

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West-Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 • FAX (785) 296-3824

kslegres@klrd.ks.gov

<http://www.kslegislature.org/klrd>

September 19, 2017

JUDICIAL SELECTION

This memorandum describes the methods for filling vacancies on the Kansas Supreme Court and the Kansas Court of Appeals, as well as recent legislative efforts to amend the selection process.

Current Method for Filling Vacancies

Article 3, Section 5 of the *Kansas Constitution* governs selection of Kansas Supreme Court justices. Since its amendment in 1958, Section 5 has specified any vacancy on the Court shall be filled through the Governor's appointment of one of three candidates nominated by the Supreme Court Nominating Commission (Commission). The nonpartisan Commission has nine members: a chairperson who is an attorney chosen by the members of the Kansas Bar; one attorney member from each congressional district chosen by members of the Kansas Bar who reside in that district; and one non-attorney member from each congressional district appointed by the Governor.

The process for filling vacancies on the Kansas Court of Appeals is governed by statute and was amended by the passage of 2013 HB 2019 to allow the Governor, with the consent of the Senate, to appoint a qualified person to fill a vacancy. Under this procedure, the Governor must make an appointment within 60 days of receiving notice of the vacancy from the Clerk of the Supreme Court. Otherwise, the Chief Justice of the Supreme Court, with the consent of the Senate, will appoint a qualified person for the position. The Senate is required to vote on the appointment within 60 days of being received or, if the Senate is not in session and will not be in session within the 60-day time limit, within 20 days of the next session. If the Senate fails to vote within the time limit, its consent will be deemed given. If the appointee does not receive a majority vote in the Senate, the Governor will appoint another qualified person within 60 days, and the same consent procedure will be followed.

Once appointed, Supreme Court justices and Court of Appeals judges are subject to retention elections following their first full year in office and at the end of each term. Supreme Court justices serve six-year terms, and Court of Appeals judges serve four-year terms.

Recent Legislative Efforts

Vacancies on the Kansas Supreme Court

The method for filling vacancies on the Kansas Supreme Court is governed by the *Kansas Constitution*, which requires a constitutional amendment to modify that process. Article

14, Section 1 of the *Kansas Constitution* provides that a concurrent resolution originating in either house of the Legislature that is approved by two-thirds of all members will be considered by Kansas voters at the next election. If a majority of those voting on the amendment approves the amendment, it becomes a part of the *Kansas Constitution*.

During the 2013 Session, the Kansas Legislature considered numerous bills and concurrent resolutions related to judicial selection. One of these concurrent resolutions, HCR 5002, which was approved by the House Judiciary Committee, would have submitted a constitutional amendment to the qualified electors of the State to modify the method of selection for justices of the Kansas Supreme Court and add the law governing the Court of Appeals to the *Kansas Constitution*. Specifically, the amendment would have eliminated the Supreme Court Nominating Commission and allowed the Governor to appoint qualified persons to the Supreme Court and Court of Appeals using the procedure adopted for the Court of Appeals in 2013 HB 2019. While the selection method would have been modified, both Supreme Court justices and Court of Appeals judges would have continued to be subject to retention elections.

Several concurrent resolutions concerning the selection of Kansas Supreme Court justices were introduced during the 2015 Session. HCR 5004 and HCR 5005 were both approved by the House Judiciary Committee. HCR 5004 would have provided for election of justices. HCR 5005 was similar to 2013 HCR 5002 and was considered by the House Committee of the Whole during the 2016 Session; however, it was not adopted by the required two-thirds majority.

Selection of Lawyer Members of the Commission

Among other changes, 2016 House Sub. for SB 128 requires licensed attorneys to provide certain identifying information to the Clerk of the Supreme Court (Clerk), who must maintain a roster of licensed attorneys. Prior to selection of attorney members of the Commission, the Clerk must transmit a certified copy of the roster to the Secretary of State. After the election, the Clerk must preserve qualification certificates, create a list of the names and residential addresses of all persons who returned a ballot with a signed certificate for an election, and transmit a certified copy of this list to the Secretary.

The identifying information and unique voter identification numbers assigned by the Secretary, the dates of licensure to practice law in Kansas of all persons on the certified rosters, the qualification certificates, and the lists of persons returning a ballot are subject to a request under the Kansas Open Records Act. Further, the bill deems the Commission to be a public body subject to the Kansas Open Meetings Act and prohibits recessing for any closed or executive meeting except for the purpose of discussing sensitive financial information contained in the personal financial records or official background check of a judicial nomination candidate.

The bill also requires the Governor (or the Chief Justice, if making an appointment because the Governor failed to make an appointment) to make public the name and city of residence of each applicant to the Court of Appeals.