

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](#))

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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 occurred, 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 hamstringing 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

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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](#))

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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.

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([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

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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.