

SELECTION TO THE KANSAS SUPREME COURT

by Stephen J. Ware



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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. The bar consequently may have more control over the judiciary in Kansas than in any other state. This process for selecting justices to the Kansas Supreme Court is described by the organized bar as a “merit,” rather than political, process. Other observers, however, emphasize that the process has a political side as well. This paper surveys debate about possible reforms to the Kansas Supreme Court selection process. These reforms would reduce the amount of control exercised by the bar and establish a more public system of checks and balances.

I. BAR CONTROL

The Supreme Court Nominating Commission is at the center of judicial selection in Kansas.¹ When there is a vacancy on the Kansas Supreme Court, the Nominating Commission assesses applicants and submits its three favorites to the Governor.² The

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¹ KAN. CONST. art. 3 § 5. See also KAN. STAT. ANN. §§ 20-119 to -125 (2006).

² The Kansas Constitution provides that:

(a) Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.

Governor must pick one of the three nominees and that person is thereby appointed a justice on the Kansas Supreme Court,³ without any further checks on the power of the Commission. Therefore, the Commission is the gatekeeper to the Kansas Supreme Court. The bar (lawyers licensed to practice in the state) has majority control over this gatekeeper. The Commission consists of nine members, five selected by the bar and four selected by the Governor.⁴

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.⁵ In these eight states, the

(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.

KAN. CONST. art. 3 § 5(a), (b).

³ If the Governor does not pick one of the three, which has never happened, the duty to pick one of the three falls to the Chief Justice of the Supreme Court. *Id.*

⁴ The Kansas Constitution provides that:

The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

KAN. CONST. art. 3 § 5(e). As Kansas currently has four congressional districts, the Commission currently has nine members. The term of office for each member of the commission is “for as many years as there are, at the time of their election or appointment, congressional districts in the state.” KAN. STAT. ANN. § 20-125.

⁵ See ALASKA CONST. art. IV, §§ 5, 8 (commission consists of 7 members: chief justice, three lawyers appointed for six-year terms by the governing body of the organized bar, three non-lawyers appointed for six-year terms by the governor subject to confirmation by legislature); IND. CONST. of 1851, art. 7, §§ 9–10 (1970), IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (7 members: chief justice; 3 lawyers, 1 from each court of appeals district, elected by members of the bar association in each district; 3 nonlawyers, 1 from each court of appeals district, ap-

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.

In sum, nine states allow the bar to select some of the commission's members and Kansas is the only state in which the bar selects a majority of the commission. By contrast, forty one states either give the bar no official power in the initial⁶ selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. For example, in Colorado the bar has no role in selecting the nominating commission⁷ and in three states the bar's role is limited to merely suggesting names for a minority of the commission and those suggested do not become commissioners unless approved by the governor and/or legislature.⁸

pointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962), IOWA CODE §§ 46.1–.2, .15 (2006) (15 members: chief justice; 7 lawyers elected by members of bar association, 7 nonlawyers appointed by governor and confirmed by senate); MO. CONST. of 1945, art. V, § 25(a)-(d) (1976), MO. SUP. CT. R. 10.03 (7 members: 1 supreme court judge chosen by members of court; 3 lawyers elected by members of bar; 3 nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972), NEB. REV. STAT. ANN. §§ 24-801–24-812 (LexisNexis 2007) (9 members: chief judge, 4 lawyers elected by members of bar association, 4 nonlawyers appointed by governor); OKL. CONST. art. VII-B, § 3 (13 members: 6 lawyers elected by members of bar, 6 nonlawyers appointed by governor and 1 nonlawyer elected by other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (7 members: 3 lawyers appointed by president of bar, 2 circuit judges elected by judicial conference, and 2 nonlawyers appointed by governor); WYO. CONST. art. 5, § 4, WYO. STAT. ANN. § 5-1-102 (2007) (7 members: chief justice, 3 lawyers elected by members of bar, 3 nonlawyers appointed by governor).

⁶ In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. See <http://www.ajs.org/js/select.htm> (last visited Aug. 16, 2007). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

⁷ COLO. CONST. art. VI §§ 20, 24 (15 voting members: 7 lawyers appointed through majority action of governor, attorney general, and chief justice, 8 nonlawyers appointed by governor).

⁸ See ARIZ. CONST. art. VI, § 36 (16 members: chief justice, 5 lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, 10 nonlawyers ap-

Fifteen states divide the power to appoint supreme court justices among several publicly-elected officials, rather than concentrating this power in the governor. In two of these states justices are appointed by the legislature.⁹ In thirteen of these states (ten with a nominating commission¹⁰) the governor nominates

pointed by governor with advice and consent of senate); FLA. CONST. of 1968 art. V, § 11 (1998), FLA. STAT. ANN. § 43.291 (LexisNexis 2007) (9 members: 4 lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, 5 other members appointed by governor with at least 2 being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (17 members: speakers of senate and house each appoint 6 lawyers, 12 total, from lists submitted by Tennessee Bar Association (2), Tennessee Defense Lawyers Association (1), Tennessee Trial Lawyers Association (3), Tennessee District Attorneys General Conference (3), and Tennessee Association for Criminal Defense Lawyers (3); the speakers also each appoint 1 lawyer not nominated by an organization, each appoint 1 nonlawyer, and jointly appoint a third nonlawyer).

⁹ These states are: South Carolina and Virginia. See <http://www.ajs.org/js/select.htm> (last visited Oct. 6, 2007). South Carolina uses a nominating commission. S.C. CONST. art. V, § 27; S.C. CODE ANN. § 2-19-10 (2006) (10 members appointed by speaker of house or president of senate, General Assembly may reject all the commission's nominees, but cannot elect a candidate who has not been nominated by commission).

¹⁰ See CAL. GOV'T CODE § 12011.5(a) (West 2007) (commission's "membership... shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Sections 6013.4 and 6013.5 of the Business and Professions Code"); CONN. GEN. STAT. § 51-44a (2007) (12 members: 3 lawyers appointed by governor, 3 nonlawyers appointed by governor, 3 lawyers, 1 appointed by each senate president, house majority and minority leaders, and 3 nonlawyers, one appointed by each of house speaker, senate majority and minority leaders); Del. Exec. Order No. 4 (Jan. 5, 2001) (9 members: 8 appointed by governor (4 lawyers and 4 nonlawyers) and 1 appointed by president of bar association, with consent of governor); HAW. CONST. art. VI, §§ 3-4 (1994) (9 members: 2 appointed by governor, 2 by senate president, 2 by house speaker, 1 by chief justice, 2 by state bar, no more than 4 members may be lawyers); Md. Exec. Order No. 01.01.2007.08 (April 27, 2007) (17 members, 12 appointed by governor, 5 by president of bar association); Commonwealth of Massachusetts, Executive Order No. 477, dated January 12, 2007 (21 members, all appointed by governor); N.Y. CONST. art. VI § 2 (12 members: 4 appointed by governor, 4 by chief judge, 4 by leaders of legislature); R.I. GEN. LAWS § 8-16.1-2 (2006) (9 members: 3 lawyers and 1 nonlawyer appointed by governor, governor also appoints 5 additional members from lists submitted by leaders of legislature); UTAH CODE ANN. 20A-12-102 (2007) (7 members: chief justice or designee of chief

justices but the governor's nominee does not join the court unless confirmed by the legislature¹¹ or other publicly-elected officials.¹² Finally, twenty two

justice, 6 members appointed by governor, 2 lawyers appointed by governor from list submitted by state bar; no more than 4 lawyers total); VT. STAT. ANN. tit. 4, § 71, 601, 603 (2007) (11 members: 2 nonlawyers appointed by governor; house and senate each select 3 members, 2 nonlawyers and 1 lawyer; and 3 lawyers elected by members of bar).

¹¹ See CONN. CONST. art. 5, § 2 (legislature); DEL. CONST. of 1897 art. IV, § 3 (senate); HAW. CONST. art. VI, § 3 (1994) (senate); ME. CONST. art. V, Pt. 1, § 8 (senate); MD. CONST. art. II, § 10 (senate); N.J. CONST. art. VI, Sec. VI, Para. 1 (1983) (senate); N.Y. CONST. art. VI, § 2, Para. e (senate); R.I. CONST. art. X, § 4 (house and senate); UTAH CONST. art. VIII, § 8 (senate); VT. CONST. § 32 (senate).

¹² Massachusetts and New Hampshire require confirmation by the governor's council, which in Massachusetts consists of the lieutenant governor and eight persons elected biennially, MASS. CONST. Pt. 2, Ch. 2, Sec. 1, art. 9, id. Amend. art. XVI, and in New Hampshire consists of one person elected from each county biennially. N.H. CONST. Pt. 2, art. 46, 60-61. California's system is unique and experience under it exemplifies the possible consequences of subordinating the nominating commission (and thus the bar) to publicly-elected officials. "Although the California Constitution provides that judges of the Supreme Court and Court of Appeal are to be elected for a twelve-year term (CAL. CONST. art. 6, sec. 16, subd. (a)), the practice is that they are appointed by the Governor to fill unexpired terms, and then must go through a non-contested retention election." Stephen B. Presser, et al., *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 365 (2002). See also Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 646-47 (2002); CAL. CONST. art. VI § 16 (retention elections). Under this practice, the governor's nominee is confirmed by a three person commission made up of the chief justice, the state attorney general, and whoever is the most senior presiding justice of the various district Court of Appeals. CAL. CONST. art. VI § 7. Before the nominee can be approved by this commission, the governor must submit the nominee to the Judicial Nominees Evaluation (JNE) Commission, an agency of the State Bar of California. CAL. GOV'T CODE § 12011.5(a) (West 2007); CAL. ST. B. R.P. 2(2.72). Until 1996, no governor had ever nominated an individual ranked unqualified by the JNE. In that year,

Governor Pete Wilson, for the first time in JNE's history, disregarded a "not qualified" rating and appointed to the California Supreme Court a remarkable African-American woman, Janice Brown. Wilson had previously appointed Brown to the Court of Appeal with JNE rating her "qualified" for that position. Moreover, she had previously served as Wilson's Legal Affairs Secretary; unlike other candidates, Wilson was personally familiar with Brown's legal abilities and qualifications.

states elect their supreme court justices.¹³ The various methods of selecting state supreme court justices are summarized in Table 1, which follows.

To recap, more than four-fifths of the states either give the bar no official power in the initial selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. These states generally select their justices through:

- (1) appointment by the legislature,
- (2) confirmation of the governor's nominees by the legislature,¹⁴ or
- (3) elections in which a lawyer's vote is worth no more than any other citizen's vote.

Less than one-fifth of states allow the bar to select members of a nominating commission that has the power to ensure that one of its initial nominees

Brown's appointment to the California Supreme Court despite JNE's opposition created a furor because she is an outspoken and eloquent conservative. JNE's "not qualified" rating was widely perceived as motivated by political or ideological considerations.

Wilson defied JNE twice more as governor, appointing to the Superior Court and the Court of Appeal candidates he believed to be well-qualified, even though they were rated "not qualified" by JNE.

Presser et al., at 372. In 2003, President Bush appointed Janice Brown to the United States Court of Appeals for the District of Columbia. See 151 Cong. Rec. S.6208, 6217 (daily ed. June 8, 2005). The Senate voted fifty-six to forty-three in favor of her confirmation. 151 Cong. Rec. S.6208, 6218 (daily ed. June 8, 2005).

¹³ Seven states use partisan elections: Alabama, Illinois, Louisiana (uses a blanket primary where all candidates appear with party labels on the ballot and the top two vote getters compete in the general election), New Mexico, Pennsylvania (if more than one seat is available all candidates run at large and the top two vote getters fill the open seats), Texas, and West Virginia. See <http://www.ajs.org/js/select.htm> (last visited Oct. 6, 2007). Fifteen states use (purportedly) non-partisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan (non-partisan general election, but partisan nomination), Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio (non-partisan general election, but partisan nomination), Oregon, Washington, and Wisconsin. See *id.* With respect to Michigan and Ohio, see also Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DE PAUL L. REV. 423, 456-60 (2007).

¹⁴ Or other publicly-elected officials.

Table 1
Bar Control of Supreme Court Selection

High Bar Control			Low Bar Control			
Nom'n Comm'n majority selected by bar	Nom'n Comm'n near majority selected by bar	Nom'n Comm'n w/ no or little role for bar	Legislative Appointment	Governor's Nominee Confirmed	Non-Partisan Elections	Partisan Elections
Kansas	Alaska Indiana Iowa Missouri Oklahoma Nebraska South Dakota Wyoming	Arizona Colorado Florida Tennessee	South Carolina Virginia	California Connecticut Delaware Hawaii Maine Maryland Massachusetts New Hampshire New Jersey New York Rhode Island Utah Vermont	Arkansas Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada North Carolina North Dakota Ohio Oregon Washington Wisconsin	Alabama Illinois Louisiana New Mexico Pennsylvania Texas West Virginia

becomes a justice.¹⁵ And Kansas alone allows the bar to select a majority of such a commission.

II. DOES SECRECY YIELD MERIT?

While the President nominates federal judges, these judges are not confirmed without a majority vote

of the United States Senate¹⁶ and these votes on the confirmation of federal judges have long been public.¹⁷ In contrast, the votes of the Kansas Supreme Court Nominating Commission are secret. The public can learn of the pool of applicants and the three chosen by the Commission,¹⁸ but cannot discover which

¹⁵ The importance of this power was recently demonstrated in Missouri where the governor publicly considered the possibility that he would refuse 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 nominees becomes a justice where appointment requires confirmation by the legislature of 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.

¹⁶ U.S. CONST. art. II, §2.

¹⁷ U.S. CONST. art. I, § 5 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”) “Until 1929 the practice was to consider all nominations in closed executive session unless the Senate, by a two-thirds vote taken in closed session, ordered the debate to be open.” Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988). See also JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY IN THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 253-55 (1953).

¹⁸ The Commission holds public interviews with each applicant.

commissioners voted for or against which applicants.¹⁹ By statute, the Commission “may act only by the concurrence of a majority of its members.”²⁰ But no statute requires that the votes of the Commission be made public.²¹

Defenders of this system describe it as “non-partisan” or “merit” selection,²² and contend that it selects applicants based on their merits rather than their politics.²³ There is, however, a remarkable

¹⁹ Research for this paper found no evidence of any dissenting votes on the Commission or of any disagreement on the Commission at all.

²⁰ KAN. STAT. ANN. § 20-123.

²¹ A 1982 opinion by the Kansas Attorney General concluded that “the Supreme Court Nominating Commission may conduct its meeting in full public view, however, the legislature is without authority to require that meetings of the Commission be open or closed. Nor may the legislature require the Commission to meet in a particular place.” XVI Kan. Op. Atty. Gen. 95, Kan. Atty. Gen. Op. No. 82-254, 1982 WL 187743. A recent survey of judicial nominating commissions lists Kansas among the “five states [that] have no written rules about whether or not commission deliberations will be confidential, and [the] seven states [that] have no written rules that govern whether commission voting will be confidential.” Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commission*, 34 FORDHAM URB. L.J. 163, 184 & n.118 (2007).

²² See, e.g., Paul T. Davis, *The Time for Merit Selection Will Come*, 70 J. KAN. B. ASSOC. 5 (2001) (“For the past two years, the Kansas Bar Association has been leading the effort for the passage of a constitutional amendment providing for statewide, non-partisan merit selection of district court judges.”); Fred Logan, *Kansas Should be Served by an Independent Judiciary*, 70 J. KAN. B. ASSOC. 3 (2001) (“The Kansas Commission on Judicial Qualifications took the rare step of endorsing merit selection of judges.”). This terminology is used nationally by bar associations and other lawyers’ groups. See, e.g., Alfred P. Carlton, Jr., *Justice In Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, July 2003 (a portion of which is reproduced as Appendix C); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges*, http://www.ajs.org/js/ms_descrip.pdf (last visited Oct. 6, 2007)

²³ See, e.g., Richard C. Hite, Chair, Supreme Court Nominating Commission, Testimony in Opposition to House Concurrent Resolution No. 5008, Feb. 13, 2007 (“Almost fifty years ago the citizens of this State mandated by constitutional amendment that election of Supreme Court Justices should be taken out of the political arena and based solely on merit.”); F. James Robinson Jr., Op-ed, *Don’t Put Politics Back into Selection of Justices*, WICHITA EAGLE, Feb. 21, 2007, at 7A (“Merit selection is a process that uses a nonpartisan commission of lawyers and nonlawyers to

pattern of governors appointing to the Commission members of the governor’s political party. Research for this paper examined the twenty-year period from 1987 to the present. During this period, twenty-two people appointed by the governor served on the Commission. In all twenty-two cases, the governor appointed a member of the governor’s party.²⁴ This is depicted in Table 2, which follows.

In addition to consistently partisan appointments to the Commission, there is a strikingly partisan record

investigate, evaluate and occasionally recruit applicants for judge-ships. Applicants are chosen on the basis of their intellectual and technical abilities and not on the basis of their political or social connections.”); John Hanna, *Father wants justices confirmed; Senate nixes penalty fix*, HAYS DAILY NEWS, Feb. 22, 2005 (“Retired Supreme Court Justice Fred Six said the current system has ‘banished politics from the judicial playing field.’”); Editorial, *Keep judges exempt from elections*, KANSAS CITY STAR, May 21, 2006 (current system achieves “[t]he separation of judges from the political process.”)

Members of the Commission say that politics plays no role in their deliberations. “We never talk about politics in those meetings. It just doesn’t come up,” said Richard Hite, chairman of the nominating commission.” James Carlson, *Method for choosing high court justices would change with resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. See also David Klepper, *Judge applicants face panel*, KANSAS CITY STAR, May 23, 2005, at B1 (“The nominating commission - consisting of nine attorneys and lay persons - tries to take the politics out of the process. Questions of party loyalty or views on issues such as abortion are never asked, according to Hite. ‘We ignore everything except merit,’ Hite said. ‘The object is to find the best judge, period.’); Chris Grenz, *Critics question Democratic majority on high court*, HUTCHINSON NEWS, Aug. 9, 2005 (“Dodge City attorney David J. Rebein, president-elect of the Kansas Bar Association and a member of the nominating commission, said the current selection system was put in place specifically to filter out politics. “At the nominating commission level, it doesn’t even come up,” Rebein said. “It is by design strictly merit based.”)

²⁴ See Appendix A (listing party of non-lawyer commissioners appointed by Democratic governors in 1979-86, 1991-94 and 2003-07 and by Republican governors in 1987-90 and 1995-2002.) By contrast, research for this paper was not able to identify the party affiliation of all the lawyer members of the Commission. Of those lawyer members for whom party affiliation was available, there were seven Democrats, thirteen Republicans and zero Independents or members of third parties. See Appendix A. This translates into 35% Democrats, 65% 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).

Table 2
Governor's Appointments to Kansas Supreme Court
Nominating Commission, 1987 - Present

Governor's Party	Republican Commissioners	Democratic Commissioners
Republican	8	0
Democrat	0	14

of appointments to the Supreme Court itself. During the twenty-year period from 1987 to the present, eleven new justices were appointed to the court.²⁵ Nine of the eleven belonged to the same political party as the governor who appointed them and in one of the other two cases the governor could not appoint a justice from his party because none of the three individuals submitted to the governor belonged to that party.²⁶ In other words, in nine of the ten cases in which the governor could pick a member of the governor's party, the governor did so. So the governor's role—in this allegedly “non-partisan” process—has been quite partisan, although not invariably so.²⁷ And in one of the last eleven cases the Commission forced the governor to select an individual who did not belong to the governor's party.²⁸ This data on the appointment of justices is depicted in Table 3, which follows.

III. THE DEBATE OVER REFORM

There is a nationwide debate brewing right now over whether “non-partisan,” “merit” selection of judges should be reformed to achieve two goals: first, to reduce the amount of control exercised by the bar, and, second, to subject the political side of the judicial

²⁵ See Appendix A.

²⁶ *Id.* (Justice Luckert).

²⁷ This is not a fluke of Kansas. According to scholars assessing judicial selection around the country, “Few deny that the Governor, although limited in his or her choice, applies political criteria in judging the three nominees submitted by the nominating commission. Assuming that the three are nearly equal in terms of qualifications, the one most politically attractive receives the Governor's nod.” CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 131 (1997).

²⁸ See *infra* Appendix A (Justice Johnson).

Table 3
Governor's Appointments to Kansas Supreme Court,
1987 - Present

	Governor appointed justice from governor's party	Governor appointed justice not from governor's party
At least one of Commission's nominees in governor's party	9	1
None of nominees in governor's party	0	1

selection process to a more public system of checks and balances.²⁹ This paper provides a brief history of selection to the Kansas Supreme Court before discussing possible reforms.

A. The 1958 Kansas Plan

Until 1958, Kansans elected their supreme court justices. The establishment of the Kansas Supreme Court Nominating Commission in 1958 was a reaction to events that had occurred after the most recently preceding general election.

A resolution for the submission of a constitutional amendment which would adopt the commission plan [for the selection of supreme court justices] was introduced in 1953, but defeated in the house judiciary committee. Again proposed in 1955, the resolution was defeated in the senate judiciary committee. However, subsequent events were to lead to the adoption of the commission plan for the selection of supreme court

²⁹ See, e.g., Editorial, *Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10; Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The same process currently used to select justices for the Kansas Supreme Court is also currently used to select all judges on the Kansas Court of Appeals, KAN. STAT. ANN. §20-3004, and in most of the state's judicial districts, a similar process is used to select district judges. See generally Stacie L. Sanders, Note, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?*, 34 WASHBURN L. J. 573 (1995). Accordingly, the case for reforming this process applies to all these courts but it applies most strongly to the Kansas Supreme Court simply because it is the state's highest court and lower courts follow its precedents.

justices: The intensive lobbying efforts of the Kansas Bar Association; and public outcry over the infamous “triple play” of 1956.

The “triple play” involved Chief Justice of Kansas Supreme Court Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. In 1956, Governor Hall was defeated in the Republican Primary by Warren Shaw, who then lost the general election to Democrat George Docking. In December of that year, Chief Justice Smith, who was seriously ill, forwarded his resignation to Governor Hall. Hall then immediately resigned his post of Governor in favor of Lieutenant Governor McCuish, who prematurely returned from a Newton Hospital to make his first and only official act of his 11 day tenure as Governor: The appointment of Hall to the supreme court. Such a result would have been avoided under the commission plan, as the nominating commission would have determined which candidates to send to the governor for appointment, rather than allowing the governor to appoint replacement justices in between elections.

The legislature submitted a proposal to amend the constitution to adopt the commission plan for the selection of supreme court justices only, and this amendment was passed by a wide margin in the 1958 general election.³⁰

In short, the current Commission system was rejected in 1953 and 1955 but—after the “triple play” of 1956—was passed in the next general election. The “intensive lobbying efforts of the Kansas Bar Association” combined with the “triple play” to give us the supreme court selection process we have now.

The lesson of the “triple play” is that governors should not have absolute power over the selection of supreme court justices. “Power corrupts and absolute power corrupts absolutely.”³¹ The Framers of the United States Constitution were acutely aware of this risk and their masterful achievement was designing a system of government in which power was divided and constrained by a system of checks and balances.³²

³⁰ Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASSOC. 32 (2000).

³¹ Letter from Lord Acton to Bishop Mandell Creighton (1887), see <http://www.phrases.org.uk/meanings/288200.html> (last visited March 14, 2007).

³² See generally THE FEDERALIST NOS. 47-51 (James Madison) (Clinton Rossiter ed., 1999) (discussing and explaining the need for separation of powers and checks and balances).

In appointing justices to the United States Supreme Court, the president’s power is checked by the power of the United States Senate. The Constitution requires a majority vote of the Senate in order to confirm a justice to the United States Supreme Court.³³ By contrast, at the time of the “triple play” the Kansas Constitution lacked this check on the governor’s power to appoint a justice to the Kansas Supreme Court.

Anger over the “triple play” prompted the addition of a check on the governor’s power to select justices. This new check on the governor’s power was given, not to the Kansas Senate, but to the bar (lawyers licensed to practice in the state). Rather than following the United States Constitution to make the Legislature the check on the Executive’s power, the 1958 change made the bar the check on the Executive’s power.³⁴

B. Is The Bar an Interest Group or “Faction”?

Lawyers, because of their professional expertise and interest in the judiciary, are well-suited to recognizing which candidates for a judgeship are especially knowledgeable and skilled lawyers. But is it likely that every lawyer on a nominating commission will completely put aside his or her personal worldview in favor of some non-political conception of “merit”? Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very 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.”³⁵

³³ U.S. CONST. art II, § 2.

³⁴ Technically, of course, it is the Commission rather than the bar that is the check on the governor. But the governor appoints four of the nine commissioners so, except insofar as they are holdovers appointed by a previous governor of a different party, those four are unlikely to serve as much of a check on the governor. The check on the governor, if it comes from the Commission at all, is more likely to come from the five commissioners elected by the bar association. See *supra* Table 2 (from 1987 to the present, all fourteen of the commissioners appointed by Democratic governors were Democrats and all eight of the commissioners appointed by Republican governors were Republicans).

³⁵ HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998). Judicial selection through a nominating commission was first adopted in Missouri and is often called “the Missouri Plan.” The classic study of the first 25 years of this process in Missouri is a book by Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar* (1969). A

The conclusion is inescapable: “merit” selection has little or no merit, if by merit we mean that nonpolitical (that is, professional) considerations dominate the selection process....

Not only is there little evidence of the superiority of judges selected by the “merit” system (although there is some evidence to the contrary), but also there is little to show that judicial selection mechanisms make any difference at all....

... Where are we then? If the lay, the professional, and even the political inputs built into the Missouri Plan^[36], do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The answer is, not much. In a thorough examination of the Missouri Plan undertaken by Henry Glick, other avenues of analysis were pursued, but the results in no instance reveal redeeming support for the claims made for merit selection. Why, then does bar, bench, and general public support for the plan continue, and why is the plan being adopted in more and more states? The specific reasons are many, but they ultimately boil down to an aggrandizement of national and state bar associations....

...The legal profession desires a larger voice in judicial selection for the same reason that other interest groups do—to advance their cause through judicial policymaking. “Merit” selection gives them that added leverage. All the better if they can sell their old line of increased political influence over the courts by using the attractive, but phony, label of “neutral professionalism.”³⁷

textbook summarizes their findings as follows:

[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 socio-economic interests of their clients.

STUMPF & PAUL, at 142.

³⁶ Judicial selection through a nominating commission was first adopted in Missouri and is often called “the Missouri Plan.”

³⁷ STUMPF & PAUL, *supra* note 35, at 142-47. See also Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002) (“This review of social scientific

Critics of “merit” selection point out that lawyers comprise an interest group just like other interest groups. Bar associations aggressively lobby for the interests of their lawyer-members. While they may articulate reasons why the policies that favor them also serve the public interest, bar associations have repeatedly advocated for policies that favor lawyers and that have been viewed by others as harming the public as a whole.³⁸ The selection of supreme court

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 that 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.”); HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 41 (1991) (“The primary appeal of the merit plan for judicial selection rests with the implication that it is a nonpartisan mechanism. Additionally, proponents claim that judges of a higher ‘quality’ are more likely to reach the bench via this system than any other. However, experience with the merit plan indicates that it is a very political one, with state and local bar politics substituting for public politics.”)

Practicing lawyers and judges confirm the scholars’ conclusion. See Robert L. Brown, *From Whence Cometh our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. REV. 313 (1998) (“Even in states which use the Missouri Plan, nominating commissions are subject to considerable lobbying by single-issue groups and political parties in the development of a slate of judicial candidates. So is the governor once the slate is prepared and presented. It is politics, but politics of a different stripe.”); Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20, 24 (1996) (“[m]erit selection does not take politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole.”)

³⁸ See, e.g., DEBORAH L. RHODE, *ACCESS TO JUSTICE* 69 (2004) (“Bar efforts to restrain lawyers’ competitive practices have inflated the costs and reduced the accessibility of legal assistance. Although the courts have increasingly curtailed these efforts through constitutional rulings, the bar’s regulatory structure has remained overly responsive to professional interests at the expense of the public.”); *id.* at 87 (“Giving qualified nonlawyers a greater role in providing routine legal assistance is likely to have positive effect, but the organized bar is pushing hard in the opposite direction.”); Norman W. Spaulding, *The Luxury of the Law*, 73 FORDHAM L. REV. 983, 994 (2004) (with respect to access to

justices through a process controlled by the bar is just one example of this form of advocacy.³⁹ Relatedly, members of the Kansas Supreme Court Nominating Commission could be lobbied and influenced by some of that lobbying.⁴⁰

justice for people of modest means, “Bar associations have behaved more like rent-seeking interest groups than the self-policing, public-minded regulatory bodies they purport to be; state legislatures and state supreme courts have too long caved to patently self-serving claims by bar associations for insulation from direct public regulation”); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003) (with respect to accreditation of law schools, American Bar Association lobbies for a set of rules that “forces one style of law training, at Rolls-Royce prices” which reduces the supply of lawyers).

³⁹ The American Bar Association has lobbied for judges selected by nominating commissions since 1937. STUMPF & PAUL, *supra* note 35 at 138. See also Appendix C, JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASS’N COMMISSION ON THE 21ST CENTURY JUDICIARY (2003)

⁴⁰ See, e.g., Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73 (2007).

The commission needs to be open to, and receptive of, external input. Rules of conduct should help reduce political control, not eliminate public input. Nevertheless, a code of ethics must address the external pressures that may exert themselves upon the commissioners. Political pressure may come from individuals, political parties, and industry and special interest groups that exist within the constituency. Commissioners should receive information from constituents, whether those constituents speak individually or collectively through organizations. Such information, however, should be properly channeled to the commission as an entity and not to individual commissioners by way of surreptitious meetings or ex parte communications.

Id. at 100-01. In Kansas, House Speaker Melvin Neufeld said the bar played too large a role and that the system needs to be reformed so a Governor’s nominee to the high court faces Senate confirmation. See Tim Carpenter, *Appeals court judge named to high court*, TOPEKA CAPITAL-JOURNAL, Jan. 6, 2007, at A1. Neufeld said: “That setup that we now have has evolved to a good-old-boy club.” *Id.* A “good-old-boy club”, with its associations of exclusivity and privilege, is an apt description of how the Commission looks to many of those who are not members of the bar. This is a shame because of the good faith and hard work exhibited by those the bar elects to the Commission. But when a single interest group controls an important governmental process—and exercises that control in a largely-secret manner—outsiders can be excused for being suspicious and resentful. Courts have held such interest-group control unconstitutional when the interest

The Framers of the United States Constitution recognized a danger from interest groups, or “factions” as they were then called.⁴¹ *The Federalist Papers* propose several cures for the “mischiefs of faction.”⁴² The most famous is the system of “checks and balances,” which divides power and sets factions against one another, ensuring that none can gain control for itself.⁴³ The question is whether such a system is in place in Kansas: are the critics correct that the process for judicial selection gives too much control to a single faction? The executive branch’s power to appoint members of the judicial branch is checked, not by the legislative branch, but by a nine-person commission a majority of whom are selected by the bar.

C. Reduce Bar Control of the Nominating Commission?

Several possible reforms would reduce the control a single faction, the bar, has over the process of selecting justices to the Kansas Supreme Court. One such reform would simply reduce the portion of the Commission selected by the bar. The majority of the twenty four states with supreme court nominating commissions allow the bar to select less than one-third of the commission’s members.⁴⁴ Kansas could move toward the mainstream of states by, for instance,

group in question was not lawyers. See Senator Susan Wagle, *Confirm Justices*, WICHITA EAGLE, March 6, 2005, at 15A (“The nominating committee is controlled by a majority of attorneys, the very individuals who appear before the courts seeking favor. In a similar situation in 1993, the federal courts declared the process by which Kansas selected its secretary of agriculture unconstitutional. The secretary used to be selected by the farm groups that the secretary regulated. The Legislature changed the position to one selected by the governor and subject to the Senate confirmation process.”)

⁴¹ See THE FEDERALIST No. 9 (Alexander Hamilton) & No.10 (James Madison) (Clinton Rossiter ed., 1999).

⁴² THE FEDERALIST No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1999).

⁴³ See THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1999).

⁴⁴ The thirteen states allowing the bar to select less than one-third are Arizona, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New York, Rhode Island, South Carolina, Tennessee, Utah, and Vermont, see *supra* notes 8 & 10, while the eleven states allowing the bar to select more than one-third are: Alaska, California, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, and Wyoming. See *supra* notes 4, 5 & 8.

allowing the Speaker of the House and President of the Senate to select two commissioners each, while the bar and Governor select three and two commissioners, respectively. In addition to moving Kansas toward the mainstream of states with respect to bar control, this reform would also bring Kansas in line with the ten states in which the legislature selects some of the commissioners or has confirmation power over those the governor selects.⁴⁵ According to Professor (and former judge) Joseph Colquitt, allowing the legislature to select some of the commissioners “diverts the power from the governor, who usually will be charged with appointing judges from the slate nominated by the commission. Placing the power to appoint or elect commissioners in hands other than the appointing authority for judges better addresses both democratic ideals and commission-independence concerns.”⁴⁶

A reform to allow the Kansas Legislature to appoint members of the Kansas Supreme Court Nominating Commission would reduce the amount of control the bar has over the Kansas Supreme Court selection process, but it would not open up the process by exposing the commissioners’ votes to the public. It is possible to require that the votes of the Commission be made public—so everyone can learn which commissioners voted for or against which applicants—but most judicial nominating commissions around the country vote in secret.⁴⁷ Other ways to expose the political side of the judicial selection process include judicial elections and senate confirmation of judicial nominees. These are discussed next.

D. Electing Supreme Court Justices

Kansans elected supreme court justices prior to 1958 and a recent proposal in the Legislature sought

⁴⁵ These states are: Alaska, Arizona, Connecticut, Hawaii, Iowa, New York, Rhode Island, South Carolina, Tennessee and Vermont. See *supra* notes 5, 8 & 10.

⁴⁶ Colquitt, *supra* note 40, at 94-95.

⁴⁷ “Most commissions vote by secret ballot in closed, executive session.... In a few jurisdictions, a non-binding vote is done in closed, executive session and then conducted again in public.” AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, 2d ed., available at http://www.ajs.org/selection/docs/JNC_Handbk-Ch2.pdf (last visited Aug. 16, 2007) (citing, for the latter proposition, Section 8 of the New Mexico Rules Governing Judicial Nominating Commissions).

to revive this process.⁴⁸ While electing supreme court justices reduces bar control, it also has many drawbacks. These include

the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge’s dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.⁴⁹

The appearance of impropriety and threat to judicial independence are exacerbated by the fact that judicial campaign contributions tend to come from those who seek favorable decisions from the court. As Professor Paul Carrington explains:

Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust.... There have been celebrated occasions... when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.⁵⁰

The Chief Justice of the Texas Supreme Court similarly asked, “when a winning litigant has contributed

⁴⁸ Sarah Kessinger, *Proposal calls for electing judges to high court*, HUTCHINSON NEWS, Feb. 12, 2005. That proposal was House Concurrent Resolution No. 5012 (2005), introduced by Representative Lynne Oharah, and hearings were held before the House Committee on Federal and State Affairs on March 17, 2005. No action was taken.

⁴⁹ Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 276 (2002).

⁵⁰ Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91-92 (1998).

thousands of dollars to the judge's campaign, how do you ever persuade the losing party that only the facts of the case were considered?"⁵¹

E. Senate Confirmation of Supreme Court Justices

Proposals to elect Kansas Supreme Court justices have received less support in recent years than proposals to require Senate confirmation of them. In 2005, Senators Derek Schmidt and Susan Wagle proposed a constitutional amendment that would have kept the Supreme Court Nominating Commission but, after the governor picked one of the three names submitted by

⁵¹ Presser et al., *supra* note 12, at 378 (quoting Thomas R. Phillips, *Current System Outlived Usefulness*, May 1, 1999). A distinction should be drawn

when the campaign contributor is not a single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy. A single contributor may seek only victories in cases in which the contributor appears as a party or lawyer. In contrast, an interest group may have a broad policy agenda, such as protecting the environment or deregulating the economy. Such an interest group may contribute to the campaigns of judges who share its political philosophy, just as it may contribute to the campaigns of like-minded candidates for other public offices. If such an interest group succeeds, it affects the results in many cases in which the winning parties and lawyers are not members of the interest group. In short, the interest group succeeds, not by buying justice in individual cases, but by buying policy that influences a range of cases.

Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 653 (1999), reprinted in, 30 CAP. U. L. REV. 583 (2002). The possibility of contributors "buying justice" in individual cases is the primary concern about judicial elections. The possibility of contributors "buying policy" over a range of cases is a secondary concern and one that raises more nuanced issues. No plausible system of judicial selection can be completely insulated from the efforts of interest groups to influence policy. Even the federal system of judicial appointment with life tenure is subject to these efforts as interest groups contribute to the presidential and senatorial campaigns of candidates likely to appoint and confirm the judges expected to advance the interest group's preferred policy positions. The difference between the federal system and a system of electing judges is that in the federal system interest-group influence over judge-made policy is indirect because it operates through the president and senators and these intermediaries campaign on a range of issues besides judicial selection. By contrast, judicial selection is the only issue in judicial campaigns so interest-group influence over judge-made policy is more direct in a system of elected judges. See *infra* text at notes 77-78 (contrasting political theory behind judicial elections with that behind federal system of judicial selection).

the Commission, that person would be appointed to the Supreme Court only with consent of the State Senate.⁵² This proposal is similar to the law in the ten states that have both a supreme court nominating commission and confirmation by the legislature or other publicly-elected officials.⁵³

Under this proposal, if the Senate did not confirm the governor's nominee then the governor would pick one of the other two names submitted by the Commission. If the Senate did not confirm any of the three individuals then the Commission would submit three additional names to the governor and the process would continue until a nominee received the consent of the Senate. In 2005, this proposal passed the Senate Judiciary Committee on a 6-4 vote,⁵⁴ but did not go to a vote in the Senate.⁵⁵ In 2006, it did go to a vote in the Senate. A 22-17 majority of senators voted for it but that was five votes short of the two-thirds necessary for a constitutional amendment.⁵⁶

In both 2006 and 2007, Representative Lance Kinzer proposed abolition of the Supreme Court Nominating Commission, with justices nominated by the governor and appointed to the Supreme Court after confirmation by the Senate.⁵⁷ This proposal is similar to the process used in three states and at the federal level.⁵⁸

⁵² See Senate Concurrent Resolution No. 1606 (2005) & Senate Concurrent Resolution No. 1606 (2006). See also David Klepper, *Nomination process scrutinized*, KANSAS CITY STAR, Feb. 10, 2005, at B3

⁵³ See *supra* notes 10-12 and accompanying text.

⁵⁴ Steve Painter, *Senators Seek Say in Judge Selection*, WICHITA EAGLE, March 20, 2005, at 1B.

⁵⁵ Steve Painter, *Topeka Judge To Join High Court*, WICHITA EAGLE, July 23, 2005, at 1A.

⁵⁶ See KAN. CONST. art. XIV, §§ 1-2 (an amendment to the constitution can originate in either house, it must then be approved by two-thirds of the members of each house, then at the next or through a special election the majority of voters must approve. A revision can also occur through constitutional convention to revise all or part of the document, each house must approve this by a two-thirds vote. At the following election the majority of voters must approve the convention then at the next (or a special) election delegates are elected from each district, after meeting and reaching consensus the proposals of the convention are submitted to the voters for majority approval.)

⁵⁷ House Concurrent Resolution No. 5033 (2006); House Concurrent Resolution No. 5008 (2007).

⁵⁸ These states are Maine, New Hampshire and New Jersey. See *supra* notes 10-12.

This proposal was the subject of committee hearings,⁵⁹ but did not receive a vote of the full House.⁶⁰

The push for Senate confirmation came shortly after two controversial Kansas Supreme Court decisions, one on school finance and the other on the death penalty.⁶¹ This timing led many people to view the push for Senate confirmation as, to use the words of Senator John Vratil, “an overreaction to our discontent with two decisions.”⁶² According to this view, the process for selecting justices should not be amended just because many people disagree with a couple of the court’s decisions. As Senator Vratil said, “We need to take a much longer viewpoint and not just react in knee-jerk fashion to a couple of decisions that are unpopular.”⁶³

So the question is, when taking the long view, did the Framers of the United States Constitution get it right? They created three co-equal branches of government (executive, legislative and judicial) and a system of checks and balances that has stood the test of time longer than any other written constitution in human history.⁶⁴ A cardinal virtue of the United States Constitution is that, at crucial points, each branch is checked by both of the other two branches. For example, a member of the judicial branch is nominated by the executive and confirmed by the

⁵⁹ James Carlson, *Method for choosing high court justices would change with resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. The Feb. 8, 2006, hearing on House Concurrent Resolution No. 5033 was before the House Judiciary Committee and the Feb. 13, 2007, hearing on House Concurrent Resolution No. 5008 were before the House Federal and State Affairs Committee.

⁶⁰ A motion to favorably report it out of the House Judiciary Committee failed by a vote of 10-8 on March 23, 2006.

⁶¹ See John Hanna, *‘Triple Play’ should guide legislators*, HAYS DAILY NEWS, Feb. 14, 2005 (“The proposal to modify justices’ selection is a response to recent court decisions striking down the state’s death penalty law and ordering legislators to improve education funding. Some Republicans complain the court now has an activist streak and believe Senate confirmation of members would make it more accountable.”)

⁶² Quoted in Carl Manning, *Proposed amendment to require Senate confirmation of justices shot down*, HAYS DAILY NEWS, March 10, 2006.

⁶³ John Hanna, *‘Triple Play’ should guide legislators*, HAYS DAILY NEWS, Feb. 14, 2005.

⁶⁴ See, e.g., David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 811 (1986).

legislature.⁶⁵ These checks come from elected officials, responsible to the public as a whole, not a single interest group or “faction.” Also, these checks take the form of public votes so citizens can, on election day, hold their president and senators accountable for these important decisions.⁶⁶ By contrast, the Kansas Supreme Court Nominating Commission’s votes are secret so even the few privileged citizens entitled to vote for commissioners cannot hold them individually accountable for these important decisions.⁶⁷

IV. OPPOSITION TO SENATE CONFIRMATION

Officials of the Kansas Bar Association defend Kansas’ current system of Supreme Court selection and resist reform.⁶⁸ In addition to arguing (as discussed above) that the current system emphasizes merit rather than politics,⁶⁹ they have argued that Senate confirmation would be a “circus.”⁷⁰ One commentator

⁶⁵ See *supra* note 16 and accompanying text.

⁶⁶ *Id.*

⁶⁷ See *supra* notes 18-21 and accompanying text.

⁶⁸ See, e.g., Jack Focht, Past President, Kansas Bar Ass’n, Testimony in Opposition to Senate Concurrent Resolution No. 1606, Feb. 21, 2005; Richard F. Hayse, Past President, Kansas Bar Ass’n, Testimony in Opposition to House Concurrent Resolution No. 5033, Feb. 8, 2006; Richard F. Hayse, Past President, Kansas Bar Ass’n, Testimony in Opposition to House Concurrent Resolution No. 5008, Feb. 13, 2007. See also Tim Carpenter, *Senators want to have say; Under plan, justices would require Senate confirmation*, TOPEKA CAPITAL-JOURNAL, Feb. 10, 2005 (“Gov. Kathleen Sebelius said there was no reason to alter the appointment process. ‘I think that the system that we’ve had in place for a number of years has worked extremely well,’ she said. ‘I think the system works.’”); David Klepper, *Nomination process scrutinized*, KANSAS CITY STAR, Feb. 10, 2005, at B3 (in response to a proposal for Senate confirmation, “Supreme Court spokesman Ron Keefover said the court is happy with the current method of selection.”)

⁶⁹ See *supra* notes 22-28 and accompanying text.

⁷⁰ See, e.g., Richard F. Hayse, Past President, Kansas Bar Ass’n, Testimony in Opposition to House Concurrent Resolution No. 5008, Feb. 13, 2007. See also Editorial, *Senate right to retain status quo*, MANHATTAN MERCURY, March 12, 2006 (“Is the circus that masquerades as the confirmation process in the United States Senate a process we want to emulate?” (quoting Senator John Vratil)); John D. Montgomery, Editorial, *No problem*, HAYS DAILY NEWS, Feb. 11, 2005 (“So, would a state Supreme Court selection process mirroring the federal process be better in Kansas? Maybe not. Consider how political judicial confirmation is in Washington. Extremely political. Do we want that in Kansas?”); Appendix C, JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR

went further and wrote:

It's not hard to imagine a scenario, similar to what takes place in the U.S. Senate, where state senators, with liberal and conservative litmus tests, end up politicizing the confirmation hearings and the final vote on a nominee.

However, the consequences of this battle in Kansas may be unlike the national level. A Kansas justice, wounded by his or her confirmation battle, will be ripe for an acrimonious retention vote. Ideologically motivated groups, who lost their battles in the state Senate, might go gunning for that justice in the ballot box. At the national level, U.S. Supreme Court justices don't face a retention vote. Thus, time has a chance to heal the wounds inflicted by their confirmation hearings.⁷¹

Is this war-like vision of battling senators and wounded justices likely to occur if Kansas adopts senate confirmation? To assess that, one can look to the experience of the twelve states that have senate confirmation or confirmation by a similar popularly-elected body.⁷² Research for this paper examined the last two votes for initial supreme court confirmation in each of these twelve states.⁷³ In all twenty four of

ASS'N COMMISSION ON THE 21ST CENTURY JUDICIARY (2003) ("The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach.")

Also, some opponents of senate confirmation express concern that the Kansas Legislature, unlike the United States Congress, is a part-time legislature. *See, e.g.*, Testimony of Retired Justice Fred N. Six, Feb. 13, 2007 ("Will the Senate be in Session? It's a Long, Long Time From April to December.") Several states with senate confirmation, however, have part time legislatures. *See* National Conference of State Legislatures http://www.ncsl.org/programs/press/2004/backgroundunder_fullandpart.htm (last visited Oct. 4, 2007) (listing Maine, Rhode Island, Utah and Vermont as part-time). If a vacancy on the Kansas Supreme Court occurred when the Kansas Legislature was not in session then a special session could be called or the seat could simply remain vacant until the Legislature's regular session.

⁷¹ Joseph A. Aistrup, *Supreme Court confirmation amendment*, HAYS DAILY NEWS, Feb. 28, 2005.

⁷² Ten of these twelve states have supreme court nominating commissions. *See supra* notes 10-12 and accompanying text. California's unique system is discussed *supra* note 12.

⁷³ *See* Appendix B. The votes presented in Appendix B are for the state's highest court regardless of whether or not it is named the supreme court. The votes examined are the last two votes

these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous.⁷⁴ In only two of these twenty four cases was there more than a single dissenting vote.⁷⁵ These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus, let alone a war.

The opposite concern about senate confirmation is that it is merely a rubber stamp so governors routinely appoint whoever they want. There are indications, however, that—rather than acting as a rubber stamp—senate confirmation may be a deterrent. 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.⁷⁶ Of course, whether this generalization is accurate or not, ultimate responsibility for the tenor of the senate confirmation process rests on the senators themselves. Similarly, ultimate responsibility for the outcome of the senate confirmation process—whether

for *initial* supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. *See infra* note 76 (citing Hartford Courant article).

⁷⁴ Seventeen of the twenty four votes were unanimous and two were effectively unanimous because they were voice votes with no tally recorded.

⁷⁵ *See* Appendix B.

⁷⁶ The Founders recognized that senate confirmation would deter the executive from controversial nominees. As Alexander Hamilton wrote, "the necessity of [Senate] 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 preventing the appointment of unfit characters...." THE FEDERALIST No. 76, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 1999). In addition to deterring controversial nominations, the requirement of senate confirmation may also lead executives to withdraw controversial nominations. Some suggest this is what led President Bush to withdraw Harriet Miers' nomination to the Supreme Court. *See, e.g.*, John Cochran, *A Troubled Nomination Implodes*, CQ WEEKLY, Oct. 29, 2005. Similarly, in Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. At least one commentator attributes the withdrawal in part to the prospect of a "grilling," (*i.e.*, "rough" questioning,) before the state senate. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1.

a nominee is confirmed or not—also rests with the senators, who are accountable to the citizens on election day.

In short, senate confirmation makes judicial selection accountable to the people. It does so without judicial elections, which embody the passion for direct democracy prevalent in the Jacksonian era.⁷⁷ Rather, senate confirmation exemplifies the republicanism of our Nation's Founders. The Framers of the United States Constitution devised a system of indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities.⁷⁸ Senate confirmation strives to make judicial selection accountable to the people while protecting the judiciary against the possibility that the people may act rashly.

V. JUDICIAL INDEPENDENCE

In defending Kansas' current system for selecting justices, some members of the bar suggest that Senate confirmation would reduce the independence of the Kansas Supreme Court.⁷⁹ 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

⁷⁷ “In the early nineteenth century, states switched to the election of a judges in a fervor of Jacksonian democracy.” DANIEL BECKER & MALIA REDDICK, *JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES* 20 (2003), available at <http://www.ajs.org/js/jsreform.pdf> (last visited Aug. 14, 2007). See also STUMPF & PAUL, *supra* note 35, at 134-35; ANTHONY CHAMPAGNE & JUDITH HAYDEL, *JUDICIAL REFORM IN THE STATES* 4-5 (1993).

⁷⁸ For Madison's classic distinction between republics and democracies, see *THE FEDERALIST* No. 10, at 49-52 (James Madison) (Clinton Rossiter ed. 1999). The Framers “understood that despotism of the many could be as dangerous to government and to individual liberty as despotism of the few, and they designed their democracy to ensure against both evils. The Framers' fear of majority faction is evident: their constitution is countermajoritarian in numerous respects. The document clearly is founded in part on permitting and expecting the populace to speak through its elected representatives. By the same token, the Constitution is shot through with provisions that in effect might defeat the decisions of a popular majority.” Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577, 619-20 (1993).

⁷⁹ See, e.g., Testimony of Jim Robinson, Kansas Association of Defense Counsel, Feb. 6, 2005 (“Senate confirmation introduces a political element into the selection process that diminishes judicial independence.”)

of independence because they have life tenure.⁸⁰ 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.⁸¹

The current system of judicial retention for the Kansas Supreme Court is as follows. When first appointed, a justice holds office for a short initial term.⁸² To remain on the bench, a justice must stand for retention at the next general election which occurs after one year in office, and if retained in that election, must stand for retention every six years thereafter.⁸³ In these retention elections, the justice does not face an opposing candidate; instead, the voters' choice is simply to retain or reject that particular justice.⁸⁴ A justice must retire at the end of the term during which the justice

⁸⁰ U.S. CONST. art. III, § 1 (“during good behavior”).

⁸¹ “Life tenure acts to insulate justices from political pressure because, short of the drastic and difficult step of impeachment, justices cannot be removed from the Court for making unpopular decisions. Nonrenewable terms insulate justices in the same way.” James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 *V.A. L. REV.* 1093, 1127 (2004) (referring to the United States Supreme Court). “Appointing justices to renewable terms, however, would move the Court in the direction of a legislative body and undermine judicial independence.” *Id.* See also Presser et al., *supra* note 12, at 369-70; Behrens & Silverman, *supra* note 49, at 305 (“Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence.”); Lee Epstein, et al., *Comparing Judicial Selection Systems*, 10 *WM. & MARY BILL RTS. J.* 7, 12 (2001) (“while the U.S. Framers gave federal jurists life tenure presumably to maximize judicial independence, other nations opted for renewable terms presumably to maximize accountability.”)

⁸² KAN. CONST. art. 3 § 5(c) (a new justice “shall hold office for an initial term ending on the second Monday in January following the first general election that occurs after the expiration of twelve months in office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any justice of the supreme court may file in the office of the secretary of state a declaration of candidacy for election to succeed himself.”)

⁸³ KAN. CONST. art. 3 §§ 2, 5(c).

⁸⁴ *Id.*

reaches the age of 70.⁸⁵

This system of judicial *retention* is perfectly compatible with a judicial *selection* process that includes senate confirmation. Three states combine retention elections with initial selection through confirmation by the senate or other publicly-elected officials.⁸⁶ Accordingly, supporters of senate confirmation in Kansas argue that there is no need to change our state's system of judicial retention.⁸⁷ The balance Kansas has struck between judicial independence and judicial accountability is quite reasonable and well within the national mainstream.⁸⁸ If, however, greater judicial independence was desired then Kansas could extend the length of a justice's term (the time between retention elections) or even abolish retention elections

⁸⁵ KAN. STAT. ANN. § 20-2608(a) (2006) (“Any judge upon reaching age 75 shall retire, except that any duly elected or appointed justice of the supreme court shall retire upon reaching age 70. Upon retiring, each such judge as described in this subsection shall receive retirement annuities as provided in K.S.A. 20-2610 and amendments thereto, except, that when any justice of the supreme court attains the age of 70, such judge may, if such judge desires, finish serving the term during which such judge attains the age of 70.”)

⁸⁶ These states are California, Maryland and Utah. *See* CAL. CONST. art. VI, § 16 (retention election every 12 years), MD. CONST. art. IV, § 5A (retention election every 10 years), UTAH CONST. art. VIII, § 9 (retention elections every ten years). *See also supra* notes 11-12 (citing methods of initial selection).

⁸⁷ House Concurrent Resolution No. 5033 (2006), & House Concurrent Resolution No. 5008 (2007), which would move to the federal system of senate confirmation without a nominating commission, make no change to judicial retention except to eliminate the use of masculine pronouns.

⁸⁸ *See, e.g.,* Behrens & Silverman, *supra* note 49.

Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence. The public's desire for accountability, however, necessitates some checks on appointed judges. Few states opt for a lifetime appointment system because the people or the political establishment want to be able to remove judges who lose sight of society's values. For this reason, most states with appointive systems set a full term of between four and twelve years.

Those states that use merit selection provide for nonpartisan retention elections that usually occur within one to two years of appointment and after each full term.

Id. at 305.

altogether so that justices would serve until reaching the mandatory retirement age. On the other hand, if greater judicial accountability was desired then Kansas could reduce the length of a justice's term.

CONCLUSION

The bar has an unusually high degree of control over the selection of supreme court justices in Kansas. None of the other forty nine states gives the bar as much control. To move Kansas from this extreme position toward the mainstream, several possible reforms have been debated in recent years. The least ambitious reform would merely change the composition of the Kansas Supreme Court Nominating Commission. Rather than allowing the bar to select a majority of the Commission's members, some of those members could, instead, be selected by the Kansas Legislature. While this would reduce the amount of control the bar has over the judicial selection process, it would not open up the process by exposing the commissioners' votes to the public. Other states open the judicial selection process to the public by using judicial elections or senate confirmation of judicial nominees. Proposals to elect supreme court justices have received little support in Kansas in recent years. By contrast, proposals to institute senate confirmation have received significant support in the Kansas Legislature. Senate confirmation would both reduce the amount of control the bar has over the judicial selection process and open up that process to a more public system of checks and balances. The worry that senate confirmation in Kansas would be a political “circus” or a “battle” finds little support in the experience of the many states that use senate confirmation. In short, senate confirmation of Kansas Supreme Justices is a reform worthy of serious consideration.

Appendix A⁸⁹
**Kansas Supreme Court Appointments,
1987 - 2007**

Allegrucci, Donald L., (D⁹⁰) Pittsburg, appointed vice Schroeder, Jan. 12, 1987 to Jan. 8, 2007.

- Governor John Carlin (D) [8 Jan 1979 – 12 Jan 1987]

- Supreme Court Nominating Commission:

- o Robert C. Foulston [Chair, 1985 – 1992]⁹¹
- o Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
- o Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
- o John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
- o Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
- o Morris D. Hildreth [Fifth District Lawyer, 1977 – 1987]⁹²
- o Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D⁹³)
- o Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D⁹⁴)
- o Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D⁹⁵)
- o John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D⁹⁶)
- o Kenneth D. Buchele [Fifth District Non-Lawyer, 1982 – 1987] (D⁹⁷)

- Co-Nominees:

- o William Cook (D⁹⁸)

⁸⁹ Unless noted otherwise, all party affiliations in Appendix A are derived from the Kansas VoterView database available at the Kansas Secretary of State website, <http://myvoteinfo.voteks.org/>.

⁹⁰ Chris Grenz, *Critics Question Democratic Majority on High Court*, HUTCHINSON NEWS, Aug. 9, 2005.

⁹¹ Deceased. No party affiliation available.

⁹² Deceased. No party affiliation available.

⁹³ GOV. CARLIN RECORDS, BOX 59-1-2-19.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Carlin Picks Allegrucci for Court*, WICHITA EAGLE, Dec. 25, 1986, at 1A.

o Jerry Gill Elliott (U⁹⁹)
Six, Frederick N., (R¹⁰⁰) Lawrence, appointed vice Prager, Sept. 1, 1988 to Jan. 13, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]

- Supreme Court Nominating Commission:

- o Robert C. Foulston [Chair, 1985 – 1992]¹⁰¹
 - o Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
 - o Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
 - o John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
 - o Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
 - o Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
 - o Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D¹⁰²)
 - o Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D¹⁰³)
 - o Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D¹⁰⁴)
 - o John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D¹⁰⁵)
 - o Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
 - o Bob Abbott (R¹⁰⁶)
 - o Charles Henson (R¹⁰⁷)

Abbott, Bob, (R¹⁰⁸) Junction City, appointed vice Miller, Sept. 1, 1990 to June 6, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]

- Supreme Court Nominating Commission:

⁹⁹ *Id.*

¹⁰⁰ *Two Judges, Lawyer Nominated for Position on State High Court*, WICHITA EAGLE, July 8, 1988, at 4D.

¹⁰¹ Deceased. No party affiliation available.

¹⁰² GOV. CARLIN RECORDS, BOX 59-1-2-19.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Two Judges, Lawyer Nominated for Position on State High Court*, WICHITA EAGLE, July 8, 1988, at 4D.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

- o Robert C. Foulston [Chair, 1985 – 1992]¹⁰⁹
- o Selby S. Soward [First District Lawyer, 1988 – 1991]¹¹⁰
- o Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
- o John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
- o Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
- o Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
- o Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
- o Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
- o Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D¹¹¹)
- o John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D¹¹²)
- o Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
 - o Joseph Pierron Jr. (R¹¹³)
 - o Elwaine Pomeroy (R¹¹⁴)

Davis, Robert E., (D¹¹⁵) Topeka, appointed vice Herd, Jan. 11, 1993—.

- Governor Joan Finney (D) [14 Jan 1991 – 9 Jan 1995]
- Supreme Court Nominating Commission:
 - o Jack E. Dalton [Chair, 1992 – 1993] (R)
 - o Constance M. Achterberg [First District Lawyer, 1992 – 1993] (R)
 - o Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
 - o John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
 - o Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
 - o Jack L. Lively [Fifth District Lawyer, 1987 – 1993]

¹⁰⁹ Deceased. No party affiliation available.

¹¹⁰ Deceased. No party affiliation available.

¹¹¹ GOV. CARLIN RECORDS, BOX 59-1-2-19.

¹¹² *Id.*

¹¹³ *Owen Case Given to Second Judge*, HUTCHINSON NEWS, Nov. 7, 1989.

¹¹⁴ STATE OF KANSAS LEGISLATIVE DIRECTORY OF THE SEVENTIETH LEGISLATURE 1983 REGULAR SESSION.

¹¹⁵ Grenz, *supra* note 90.

- (R)
- o Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
- o Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
- o Emmett J. Tucker, Jr. [Third District Non-Lawyer, 1990 – 1993] (R)
- o Evangeline S. Chavez [Fourth District Non-Lawyer, 1991 – 1993] (D)
- o Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
 - o Kay Royse (D¹¹⁶)
 - o Franklin Theis (D¹¹⁷)

Larson, Edward, (R) Hays, appointed vice Holmes, Sept. 1, 1995 to Sept. 4, 2002.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
 - o Lynn R. Johnson [Chair, 1993 – 2001] (D)
 - o Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
 - o Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
 - o Patrick D. McAnany [Third District Lawyer, 1993 – 1995] (R)
 - o Arden J. Bradshaw [Fourth District Lawyer, 1993 – 1997] (D)
 - o Carolyn Bird [First District Non-Lawyer, 1993 – 1998] (D)
 - o Edwin Watson [Second District Non-Lawyer, 1993 – 1995] (D¹¹⁸)
 - o John Strick, Jr. [Third District Non-Lawyer, 1993 – 1996] (D)
 - o Pat Lehman [Fourth District Non-Lawyer, 1993 – 1997] (D¹¹⁹)
- Co-Nominees:
 - o Robert J. Lewis Jr. (R)
 - o Steve A. Leben (D)

¹¹⁶ Al Polczynski, *Weigand Fights Rich-Guy Image*, WICHITA EAGLE, May 25, 1990, at 3D.

¹¹⁷ *Finney Fills Spot on State's High Court*, WICHITA EAGLE, Dec. 15, 1992, at 3D.

¹¹⁸ Phone conversation between Christopher Steadham and Linda Chalfant, Atchison County Clerk's Office (Aug. 16, 2007).

¹¹⁹ Kansas Democratic Party, <http://www.ksdp.org/node/1210> (last visited Aug. 16, 2007).

Nuss, Lawton R., (R¹²⁰) Salina, appointed vice Larson, Sept. 4, 2002—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
 - Richard C. Hite [Chair, 2001 – 2009] (R)
 - Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
 - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
 - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
 - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
 - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
 - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
 - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
 - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
 - Marla Luckert (D¹²¹)
 - Warren M. McCamish (R)

Luckert, Marla J., (D¹²²) Topeka, appointed vice Six, Jan. 13, 2003—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
 - Richard C. Hite [Chair, 2001 – 2009] (R)
 - David J. Rebein [First District Lawyer, 2002 – 2006] (R¹²³)
 - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
 - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
 - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
 - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
 - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)

¹²⁰ Grenz, *supra* note 90.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

-
- Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
 - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)

- Co-Nominees:
 - David L. Stutzman (U¹²⁴)
 - Stephen D. Hill (D¹²⁵)

Gernon, Robert L., (R¹²⁶) Topeka, appointed vice Lockett, Jan. 13, 2003 to March 30, 2005.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
 - Richard C. Hite [Chair, 2001 – 2009] (R)
 - David J. Rebein [First District Lawyer, 2002 – 2006] (R¹²⁷)
 - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
 - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
 - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
 - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
 - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
 - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
 - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
 - Warren M. McCamish (R)
 - David L. Stutzman (U¹²⁸)

Beier, Carol A., (D¹²⁹) Wichita, appointed vice Abbott, Sept. 5, 2003—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:

¹²⁴ Jim McLean, *Appointed: Governor Tabs Shawnee County District Court Judge to Replace Retiring Justice Six*, TOPEKA CAPITAL – JOURNAL, Nov. 21, 2002, at A1.

¹²⁵ *Id.*

¹²⁶ *Hayden to Pick Appeals Judge*, WICHITA EAGLE, October 31, 1987, at 15A.

¹²⁷ Grenz, *supra* note 90.

¹²⁸ McLean, *supra* note 124.

¹²⁹ Grenz, *supra* note 90.

- o Richard C. Hite [Chair, 2001 – 2009] (R)
- o David J. Rebein [First District Lawyer, 2002 – 2006] (R¹³⁰)
- o Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
- o Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
- o Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
- o Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
- o James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
- o Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
- o Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)

• Co-Nominees:

- o Steve A. Leben (D)
- o Patrick D. McAnany (R)

Rosen, Eric S., (D¹³¹) Topeka, appointed vice Gernon, Nov. 18, 2005—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
 - o Richard C. Hite [Chair, 2001 – 2009] (R)
 - o David J. Rebein [First District Lawyer, 2002 – 2006] (R¹³²)
 - o Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
 - o Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
 - o Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
 - o Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
 - o Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
 - o Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
 - o Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

• Co-Nominees:

- o Robert Fairchild (R¹³³)
- o Martha Coffman (D¹³⁴)

Johnson, Lee A., (R¹³⁵) Caldwell, appointed vice Allegrucci, Jan. 8, 2007—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
 - o Richard C. Hite [Chair, 2001 – 2009] (R)
 - o Kerry E. McQueen [First District Lawyer, 2006 – 2010] (R)
 - o Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
 - o Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
 - o Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
 - o Janet A. Juhnke [First District Non-Lawyer, 2006 – 2010] (D)
 - o Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
 - o Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
 - o David N. Farnsworth [Fourth District Non-Lawyer, 2005 – 2009] (D)
- Co-Nominees:
 - o Robert Fairchild (R¹³⁶)
 - o Tom Malone (D¹³⁷)

¹³³ Chris Moon, *Local Judge a Finalist*, TOPEKA CAPITAL – JOURNAL, May 25, 2005, at B1.

¹³⁴ *Id.*

¹³⁵ Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL – JOURNAL, Jan. 6, 2007, at 1A.

¹³⁶ Moon, *supra* note 133.

¹³⁷ Nickie Flynn, *GOP Rivals for Judgeship are Old Allies*, WICHITA EAGLE, July 31, 1992, at 3D.

Appendix B
Most Recent State Supreme Court
Confirmation Votes¹³⁸

State	Nominee	Governor	Confirm	Vote tally
CT ¹³⁹	Justice Peter T. Zarella	John G. Rowland	Y	(Senate: 35-1; House: 136-0, 14 absent or not voting)
CT	Chief Justice Chase T. Rogers	M. Jodi Rell	Y	(Senate: 33-0, 3 absent or not voting; House: 149-0, 2 absent or not voting)
DE ¹⁴⁰	Justice Jack Jacobs	Ruth Ann Minner	Y	(19-0, 2 absent or not voting)
DE	Justice Henry DuPont Ridgely	Ruth Ann Minner	Y	(21-0)
HI ¹⁴¹	Justice James E. Duffy	Linda Lingle	Y	(25-0)
HI	Justice Simeon R. Acoba Jr.	Benjamin Cayetano	Y	(25-0)
MA ¹⁴²	Justice Robert J. Cordy	Paul Cellucci	Y	(8-0, vacancy on the Council at the time)

¹³⁸ This Appendix reports the two most recent supreme court confirmation votes prior to August 1, 2007 in the states that have such votes. The votes reported are for the state's highest court regardless of whether or not it is named "the supreme court." The votes reported are the last two votes for initial supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. *See supra* note 76 (citing Hartford Courant article).

¹³⁹ Telephone call between Beth Dorsey and Legislative Library, Connecticut General Assembly, Aug. 14, 2007. Information can be found at www.cga.ct.gov/.

¹⁴⁰ Telephone call between Beth Dorsey and Bernard Brady, Secretary of the Senate, Delaware General Assembly, Aug. 16, 2007.

¹⁴¹ Telephone call between Beth Dorsey and Public Access Room, Hawaii State Legislature, Aug. 16, 2007.

¹⁴² Email between Beth Dorsey and Ethan Tavan, Constituent Services Aide, Office of the Governor, Massachusetts, July 30, 2007.

MA	Justice Judith Cowin	Paul Celluci	Y	(9-0)
MD ¹⁴³	Justice Clayton Greene Jr.	Robert Ehrlich	Y	(45-0, 2 absent)
MD	Justice Lynne Battaglia	Parris N. Glendening	Y	(40-3, 4 absent)
ME ¹⁴⁴	Justice Andrew M. Mead	John Baldacci	Y	(33-0, with 2 members absent; 13-0, in judiciary committee)
ME	Justice Warren M. Silver	John E. Baldacci	Y	(30-0, with 5 members absent; 12-0, with 1 absent in judiciary committee)
NH ¹⁴⁵	Justice Gary E. Hicks	John Lynch	Y	(5-0)
NH	Justice Richard E. Galway	Craig Benson	Y	(5-0)
NJ ¹⁴⁶	Justice Helen E. Hoens	Jon S. Corzine	Y	(35-0, 2 members did not vote)
NJ ¹⁴⁷	Chief Justice Stuart Rabner	Jon S. Corzine	Y	(36-1, dissenting vote Senator Nia Gill)
NY ¹⁴⁸	Justice Eugene F. Pigott, Jr.	George E. Pataki	Y	(no tally available - confirmed by voice vote)

¹⁴³ Letter between Beth Dorsey and Marilyn McManus, Department of Legislative Services, Office of Policy Analysis, Maryland General Assembly, Aug. 16, 2007.

¹⁴⁴ Email between Beth Dorsey and Mark Knierim, Reference Librarian, Maine State Law and Legislative Reference Library, July 30, 2007.

¹⁴⁵ Email between Beth Dorsey and Raymond S. Burton, member of the New Hampshire Executive Council, Aug. 4, 2007.

¹⁴⁶ Email between Beth Dorsey and James G. Wilson, Assistant Legislative Counsel, Office of Legislative Services, New Jersey State Legislature, Aug. 7, 2007.

¹⁴⁷ Email between Beth Dorsey and the Legislative and Information and Bill Room, Office of Legislative Services, New Jersey State Legislature, July 30, 2007.

¹⁴⁸ Telephone call between Beth Dorsey and Legislative Journal Room, New York Assembly, Aug. 25, 2007 and Telephone call between Beth Dorsey and Liz Carr, New York Governor's Office, Sept. 12, 2007.

NY	Justice Theodore T. Jones	Eliot Spitzer	Y	(no tally available – confirmed by voice vote)
RI ¹⁴⁹	Justice P. Robinson III	Donald L. Carcieri	Y	(House: 65-5, 5 absent or not voting; Senate: 37-0, 1 absent or not voting)
RI	Justice Paul A. Suttell	Donald L. Carcieri	Y	(House: 65-0, 10 absent or not voting; Senate: 30-0, 8 absent or not voting)
UT ¹⁵⁰	Justice Jill N. Parrish	Michael O. Leavitt	Y	(28-0, 1 absent)
UT	Justice Ronald E. Nehring	Michael O. Leavitt	Y	(27-1, 1 absent)
VT ¹⁵¹	Justice Brian L. Burgess	James H. Douglas	Y	(29-0, 1 absent or not voting)
VT	Chief Justice Paul L. Reiber	James H. Douglas	Y	(27-0, 3 absent or not voting)

¹⁴⁹ Telephone call between Beth Dorsey and Rhode Island Legislative Library, Rhode Island State Legislature, Aug. 15, 2007.

¹⁵⁰ Telephone call between Beth Dorsey and Shelley Day, Legislative Information Liaison, Utah State Legislature Research Library and Information Center, Aug. 24, 2003. *See also* <http://le.utah.gov/>.

¹⁵¹ Email between Beth Dorsey and Michael Chernick, Legislative Council, Vermont State Legislature, Aug. 15, 2007.

Appendix C
Pages 70-73 of:

JUSTICE IN JEOPARDY

**REPORT OF THE
AMERICAN BAR ASSOCIATION
COMMISSION ON THE 21ST CENTURY
JUDICIARY**

July 2003
Alfred P. Carlton, Jr.
American Bar Association President,
2002-2003

THE RECOMMENDATIONS OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY WERE APPROVED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES IN AUGUST 2003. THE COMMENTARY CONTAINED HEREIN DOES NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE ABA. ONLY THE TEXT OF THE RECOMMENDATIONS HAS BEEN FORMALLY APPROVED BY THE ABA HOUSE OF DELEGATES AS OFFICIAL POLICY (SEE APPENDIX A).

THE REPORT, ALTHOUGH UNOFFICIAL, SERVES AS A USEFUL EXPLANATION OF THE RECOMMENDATIONS.

I. The Preferred System of Judicial Selection

- The Commission recommends, as the preferred system of state court judicial selection, a commission-based appointive system with the following components:**
- The Commission recommends that the governor appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, nonpartisan, diverse deliberative body or commission.**
- The Commission recommends that judicial appointees serve a single, lengthy term of at**

least 15 years or until a specified age and not be subject to a reselection process.^[FN] Judges so appointed should be entitled to retirement benefits upon completion of judicial service.

•**The Commission recommends that judges not otherwise subject to reselection, nonetheless, remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.**

The American Bar Association has long supported appointive-based or so-called “merit selection” systems for the selection of state judges, and in the Commission’s view, rightly so, for several reasons. First, the administration of justice should not turn on the outcome of popularity contests. If we accept the enduring principles identified in the first section of this report, then a good judge is a competent and conscientious lawyer with a judicial temperament who is independent enough to uphold the law impartially without regard to whether the results will be politically popular with voters. Second, initial appointment reduces the corrosive influence of money in judicial selection by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges. Some argue that in appointive systems, campaign contributions are simply redirected from judicial candidates to the appointing governors, but that is an important difference because it is the money that flows directly from contributors to judicial candidates that gives rise to a perception of dependence. Third, the escalating cost of running judicial campaigns operates to exclude from the pool of viable candidates those of limited financial means who lack access to contributors with significant financial resources. The potential impact of this development on efforts to diversify the bench is especially troublesome. Fourth, the prospect

¹⁵² The American Bar Association House of Delegates adopted a recommendation stating, “Judicial appointees should serve until a specified age.”

of soliciting contributions from special interests and being publicly pressured to take positions on issues they must later decide as judges threatens to discourage many capable and qualified people from seeking judicial office. For these and other reasons upon which the ABA has relied in the past, the Commission believes that judges should initially be selected by appointment.

Consistent with an earlier recommendation in this Report, the Commission likewise recommends that an independent deliberative body evaluate the qualifications of all judicial aspirants and that candidates eligible for nomination to judicial office be limited to those who have been approved by such a body. In grounding its support for appointive judiciaries on the principle that the viability of a would-be judge's candidacy should not turn on her or his political popularity, the Commission does not mean to suggest that appointive systems are apolitical. Any method of judicial selection will inevitably be political because judges decide issues of intense social, cultural, economic, and political interest to the public and the other branches of government. In this inherently political environment, however, the requirement that independent commissions review the qualifications of and approve all would-be judges provides a safety net to assure that all nominees possess the baseline capabilities, credentials, and temperament needed to be excellent judges.

Despite the occasional tendency to regard "politics" as a bad word, at its root, politics refers to the process by which citizens govern themselves. In that regard, it is not only inevitable but also perhaps even desirable that judicial selection have a "political" aspect to ensure that would-be judges are acceptable to the people they serve. Because judges, by virtue of their need to remain independent and impartial, serve a role in government that is fundamentally different from that of other public officials, the Commission has recommended against the use of elections as a means to ensure public acceptability.

The Commission did, however, consider another possibility: legislative confirmation of gubernatorial appointments. Requiring that judges

be approved by an independent commission and *both* political branches of government could conceivably increase public confidence in the judges at the point of initial selection and serve as a form of prospective accountability that reduces the need for resorting to more problematic reselection processes later. A majority of the Commission ultimately decided, however, not to recommend legislative confirmation as a component of its preferred selection system. The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach.

The last of the Commission's recommendations with respect to the selection system it regards as optimal is that states not employ reselection processes. Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. When nonincumbents run for judicial office in contested elections, the threat that elections pose to their future independence and impartiality—though extant—is limited. Granted, nonincumbent candidates can be made to appear beholden either to their contributors, to positions they took on the campaign trail, or more generally to the electoral majority responsible for selecting them. But unlike incumbent judges, first-time judicial office seekers are not at risk of being removed from office because they made rulings of law that did not sit well with voters.

A similar point can be made with respect to judges initially selected by appointment. The process by which those candidates are first chosen may be partisan and political, and some judges may feel a lingering allegiance to whoever appointed them. But they are not put in danger of losing jobs they currently hold on account of judicial decisions made in those positions.

In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or

rejected the claims of popular litigants are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is, in turn, undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.

The problems with reselection may be most common in contested reelection campaigns but are at risk of occurring in any reselection process—electoral or otherwise. Thus, for example, the issue arises in states that delegate the task of judicial reselection to legislatures, whose enactments judges are to interpret and, if unconstitutional, invalidate. For that reason, the Commission recommends against resort to reselection processes.

While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has remained flexible as to the optimal length of a judge’s term of office. Most states that appoint judges without the possibility of subsequent reselection cap judicial terms at a specified age. States could also set judicial terms at a fixed number of years. In either case, however, it is important that states take pains to preserve judicial retirement benefits because judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their retirement benefits vest.

If states opt for a single term, it is important that the term be of considerable length—at least fifteen or more years—for several reasons. First, there are obvious advantages that flow from experience on the bench that will be lost if judges are confined to short terms of office. Second, the most qualified candidates for judge will often be lawyers with very successful private practices that they may be reluctant to abandon if they are obligated to return to practice after only a few years on the bench. Third, to the extent that lawyers view judicial service as the culmination of their legal careers and not simply as a temporary

detour from private practice, short terms may discourage younger lawyers from seeking judicial office. Fourth, insofar as judges are obligated to reenter the job market at the conclusion of their judicial service, their independence from prospective employers who appear before them as lawyers and litigants in the waning years of their judicial terms may become a concern.

In earlier recommendations, the Commission urged that systems of judicial discipline be actively enforced and that regular and comprehensive judicial evaluation programs be instituted. These recommendations are critically important to ensuring accountability in a system that does not rely on reselection processes. All states have procedures for judicial removal, typically including but not limited to those subsumed by the disciplinary process.

The Commission believes that judges must be removable for cause to preserve the institutional legitimacy of the courts. It is beyond the scope of this report to describe in detail the nature and extent of “for cause” removal. By way of general guidance, however, the Commission points to the enduring principles discussed in the first part of this report. An overriding goal of our system of justice is to uphold the rule of law. Judges should never be subject to removal for upholding the law as they construe it to be written, even when they are in error, for then the judge’s decision-making independence—so essential to safeguarding the rule of law in the long run—will be undermined. On the other hand, we do not want judges who are so independent that they are utterly unaccountable to the rule of law they have sworn to uphold. Thus, judges who disregard the rule of law altogether by taking bribes or committing other crimes that undermine public confidence in the courts should be removed. One could reach a similar conclusion with respect to judges who, despite the best efforts of nominating commissions to weed out unqualified candidates, manifest an utter lack of the competence, character, or temperament requisite to upholding the law impartially.



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