



LAW WISE

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Greetings from the Kansas Bar Association (KBA).
Welcome to this edition of *Law Wise* and the fourth edition of the 2012-2013 school year.

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WELCOME

This Spring, *Law Wise* examines the separation of powers, continuing this year's focus on civics education. Hopefully your students are among those who understand the value of and the differences between our three branches of government in the United States – the executive, the judicial, and the legislative.

The Kansas legislature is debating proposed legislation this year that ignited the debate about the proper division of power between these branches of government. Read on to find out the latest development in this area and for related lesson plans about separation of powers in general. The next two issues of *Law Wise* will address the executive, judicial, and legislative branches in more detail.

POTENTIAL CHANGES TO THE SELECTION OF KANSAS APPELLATE JUDGES

CURRENT PROCESS

This year's legislative session is addressing the issue of how appellate judges (those on the Kansas Supreme Court and on the Kansas Court of Appeals) are appointed in Kansas. Does the current process exclude voters and lack transparency? Does the proposed process give the governor too much power?

ROLE OF APPELLATE JUDGES

Appellate judges ordinarily do not conduct trials. They decide an appealed case by reading the record of the trial and written briefs filed by the parties, and by hearing lawyers' oral arguments. They research and review the law involved in the case and then write an opinion which is often published in bound volumes.

CURRENT METHOD OF SELECTION

In Kansas, the governor currently selects an appellate judge from a list of three qualified individuals submitted to him by the Supreme Court Nominating Commission, which is an independent body created by the Kansas Constitution, art. 3, § 5(g). The Constitution requires the nine-member commission to recommend to the governor qualified persons for the Kansas Supreme Court. Years ago, the Kansas legislature enacted a law expanding the commission's authority, so it now recommends persons for the Kansas Court of Appeals, as well as for the Kansas Supreme Court. The commission sends the names of three qualified individuals to the governor for each vacancy. The governor then interviews the candi-

CALENDAR OF EVENTS

March 2, 2013	Regional Mock Trial (Olathe and Wichita)
March 11, 2013	Application deadline for Supreme Court Summer Institute
March 29-30, 2013	State Mock Trial (Topeka)
May 9-11, 2013	National Mock Trial Competition (Indianapolis, Ind.)



dates and must appoint one of the three within 60 days, or the chief justice of the Kansas Supreme Court will do so thereafter. Supreme Court justices serve terms of six years, while Court of Appeals judges serve four-year terms. At the end of each judicial term, voters decide whether or not to retain that judge.

Five of the commission's members are attorneys. Four of the attorneys are elected by attorneys in each of the state's four congressional districts, and the fifth, the chair, is elected by attorneys in a statewide vote. The four non-attorney members are appointed by the governor.

BACKGROUND – JUDICIAL SELECTION IN KANSAS

The Kansas judiciary is composed of three levels of general jurisdiction courts—the supreme court, the court of appeals, and the district court. Kansas has a bifurcated system of judicial selection, in which appellate court judges are chosen through merit selection and district court judges are chosen through merit selection or partisan election, at the option of each district.

Kansas was first admitted to the Union in 1861, at a time when elected judiciaries were the norm. However, dissatisfaction with the close interplay between political parties and judicial selection led to a series of reform efforts to transform judicial selection into a nonpartisan process. These efforts succeeded in 1958, when Kansas voters approved a constitutional amendment authorizing merit selection of supreme court justices. The amendment's success can be attributed to the intensive lobbying efforts of the Kansas Bar Association and the political scandal aptly titled the "triple play of 1956," in which the governor and chief justice resigned their positions with the understanding that the lieutenant governor—who would become the governor—would appoint the former governor as chief justice.

The merit plan for Supreme Court justices was later extended to the Court of Appeals and the district court, with individual districts having the option to move to merit selection or maintain partisan elections. The majority of judicial districts in Kansas have chosen merit selection.

<http://bit.ly/WxX7W1>

PROPOSED CHANGES

The proposed legislation (Senate Concurrent Resolution No. 1601) would allow the governor to appoint a judge to the Kansas Supreme Court or to the Kansas Court of Appeals, contingent upon confirmation by a majority of the Senate. The Supreme Court Nominating Commission would be abolished. A related bill (Senate Bill No. 8) would establish a Kansas Commission on Judicial Nominations, consisting of a majority of non-lawyers, to assess the qualifications of the governor's selection and issue an advisory opinion to the Senate and its Judiciary Committee. The proposed procedure is much like the way in which federal judges are selected, since they are chosen or nominated by the president of the United States and are confirmed by a majority of the U.S. Senate. Similar legislation passed the Kansas House in 2011, but did not pass the Kansas Senate. Will it do so this year?

Another option would be for the appellate judges to be selected by Kansas voters in general elections. Some of our county judges are already selected this way.

Because the process for selecting Court of Appeals judges is established by legislation, it can be changed by a simple majority of lawmakers. The process for selecting Supreme Court justices, however, is mandated by the Kansas Constitution, so changing that process requires a constitutional amendment, two-thirds majorities in both chambers, and a statewide vote.

ARGUMENTS FOR AND AGAINST CHANGE

Arguments for changing the process to an appointment by the governor and confirmation by the Senate include:

- Kansas is the only state in which attorneys chosen exclusively by other attorneys make up a majority of the commission screening applications. So five of the nine members are elected by only 10,000 or so attorneys. Not all attorneys can participate in that election, because only members of the Kansas Bar Association select the Commissioners, and not all KBA members exercise their right to vote. The bar thus controls the majority of the commission, making the process more exclusive and elitist, and the nominees more liberal.
- More transparency is necessary. Commissioners deliberate behind closed doors and never reveal the reasons for their decisions, which can be political. Senate confirmation would entail open debates and recorded votes on nominees, which would be open to all Kansans.
- More accountability is needed. Commissioners are not accountable to anyone. But if the governor appoints judges and the Senate confirms them, decisions are made by persons who are directly accountable to voters. The current system is undemocratic.
- Too much power is vested in the hands of the commissioners because judges, when appointed, have no accountability. Although voters can vote to not retain judges at the end of their terms, no judge has ever lost a retention election in Kansas and some are retained by 100 percent of those voting.
- There is no confirmation by the Senate or other role for legislators in the current selection process. Elected officials should have a greater say in the matter.
- For people to have confidence in their judicial system they need a system that provides openness and accountability and doesn't exclude qualified individuals. This would increase respect for the rule of law.
- Senate confirmation would allow for a more transparent, citizen-based approach to the judicial selection process.
- The current process is just as political as but is less transparent than the proposed process.

Arguments for maintaining the current system include:

- Members of the bar are in the best position to know who the best qualified persons are for a judgeship, so having an attorney majority on the Commission makes sense.
- Selection of judges by a group of Commissioners is less political, and more merit-based than the proposed system.
- The federal system is not preferable to the current system. Many federal judicial appointments remain vacant because of partisan conflicts arising during Senate confirmation.
- Kansas' system has worked well for decades. "If it's not broken, don't fix it."

- If attorneys have undue influence by virtue of their majority on the commission, then pass legislation requiring a majority of the commission to be lay persons. No greater change is warranted.
- The proposed change is politically motivated and would give the governor unbridled discretion to choose based on factors other than merit. The current system removes politics from the selection process.
- Judicial accountability is tested in the current system by having the judge's name on the ballot during retention votes, which incorporates a "populist" voter participation concept.
- The proposed system is subject to abuse, such as occurred in the "triple play" of 1956.
- Litigants want a fair, impartial judge, not a partisan politician, whether Republican or Democrat.

What do you think? Perhaps your class could debate this topic after learning more about the separation of powers from the lesson plan below.

LESSON PLAN

Source: <http://bit.ly/TXeotb>

Description

Students learn about the three branches of government and find out how the three branches interact with one another. Through the process of creating a healthy school lunch menu, students role-play each branch's responsibility in the law-making process.

Objectives

The student will be able to:

Model the roles of each of the three branches of government in relation to forming a new lunch menu for school.

Identify the main role and function of each of the three branches by taking notes about what each part of the role-playing activity represented.

Lesson Prep

PRINT all student and teacher materials for yourself.

<http://bit.ly/XSdOZd>

Step by Step

DISTRIBUTE the Anticipation Activity half-pages to the class. Give students time to complete the survey and then review their answers.

DIVIDE students into groups of 2 to 4 students. Make sure you have at least three groups and arrange the groups in a circle.

DISTRIBUTE the Activity pages, one to each group.

INSTRUCT students to read the instructions carefully. Students will complete Round 1 as a group. Upon completing Round 1, each group should pass their paper to another group. That group will complete Round 2 and then pass the paper back to the first group for Round 3. The paper will go to the second group for Round 4 if necessary, and finally be passed to a third group for Round 5. It is helpful to time these rounds so that transitions are all happening at the same time.

REVIEW the menus that each group has created and the final verdict by the judges.

DISTRIBUTE the Guided Notes page to each student.

PROJECT Transparency 1, working through each branch of government with the students and helping them take notes on their worksheet. Use Transparency 2 to draw connections between the three branches of government and the activity the students completed.

ASK students to describe each round before revealing it, then ask them what the real life version might look like.

CLOSE the class by having students review aloud the role that each branch of government plays in creating new laws.



SUPREME COURT SUMMER INSTITUTE FOR TEACHERS

Street Law Inc. and the Supreme Court Historical Society will sponsor two sessions of the annual Supreme Court Summer Institute, June 13-18 and June 20-25, 2013. The Institute is open to secondary level social studies teachers and supervisors, who will spend six stimulating days on Capitol Hill and inside the Supreme Court learning about the Court, its past and current cases, and how to teach about them from top Supreme Court litigators and educators. If selected, you will also be in the Court to hear the justices announce the final decisions of the term and attend a private reception at the Court. For full information and to apply online (under the "Registration Info" tab), go to www.streetlaw.org/scsi_apply. The application deadline is March 11, 2013.



PUBLIC SERVICE VIDEOS

Did you know that as a public service of the KBA, the following educational programs are available to you in DVD format **at no charge**? The Fourth Amendment DVD is a short, interactive tool designed to

engage today's students. The other three DVDs replicate portions of oral arguments to the U.S. Supreme Court in landmark cases.

THE FOURTH AMENDMENT RIGHTS OF STUDENTS IN PUBLIC SCHOOLS

This DVD is distinctively different than most teaching resources. This film was made by students, for students, about students. In this DVD, a student witnesses the theft of a teacher's laptop at school. What are the accused student's search and seizure rights? What are the school's options? Topeka students act out each part, bringing the Fourth Amendment to life in a realistic school setting. A set of teaching aids, including interactive class questions, will engage your class in a meaningful discussion about the Fourth Amendment. This resource can be used to help meet the Kansas civic-government standard.

Teacher materials included. Time: Approx. 9 minutes

BROWN V. BOARD OF EDUCATION OF TOPEKA: THE CASE OF THE CENTURY

In this landmark case, the U.S. Supreme Court declared racial segregation of public schools to be unlawful under the Constitution of the United States. The *Brown* decision altered the daily lives of black and white Americans, laid a foundation

of equal rights and opportunities for all, and shines as a beacon to all Americans and to the rest of the world, demonstrating that the ideals in the Declaration of Independence and the tenets of the U.S. Constitution will be universally applied to all citizens.

Teacher Materials included. Time: 74:44 minutes

MIRANDA V. ARIZONA

This decision reversed an Arizona courts conviction of Ernesto Miranda on kidnapping and rape charges. The case made it all the way to the U.S. Supreme Court, where the conviction was overturned. In a landmark ruling issued in 1966, the court established that the accused have the right to remain silent and that prosecutors may not use statements made by defendants while in police custody unless the police have advised them of their rights, commonly known as *Miranda* Rights.

Time: 41:25 minutes

NEW YORK TIMES V. SULLIVAN

In the 1964 case of *New York Times v. Sullivan*, the U.S. Supreme Court underlined the importance of a free, robust, inquiring, and possibly critical press to the healthy functioning of a democratic society. The decision used the First Amendment of the U.S. Constitution to put tight limits on the ability of public officials to punish press critics through the use of libel suits.

Teacher materials included. Time: 42:40 minutes

To order any or all of these great resources, just fax your request to (785) 234-3813 or order them online at www.ksbar.org.



KANSAS BAR ASSOCIATION'S LAW-RELATED CLEARINGHOUSE AT EMPORIA STATE UNIVERSITY

A good portion of the north wall of the Teachers College Resource Center is devoted to the contents of the Law-Related Clearinghouse. There, an educator will find several NEW DVD videos, such as "U.S. Government and How It Works," "The Election Process in America," and a four DVD set of "U. S. Constitution." Scattered among those new DVDs are related books, games and kits, and even tried and true mock trial scripts.

Even though this resource is called a Clearinghouse, which for some might indicate that the contents are free, these items have been purchased by the Kansas Bar Association so that educators will have an opportunity to check these materials out, use them, and return them for others to check out and use. If you are a citizen of the state of Kansas, you may check materials out from our Center. We also have the law-related materials listed on our website at: <http://whitelib.emporia.edu>. There you may use the advanced search feature and then change the location to "Resource Center" and continue your search. An added capability is our FAX service, (620) 341-5785, through which you may order short articles or materials.

If you search and find items that you'd like to use, and cannot get here to check them out, we will send them to you. It then becomes your responsibility to send or bring them back. You may also contact us by phone at (620) 341-5292. Our hours of operation are 9-6, Monday through Thursday, and 9-5 on Fridays. For added information, you may contact me at the above phone, or email me at jromeise@emporia.edu.

Janice Romeiser
Director, Teachers College Resource Center/
Instructional Materials Center
Emporia State University

The Kansas Bar Association Law-Related Education Clearinghouse Inventory catalog is available. To request a new copy, please call Beth Warrington, communication services director, at (785) 234-5696 or email at bwarrington@ksbar.org.



TERRIFIC TECHNOLOGY FOR TEACHERS

Check out the current status of the bills being debated in the Kansas legislature.

<http://www.kslegislature.org/li/events/>

To learn more about the types of courts in Kansas, the history of the Kansas appellate courts, the Kansas Supreme Court Justices, and the Kansas Court of Appeals Judges.

<http://www.kscourts.org>

For criticism of the judicial selection process currently used in Kansas, see "Selection to the Kansas Supreme Court," Stephen J. Ware, 17 Kan. J.L. & Pub. Policy, No. 3, 386 (2008).

<http://bit.ly/11fftij>

For a response from a Nominating Commission member to Ware's criticism, see "Merit Selection: The Workings

of the Kansas Supreme Court Nominating Commission: A Response to Professor Ware's Article—From the Perspective of a Supreme Court Nominating Commission Member," Patricia E. Riley, 17 Kan. J.L. & Pub. Policy, No. 3, 429 (2008).

<http://bit.ly/XiZERK>

For a response from a Judge to Ware's criticism, see "The Merits of Merit Selection: A Kansas Judge's Response to Professor Ware's Article," Janice D. Russell, 17 Kan. J.L. & Pub. Policy, No. 3, 437 (2008).

<http://bit.ly/11fzwlx>

For a history of judicial selection in Kansas, see "The selection of judges in Kansas: A Comparison of Systems," Jeffrey D. Jackson, 69 JKBA, No. 1, 32 (2000).

<http://bit.ly/Tb3fU1>

Law Wise is published by the Kansas Bar Association during the school year. The Kansas Bar Foundation, with Interest on Lawyers' Trust Accounts funding, provides support for this publication. *Law Wise* provides general information about law-related matters of interest to teachers, students, and the public in Kansas, but does not provide any legal advice, so readers should consult their own lawyers for legal advice. It is published free, on request, for teachers or anyone interested in law-related education and is edited by Kathryn Gardner, Topeka. For further information about any projects or articles, contact Kathryn Gardner, Topeka, (785) 338-5366; or Beth Warrington, communication services director, (785) 234-5696. *Law Wise* is published by the Kansas Bar Association, 1200 SW Harrison, Topeka, KS 66612-1806.