Diane Kuhn, Vice President, League of Women Voters of Kansas

House Judiciary
Date 2-16-11
Attachment #27

618 S. Kansas Ave. Suite B1
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Topeka, KS 66601

Phone: 785-234-5152
E-mail: lwvk@sbcglobal.net

KANSAS BAR ASSOCIATION

TO: **The Honorable Lance Kinzer, Chair**
And Members of the House Judiciary Committee

FROM: **James L. Bush**
On behalf of the Kansas Bar Association

RE: **HB 2101, amending the Kansas Court of Appeals**

DATE: **February 16, 2011**

Mr. Chairman and Members of the House Judiciary Committee;

My name is James L. Bush and I appear on behalf of the Kansas Bar Association. Unlike the distinguished jurists and legal scholars who you have heard or will hear testify today, I'm just a small town lawyer who has spent his entire professional career in small county-seat towns in Kansas. For twenty-three years I practiced law in Smith Center Kansas where I regularly tried cases in the District Courts. I've argued cases before the Kansas Appellate Courts and the 10th Circuit Court of Appeals. For the past thirteen years, I've been a trust officer with the Citizens State Bank and Trust Co. in Hiawatha Kansas. So, my background could hardly be described as academic or theoretical. I'm just an average hard working small town lawyer.

I've always believed that if something isn't broken, you don't need to fix it. Those who are trying to convince the members of this committee that the Kansas Court of Appeals is broken and needs to be fixed are not Kansas lawyers who regularly appear before our appellate courts. One of the most vocal proponents for change is a KU law professor who has never practiced before our courts. If change is needed wouldn't there be a hue and cry from Kansas lawyers aggrieved by the decisions of our appellate courts? There isn't. If change were needed, wouldn't we have heard from disgruntled parties who feel that their cases were not handled properly? There isn't. If change were needed, wouldn't voters have come forward to vote not to retain our appellate judges? They haven't, not once!

As past President of the Kansas Bar Association, I can tell you Kansas attorneys who regularly appear before our appellate courts believe our current system works. Those attorneys are prosecutors, criminal defense attorneys, civil defense lawyers, plaintiff's lawyers, general practitioners and even attorneys like myself, who focus on wills, estates and estate planning. Yes, Kansas lawyers feel the current system is not broken and does not need to be changed. However, it's VERY important to understand that Kansas

House Judiciary
Date 2-16-11
Attachment #2P

Lawyers are not a monolithic body representing just one class of clients. As I've indicated, some are prosecutors, representing the state in criminal prosecutions. Some are small firm or solo practitioners appointed (at drastically reduced fees) to represent indigent criminal defendants. The backgrounds and experiences of Kansas lawyers are as diverse as the parties they represent before our courts. Therefore, the argument that Kansas lawyers control our courts is flawed in that Kansas lawyers have no unified interest that they are trying to protect. Control? For what purpose? We represent everyone, rich, poor, big business, cities and municipalities, school districts, injured parties, decedents estates, banks, farmers, co-ops, EVERYONE. We're not even compensated the same. Some are employees of businesses or units of government; some are paid by contingent fees, some for reduced fees for indigent clients and some for no fees at all. Kansas lawyers simply have no unified interest that they are seeking to protect by supposedly controlling the appointments to our appellate courts. The ONLY thing that all Kansas lawyers share in common is their education and belief that our courts should be fair and just.

This is a political body and presumably a body that focuses on public issues from a political perspective. Our Kansas courts are not political bodies. Before taking action on this bill, I would urge each and every member of this committee to actually read a few of the decisions handed down by our Kansas Court of Appeals over the past year. If you do so, you'll quickly notice that the overwhelming majority of decisions handed down by our appellate courts DO NOT deal with matters of compelling public policy. The cases are important to the parties involved but to few others. Our appellate courts are NOT the United State Supreme Court.

I last appeared before this committee in 2009 when similar efforts were brought forth to change the way we select our appellate judges. I recall being puzzled at the time as to why "legal experts" were being flown in from diverse parts of the United States to tell us what's wrong with our judicial system? I suspect that those who funded the expense of these experts have an agenda and it's a political agenda, not an agenda to improve the quality of justice for all Kansans. Ironically, with all the talk about Washington D.C. being "out of touch", this bill is nothing more than an attempt to impose Washington D.C. politics on our Kansas court system. Maybe it should be the other way around.

Finally, I have a unique perspective that distinguishes me from all of the other conferees appearing today. I have twice been selected as a member of a panel of three attorneys whose names were presented to the governor for appointment to the court of appeals. At no point in that process were my political views discussed. At no point were my views on controversial issues discussed. To my knowledge, none of my peers were interviewed regarding my political views or beliefs regarding potentially controversial issues. I believe I was nominated because I was perceived as a competent attorney, an attorney with a rural Kansas perspective and an attorney who was respected by his peers as being of sound judgment and reasonable intelligence. To my disappointment, I was not selected on either occasion. Nevertheless, I believe the process is absolutely sound and focused on selecting judges based upon their competence, objectivity, professionalism and character, not their politics. To change the current system will do nothing more than

to politicize the delivery of justice in the state of Kansas. I strongly urge you to defeat this bill. Our system works and those who try to convince you otherwise have a political agenda.

On behalf of the Kansas Bar Association, I thank you for your time this morning and would be available to respond to questions.

About the Kansas Bar Association:
The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,200 members, including lawyers, judges, law students, and paralegals. www.ksbar.org

TO: HOUSE JUDICIARY COMMITTEE
FROM: JON NEWMAN, PRESIDENT WICHITA BAR ASSOCIATION
RE: HB 2101
DATE: FEBRUARY 14, 2011

Thank you for the opportunity to appear today and comment for your review of House Bill 2101. My name is Jon Newman and I have been in private practice in Wichita for more than 15 years. I am currently President of the Wichita Bar Association (WBA). I am here at the direction of the WBA Board of Governors in opposition to HB 2101 and in support of the current merit selection process for selecting appellate court judges.

The Wichita Bar Association is a professional legal association founded in 1915 and consists of over 1,300 members. One of the Association's missions is to promote learning, garner respect and appreciation of the law, and build public confidence in the administration of justice. The WBA has a tradition of public service in educating the community regarding our system of justice.

On this, the seventh occasion in the last eight years, of the discussion of whether Kansas should change the method of selecting appellate judges, you may be expecting another detailed discussion of the system of merit selection in this state. But I do not want to dwell too long on that because much of it is recounted in the remarks of other conferees. I really want to have a different conversation with the committee this year.

House Judiciary
Date 2-16-11
Attachment #29

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I could point out that some of objectives of the Judiciary have not yet been achieved because it has had to focus, as have other branches of the government, on the difficult task of making do with less money when the demands on courts in these difficult times are greater than ever. Once the courts are fully funded they will be able to move forward with efforts to increase their efficiency and effectiveness, but I suspect that many of you are more interested in results, not explanations.

I could trumpet the fact that in 2010, despite all the human and material resource constraints, 469,345 civil, criminal and other types of cases were filed in the district courts and 469,205 were terminated. And 1,854 appeals were filed with the Court of Appeals and the Supreme Court and 2,784 appeals were terminated. But if you were one whose case was still pending those statistics may not mean much.

I could leap to the defense of the appellate judges and justices who, like all of us are not perfect, but nevertheless in the vast majority of cases the decisions of our district court judges are affirmed in whole or in part. Or, I could remind you that of the 1,354 written decisions issued by the appellate courts in 2010, very few of those cases garnered any mention in the press or stirred up any significant controversy among the public. These are published statistics and similar to those published last year, but facts can be inconvenient things for those seeking to change a system that is not broken.

The conclusion that the Kansas judicial system is not broken is echoed in the results of a recent survey by The U.S. Chamber of Commerce who published a study 3/9/10 entitled *2010 U.S. Chamber of Commerce State Liability Systems Ranking Study*. It is a 106 page report covering multiple issues. It was conducted for The US Chamber Institute for Legal Reform. In the overall ranking of judicial liability systems Kansas ranked 14th out of 50 states. The Kansas judicial system

ranked 12th regarding damages and 11th regarding judges' impartiality. The Kansas judicial system has consistently received favorable rankings in prior surveys.

I could spend a great deal of time listing the things our courts have managed to accomplish if that would give some reassurance, but I propose only to take a detour to focus on a single point.

The proponents of HB 2101 focus on the process of selecting judges rather than on judicial outcomes. They transport the Committee back in time to the debate during the ratification of the Constitution of the United States.

Here is a founding principle of this democracy with which the proponents cannot argue against: The rule of Law is unsustainable without scrupulous adherence to the principle of separation of powers. The separation of powers is the fundamental philosophy underlying the Constitution and the framework upon which government is structured. George Washington, after the Constitutional debates said "the true administration of justice is the firmest pillar of good government".

Our founding fathers understood that courts are important, not simply as a way to resolve disputes – other mechanisms are also available to resolve disputes – courts are important because they resolve disputes impartially, fairly and according to law. The founding fathers held the common conviction that the Separation of Powers was an essential barrier to tyranny, to hold the government in check and to protect individual rights and freedoms. But words alone written in the Constitution are not sufficient. As James Madison said "while these paper provisions are necessary the security of real separation of power – ***consists in giving those who administer each department the necessary means to resist encroachment of the others."*** It was Alexander Hamilton who was concerned about the need for ***"a steady, upright, and impartial administration of the laws,"*** by a judiciary of ***"firmness and independence."***

The proponents of HB 2101 want to revisit the natural tension between principles of democratic accountability and the need for fair and impartial courts—a debate that is as old as the Republic. It is precisely these opposing views that have led to the development of the present system that strikes a balance between the two principles. Our system of merit selection falls somewhere between judicial elections at one extreme, and pure appointment by the Governor at the other extreme. This balance was struck in Kansas decades ago. The proponents of the legislation now want to shift the balance. If we were creating a system from whole cloth it would make sense to engage in an academic debate about the process. But we are not. We have an existing system. And a legitimate question for the proponents of HB 2101 is why consider a change now?

Under the current bill all of the judges of the Court of Appeals would be selected by the Governor. No one else would pre-screen or vet the nominees. The fact that the Senate must approve these appointments does not provide the type of check contemplated above, that is likely to foster public confidence in the fairness and impartiality of the Court of Appeals.

It comes down to this—Kansas must decide whether it wants to retain the non-partisan nominating commission to choose fair and impartial judges. If there is some aspect of that process that is no longer working then we can have a meaningful debate only if we identify it with clarity and then articulate exactly what we want to achieve and why we think it will be better. I am afraid that given the stellar record of our courts, the arguments of the proponents fall far short of that.

According to Edmund Burke the British philosopher generally regarded as the father of conservatism, this principle is all about preserving the *status quo* or, at least, the avoidance of radical or unstructured changes. This philosophy is in line with the time tested saying that "if it isn't broke don't fix it," implying that an unnecessary change must be avoided. Our system of selecting Court of Appeals judges is far from broken. The Wichita Bar Association opposes HB 2101.

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HOUSE JUDICIARY COMMITTEE

Hearing on HB 2101
February16, 2011, 3:30 PM
Hearing Room 346 S

Submission of J. Eugene Balloun
On behalf of Kansas Association of Defense Counsel

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1. **Education:** B.S. in Business, Kansas University, 1951; JD, University of Kansas, 1954.
2. **Military:** United States Air Force (JAG), 1955-1957 (highest rank: Captain).
3. **Professional:** Private practice of law since 1957. Argued more than 100 appeals before the Kansas Supreme Court and Kansas Court of Appeals.

COMMENTS IN OPPOSITION TO HB 2101

To adopt HB 2101 would eliminate the right of Kansans to participate in either the selection or retention of Judges of the Court of Appeals. Currently, the citizens' voices are heard twice. First, citizens participate in the initial selection of judicial candidates through the Supreme Court Nominating Commission. That Commission has done an outstanding job of insuring that only the best qualified candidates are submitted to the Governor for appointment. Second, once appointed, the judges must again be approved by voters each four years. HB 2101 would totally eliminate such citizen participation in the selection and retention process.

In 1958 the voters of Kansas were so outraged by political shenanigans that they approved a constitutional amendment requiring merit selection of Supreme Court justices. Later, the same process was adopted when the Court of Appeals was created. That system has worked extremely well and has placed highly qualified justices and judges on the bench. There simply is no reason to change a process that has served Kansans so well for more than fifty years.

Merit selection is a process that uses a nonpartisan commission of lawyers and non-lawyers to investigate, evaluate, and occasionally recruit applicants for judgeships. Applicants are chosen on the basis of their intellectual and technical abilities and experience, and not on the basis of their political or social connections. The commission submits the names of the three most qualified applicants to the Governor, who must select one of the persons on the list. Kansas voters decide whether to keep a judge during retention elections.

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Any one of us should be able to walk into a courtroom with confidence knowing that our side of the story will be heard and that our rights will be protected. We expect our judges to have no allegiance to any particular person, political party, or point of view in the courtroom. We want them to listen to both sides and make principled decisions based only on the law and the facts of the case.

As Kansans we must insist on having a sacred boundary we do not cross when it comes to our court system. If we can't trust that our courtrooms will be the one fair place to resolve problems based on the law rather than what is popular at the time – where else can we turn?

The Governor and the Legislature can make decisions based on polling data or focus groups. That's because elected politicians are supposed to represent the people.

But our judges do not represent the people. They represent the law. They must be able to make unpopular decisions, so they do what's legally right – not necessarily what's popular. Otherwise, the mob will always rule.

When the Legislature reacts to unpopular court decisions by proposing that we change the way we select our judges so that through a political screening process they can question the nominee and better know how that person is likely to decide controversial cases in the future, we have crossed the sacred boundary.

Currently under consideration in the Legislature is a proposal to abolish the nonpartisan commission in favor of a process whereby the Governor makes an appointment followed by Senate confirmation.

That's not a good idea. It put politics back into the selection process. The nominees will become more like politicians. There will be highly politicized opportunities for grandstanding, for combative questioning, for special interests to ply their trade, for "issue advertising" targeting issues of intense political interest, and fundraising to mount a successful confirmation or non-confirmation effort. The modern advent of political action committees and special interest groups which have invaded the federal selection process in the last 30 years underscores only too well the mischief and hysteria that political screening invites.

The politicalization of the nomination of Judge Robert Bork in 1987 even gave use a new verb: to "Bork" someone, meaning to systematically attack and disparage a nominee.

Our current merit selection process, though it is not perfect, minimizes the political elements which can compromise impartiality and the integrity of courts. HB 2101 would totally eliminate the process for determining whether judicial candidates are qualified before they are appointed. Political connections would become more important than legal expertise. We have seen examples of that in the Federal Judge and Justice selection process. And once appointed, an unqualified judge could not be removed by the voters. Under the Federal system, the American Bar Association carefully studies and evaluates nominees for judicial nomination. The ABA does just what the Kansas Supreme Court Nominating Commission does – vetting the nominees on the merits of their qualifications. The real difference is that

the Kansas system is a statutorily required true filter of judicial qualifications, while the ABA evaluations are merely advisory.

Kansans do not need, nor should they want, to replace merit selection with a political process which invites unsavory attacks or subjects the selection of our appellate judges to the type of backroom lobbying that invariably results.

KANSAS ASSOCIATION FOR JUSTICE

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TO: Representative Lance Kinzer, Chairman
Members of the House Judiciary Committee

FROM: Zackery E. Reynolds, The Reynolds Law Firm, Fort Scott
Kansas Association for Justice

DATE: February 16, 2011

RE: HB 2101—Act Concerning Court of Appeals Appointments

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial lawyers. KsAJ members support protection of the right to trial by jury and laws that are fair to all parties to a dispute. KsAJ members believe the judiciary must be independent because independence gives all citizens the assurance that they will be treated impartially in a court of law. KsAJ opposes HB 2101.

HB 2101 eliminates the nonpartisan Supreme Court Nominating Commission, which submits candidates for the Court of Appeals for final selection by the governor. HB 2101 replaces the Nominating Commission with an appointment and consent system modeled on the federal system. Under HB 2101, the governor would fill vacancies in the Court of Appeals only with the approval of the Kansas Senate.

The current system was enacted after the famous "Triple Play" of 1956. The "Triple Play" involved Chief Justice Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. Governor Hall was defeated in the Republican primary by Warren Shaw, who then lost the general election to Democrat George Docking. Chief Justice Smith, a strong supporter of Hall, was seriously ill and contemplating retirement. However, Smith was concerned that if he retired after Docking took office in January 1957, Docking would appoint a Democrat to replace him.

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Smith, Hall, and McCuish devised a plan to prevent such an appointment. Chief Justice Smith resigned on December 31, 1956, followed by the resignation of Governor Hall on January 3, 1957. Lieutenant Governor McCuish was then sworn in as governor. The first and only official act of his 11-day tenure as governor was to appoint Hall as Chief Justice of the Supreme Court.

In the wake of the "Triple Play," Kansas citizens' outrage led to the merit plan for Supreme Court justices. The merit plan was later extended to the Court of Appeals and the District Courts, with individual districts having the option to move to merit selection or maintain partisan elections. The majority of judicial districts in Kansas have chosen merit selection.

The Supreme Court Nominating Commission provides an invaluable service to both the state government and Kansas citizens by vetting candidates for judicial appointment and presenting the most qualified individuals to the governor. The Commission is nearly equally composed of lawyer members (5 members) and non-lawyer members (4 members). The Commission conducts a thorough analysis of the pool of candidates to provide the governor with the best three candidates. From those three options, the governor makes a final selection.

Commission members constitute a cross section of citizens and lawyers whose sole goal is to find qualified candidates, a majority of whom are already judges who have been, by rule, distanced from the political process. KsAJ is not aware of any contention, historically or recently, that the Commission is made of up of members attempting to advocate any particular political philosophy through the selection of candidates for the governor's consideration. Neither have we heard complaints that the selections provided to the governor are filled with candidates who have a uniform political philosophy that gives the governor no choice but to appoint one of three like-minded candidates. Notably, there has not been a single instance regarding the Court of Appeals when all the candidates were rejected by the governor.

The Nominating Commission, and the merit selection process, protects the independence of the judiciary, which is paramount to our system of democracy. One of the hallmarks of an independent judiciary is the ability of the courts to be insulated from political pressure so that they can uphold the laws of Kansas without fear of political reprisal. In a lecture to the University of Missouri School of Law, former United States Supreme Court Associate Justice Sandra Day O'Connor championed the benefits of merit selection in upholding the independence of and respect for the Judiciary among the citizenry.

The system proposed in HB 2101 would directly inject politics into judicial appointments, thereby weakening judicial independence by ensuring that candidates "politic" during both the appointment and confirmation process. Such a system would inevitably lead to judges being selected based upon political ideology and connections (and possibly partisan campaign contributions) rather than qualifications. Moreover, as we have seen with the federal system, contentious and partisan confirmation hearings are divisive and tend to lead to a lack of respect for the judiciary.

Further, HB 2101 attempts to fix a problem that does not exist. Proponents of a federal-style system in Kansas argue that the Nominating Commission is undemocratic because Kansas lawyers select 5 of the 9-member Commission. However, the governor, who is popularly elected, still controls the final judicial appointment. And judges remain subject to popular retention elections. Finally, we are not aware of any decidedly politically motivated decisions by the Court of Appeals since the Commission has been established.

Instead, HB 2101 actually eliminates retention elections and provides for lifetime appointments, thereby further limiting citizens' input on who sits on our Courts, possibly imposing a particular political philosophy on the citizenry for three decades or more. And as has been shown by United States Supreme Court appointees, many times an executive making the appointment is a very poor predictor of the true ideology of the appointee and is stunned by decades of voting contrary to what the executive predicted.

In addition to the fundamental issues discussed above, there are practical problems with HB 2101. The Kansas Legislature is not in session on a year round basis. HB 2101 requires a confirmation vote within 30 days of the Governor's appointment, mandating a special session for appointments made during the approximately 9 months a year when the Senate is not in session, in turn leading to additional state expenditures.

KsAJ urges that the Committee exercise caution in its consideration of HB 2101. There is no evidence that HB 2101 will lead to a more careful review of a nominee's qualifications or search of integrity than can be accomplished with the Nominating Commission. Kansas' merit selection system has stood the test of time and upheld the ideal of an independent judiciary.

On behalf of our members and their clients, KsAJ respectfully requests that the House Judiciary Committee oppose HB 2101.

Before the House Judiciary Committee
Wednesday, February 16, 2011

Testimony in Opposition to HB 2101
Dale E. Cushinberry, Lay Member
Supreme Court Nominating Commission
785-379-5542
cushde@hotmail.com

Thank you for the invitation to speak. I am Dale E. Cushinberry, a lay member of the Supreme Court Nominating Commission and retired school principal. I would like to make a few points.

If the issue is giving power to the people and if this Commission is truly a concern of the people, the people should be present here in numbers to support this bill. They are not.

If HB 2101 is passed, it will escalate the role of politics in the selection of judges.

- The Governor will not personally have time to do the work currently done by the Commission with the assistance of the Supreme Court Clerk, i.e., compiling background information, making investigative phone calls, and conducting interviews. The Governor will select a few people or establish a committee to do essentially what the current Commission does. The composition of those groups could potentially reflect the political affiliation of the Governor.
- The Governor, individually or with the assistance of a small group, would select the candidate. This isolated practice has the potential to be highly political. Appellate judges could be selected for reasons other than qualifications.
- Once the Governor's choice reaches the Senate for confirmation, procedures or committees will again need to be established. The Senate will need to convene if that body is not in session.
- Appellate judges appointed under the proposed system potentially will have obligations to special interest groups.

Some committee is going to make a decision to narrow the applicants for the Governor's consideration. The question is whether that body is going to be this Commission which has a proven track record of service to the people of Kansas or an ad hoc committee selected by the Governor.

I urge you to reject HB 2101.

Respectfully submitted,

Dale E. Cushinberry, Lay Member
Supreme Court Nominating Commission