

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 9:00 A.M. on June 28, 2005 in Room 519-S of the Capitol.

All members were present.

Committee staff present:

Athena Andaya, Kansas Legislative Research Department
 Dennis Hodgins, Kansas Legislative Research Department
 Mary Torrence, Revisor of Statutes Office
 Rose Marie Glatt, Committee Secretary

Conferees appearing before the committee:

Proponents:

Attorney General Phill Kline
 Representative Mike O'Neal
 Senator Nick Jordan
 Representative Frank Miller
 Leo Kerwin, Private Citizen
 Representative Lance Kinzer

Neutral

Representative Pat Colloton
 Professor James Sherow, Professor of History, KSU

Opponents:

William Rich, Professor of Constitutional Law, Washburn University
 Richard Hayes, President of the Kansas Bar Association
 Donna Whiteman, Kansas Association of School Boards
 Michael Donnelly, Disability Rights Center of Kansas

Others attending:

See attached list.

The Chairman opened the floor for bill introductions. Seeing no bill introductions, he opened the floor for a public hearing.

HCR 5003 - an amendment to the Kansas Constitution relating to appropriations

HCR 5003 if adopted by voters at a special election, would amend Section 24 of Article 2 of the Kansas Constitution (regarding appropriations) to clarify that the executive and judicial branches are with authority to direct the legislature branch to appropriate money; and that the judicial branch is prohibited from fashioning remedies that interfere with the expenditure of funds in compliance with lawful appropriation acts.

The Chairman called the first conferee for the **PROPONENTS**:

Attorney General Phill Kline appeared to present a legal analysis of Kansas Supreme Court Ryan Montoy decision (no written testimony). He commended the members for their recent full debate of the doctrine of separation of powers. It was well reasoned, with deeply thought ideas expressed regarding governance and decision making on both sides. There are many who mock and ridicule legislative debate, however they should truly listen to the discussions that are echoed in the halls today. He spoke of many editorialists that expressed frustration, and questioned the professionalism, and sincerity of the deliberative body, however, he cautioned, they must continue to stand for those beliefs which inspired them to serve their constituents. He questioned whether they would resist the mocking of the Legislative process by the Court. He reviewed the history of the Constitution, importance of the separation of powers, similar court actions in other states, and ramifications of acquiescence to the court order.

He reviewed the rationale behind the monetary amount of the court order. He quoted directly from the Court's opinion (page 19) stating "*The Augenblick and Myers study is the only analysis resembling a legitimate cost study before us. We accept it as a valid basis to determine the cost of a constitutionally adequate public education. Furthermore the court acknowledges that full implementation of this study would*

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require additional expenditures, for K-12, of approximately \$853 million dollars. (Copies of the court's opinion were provided to Legislative leadership on February 24, 2004 or may be obtained from the Attorney General's office). He reviewed the voting record of the House and Senate regarding acceptance of the Augenblick and Myers study. In conclusion he urged the Committee to pass the amendment, that would provide clear guidance and policy, allowing him to defend the state when the Legislature is not in session. If not he warned they would lose their authority before January and he would be presented with the impossibility of defending a Legislature that says we must comply, but refuses to enact the policy to comply.

He responded to the following questions regarding: recourse or remedy of private citizen in the courts, the correctness of the subject of the separation of powers being germane to the special session, concern over closure of schools, conflicting January and June court orders, differences in SCR 1603 and HCR 5003, discussion of the current authority of the court, process of filing federal lawsuits/motions and other options and questions over loss of local control and the court's order relating to the current school formula.

Representative Mike O'Neal stated that nothing that has happened in his legal or legislative experience of over two decades compared to the current situation faced by the Legislature and the state of Kansas, in the wake of the Montoy decision. He had followed the Montoy case, since 1999, and had no objection to the January 3, 2005 opinion. After a review of the history of education funding he stated that court's June 3rd decision breached the Legislative perimeter, in a number of fashions. These are detailed in two papers that he wrote: (1) *Lesson in Jurisdiction and Separation of Powers; State ex rel. Stephan v. House of Representatives*, June 19, 2005 (2) *The Power of the Court to Order an Amount Is the Power to also Direct the Distribution* June 27, 2005. Copies were distributed to the Committee (Attachment 1).

He stated the rationale behind the governor calling a special session. Following a review of previous legal cases, copies of an article published in *Judicature*, Volume 88, Number 1 July-August 2004 "*Judicial Independence, The Power Of The Purse, And Inherent Judicial Powers*," were distributed (Attachment 2). He urged that they take back the ground that states that the Legislature is the branch that develops public policy and decides how much and when funds are distributed. Until then, it is dangerous for the Legislature to take any action, given the overt statements made in the June 3rd opinion.

Discussions followed regarding: remedies available to citizens to address disagreements with the Legislature's decisions, rationale behind special election that would clarify the court's authority, strongly stated inference in the June 3rd opinion regarding the court's ability to direct its distribution, question of responsibility of Legislature for court ruling, need for additional time in order to study issues before passing a resolution and perceived court's misunderstanding of the benefits resulting from a school formula shift.

The Committee recessed at 11:00 a.m. and reconvened at 11:20, upon adjournment of the House.

Senator Nick Jordan addressed his comments to **SCR 1603**, which the Senate passed 30-9 on June 24th (no written testimony). He briefed the Committee on the June 24th, four-hour Senate Judiciary Committee meeting that resulted in the resolution's passage. He gave the background leading up to the Senate and House resolutions. He stated that these issues were not competitive initiatives against funding for schools. The question before them was whether the Supreme Court overstepped its bounds in any way with its June 3 decision. It is the role of the Legislators, elected by the people, to come together, debate the issues in order to gain consensus for a set budget to forward to the Governor. This is a precedent setting situation, a serious constitutional question that needs everyone's attention relating to the separation of powers in Kansas.

He explained the language, regarding the US Constitution, inserted in **SCR 1603**. He discussed recent polls addressing public frustration over the additional money ordered by the court. This resolution simply states that the court has the right to rule constitutionally, but re-affirms the authority of the Legislative Branch to set the dollar amounts. The Legislature has no place to appeal, so the only recourse is to go directly to the people, through a special election.

He answered questions regarding: processes to regain the affordability in budgeting and appropriations, scenario of passing the school bill first, followed by the issue of judicial oversight, and future real cost studies.

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Representative Frank Miller testified that the Kansas Supreme Court has triggered a constitutional crisis that must be resolved before they can consider any funding or administrative policies regarding Kansas schools (Attachment 3). He concluded with a pledge to not vote for additional funding for schools until they pass a constitutional amendment that protects the Legislature from further encroachment by the Kansas Supreme Court into the constitutional authority of the Legislature.

Leo Kerwin, Private Citizen, testified that the Legislature is the taxpayers last line of defense (no written testimony). He reviewed his career as a teacher of 38 years and questioned the validity of “education” today after the advent of many federally mandated school programs. He urged the committee not to close small schools but to analyze the caliber of students graduating. Additional funds will come from middle class people, who can afford it least.

Representative Lance Kinzer addressed the committee on the specific language in the amendment (no written testimony). Based on the history of other states, the Legislature could be facing decade long ongoing battles between the Court and Legislature. A decision needs to be made whether the court has the ability to determine amounts of funding, or if their remedy has overstepped their authority. He planned to offer an amendment later that would make the language mesh with the Senate resolution. He cautioned committee members to be aware of the many reasons people believe this would place limitations on the courts and reminded them that this resolution is a clarification of the current separation of powers. He suggested several scenarios for the representatives to consider when confronted with the argument of the resolution’s unintended consequences.

He stated that many legislators had questioned why they were attempting to make the language address the *Montoy* order, instead of merely looking forward. If you agree with the premise that all this does is clarify language that is already in the Constitution, by saying the *Montoy* order it becomes ineffectual in the event that the people pass this constitutional amendment. This places the boundary back where it always should have been and undoes an order that the people have specifically indicated that they thought was inappropriate to begin with.

Chairman Edmonds advised members of the remaining agenda issues for the day. Due to the short time frame his intention is to request the committee to consider the resolution, once they have had the opportunity to hear from and question all conferees. They will recess after hearing the neutral conferees and reconvene after the session adjourns.

The Chairman called the first conferee representing a **NEUTRAL** position.

Representative Pat Colloton presented an overview of school finance law (no written testimony). She stated that in 45 states there has been school finance litigation brought before the court. In seven of those the courts have said this is a political question and an issue in which the courts should not be involved and they dismissed the action. In the other 38 states, they have found that under their requirement for a thorough and efficient school system, there is the constitutional right to litigate the question of school finance. She reviewed what had taken place since 1973, when the first school finance suit was brought in New Jersey. Various courts have ordered additional cost studies and others have implemented various programs be added, however no court has ever ordered a specific dollars be appropriated by the Legislature.

She stated that with the January ruling, in her opinion, the Kansas Supreme court was essentially saying that they only had one piece of actual costing in front of them (Augenblick and Myers study) and they found the financing systems inadequate. They requested the Legislature submit some actual costs and then fix the funding to be reflective of those actual costs. The Legislature responded with a statute that did not address the actual costs. This is not different than what the courts in 19 other states have done. She compared what happened to Kansas to a similar scenario in Ohio that resulted in that Legislature’s passage of a series of programs, funded over a period of time. That is the example of Ohio much relied upon by the Kansas Supreme court.

In response to the very strong order given by the Kansas court, she believed that they should not rush into a constitutional amendment without appropriate hearings and appropriate vetting of the language in the amendment. She suggested that they should appropriate what they consider is a suitable amount of funding, and that the court would give due deference to the Legislature, as the Supreme Courts in other states have

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done when there has been reaction to their orders. She voiced concern over the language in the proposed amendment and cautioned they take time to have sufficient hearings in order to consider all the different sections of the Kansas Constitution.

Discussions followed regarding: determination of actual costs, lack of costing information presented to the courts, concerns of the timeliness of passing a constitutional amendment without additional hearings, qualifications of experts of the Kansas Constitution, and specific language in the current amendment regarding the ability of courts to appropriate funds.

Professor James Sherow, Professor of History, KSU provided the Committee historical background on the Kansas Constitution (Attachment 4). It is the Constitution of Kansas that establishes the powers of court in Article III and the Constitution has served Kansas well, even if there has been 118 attempts to amend it with 89 of those propositions placed into law. Even when it seems clear what the document directs the Legislature to do, as in the case where it states that "The legislature shall make suitable provision for the finance of the educational interests of the state," as far back as 1879 the Legislature cut funding for secondary education, thereby reducing funding for public education by 50% and placing a greater financial burden on all local school boards. He described various events in the history of "bleeding" Kansas that led up to January 29, 1861, when the Constitution met the approval by U.S. Congress, and President Buchanan signed it into law.

He responded to a question about whether he believed this amendment changed or clarified the Constitution, by stating that from his review of the Constitution, Article II is clear on who appropriates money and he didn't see the need for that to be restated and by doing so there may be unintended consequences.

The Committee recessed at 1:30 p.m. to be reconvened upon adjournment of the House.

The Committee reconvened at 3:55 p.m. and continued with **NEUTRAL** opponents

Richard Levy, Constitutional Law Professor, Kansas University, reviewed the *Montoy* lawsuit, from the District Court level through the June 3, 2005 Supreme Court opinion (no written testimony). He stated that the conflict ought to be understood, not necessarily as one involving a court that is out-of-control, rather one that found itself confronted with what it regarded a violation of Article VI. At that time they attempted to draft a remedy that would address the problem they found. The only ultimate remedy that they considered available to them was to issue an order to the Legislature.

Mr. Levy addressed the proposed amendment, stating that it may be justifiable as a matter of separation of powers, but in his opinion, it would not solve any of the underlying problem, that is Article VI imposes a duty on the Legislature to provide funding. The underlying basis for the court's decision in January and in June still remains: (1) the funding that is provided does not reflect the cost, (2) the levels of funding are inadequate, (3) portions of the funding (formula) were not equitable (4) allowing or using local option budgeting to provide some of the essential costs violated the Legislature duties to provide the funding. If **HCR 5003** is adopted the court will still be confronted with a funding formula and a level of funding that it considers constitutionally inadequate and it will still be required, at some level, to fashion a remedy.

Mr. Levy spoke of the importance of separation of powers, however, urged caution when contemplating any kind of Constitutional amendment. He voiced concern over the overall implications of **HCR 5003** stating that it may have an impact on the common practice of judicial remedies that frequently arises in Constitutional litigation. When the court is dealing with an executive branch agency or other governmental official and finds a constitutional violation, it frequently orders some kind of action, that will cost money to the state. HCR 5003 might be interpreted to impose a barrier on those type scenarios, and if so, would cause serious changes in the balance of separation of power. Another concern would be the symbolism this would create between two branches of government.

Discussion followed regarding the amendment setting a precedent, the definition of suitable provision for funding for education, the rationale behind the dollar amount on the court's order, what the amendment would not do, source used to determine the dollar amount specified in the court's decision, the due process clause of the US Constitution pertaining to Ex Parte communications and his interpretation of the proposed amendment.

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When Mr. Levy was asked for his recommendation concerning this matter, he responded that if the Legislators wanted to talk with the court, they should seek a re-hearing or re-consideration of the order denying the right to intervene in which they could articulate the Legislature's particular interest in the separation of powers issues. In addition he suggested combining that with a motion to the court to re-consider its order on separation of powers grounds.

The Chairman called the first conferee representing the **OPPOSITION**.

William Rich, Professor of Constitutional Law, Washburn University testified that enactment of **HCR 5003** would result in fundamental changes in the relationship between the legislative and judicial branches in Kansas. He stated that his remarks were tentative, as he has had only a brief time to focus on the language of the amendment, which, in his opinion, contained issues for which he currently does not have clear answers. The proposed language represents a marked departure from traditional separation of powers doctrine and contains substantial problems in terms of changing our traditional understanding of the way in which Legislatures and Courts relate to each other.

He spoke about four issues, that he believed deserved consideration, prior to taking action; (1) Separation of Powers Doctrine (2) Proposed Deviations from Separation of Powers Doctrine, (3) Principles of State Sovereign Immunity do not Apply (4) Gaps and Unintended Consequences ([Attachment 5](#)).

Discussion followed regarding, terms used in lawsuits pertaining to party being sued. (Legislature or the state of Kansas), worst case scenarios that could result from the proposed amendments, uniqueness of Kansas Supreme Court decision and resulting proposed amendment, concerns of Representatives to explain the additional costs of education, and options available to the Legislature that he believed would be more appropriate.

In response to a question of what it would take to resolve the situation, Professor Rich responded that a good start would be if they complied with the appropriation of dollars as outlined in the court order, order a full post audit study to develop and understand the funding costs, and to show respect, not contempt, for the court.

Richard Hayes, President of the Kansas Bar Association urged the Committee not to pass either of the proposed amendments because they were designed to erode the independence of the Kansas judiciary ([Attachment 6](#)). He voiced concern that the current atmosphere in this body would lead to hasty, ill-considered legislation which would produce regrettable results. KBA respectively suggested that the real solution to the problems facing the legislature was to accelerate the new cost study by the Legislative Division of Post Audit, that would yield a product that the Legislature can use and the Supreme Court can look to with confidence. The Legislature could also consider amending the definition of a "suitable education" contained in KSA 46-1225 (e), upon which the study of Augenblick & Myers was based. Unfortunately the time has passed when a motion could be filed for reconsideration of the separation of powers issue. He concluded by requesting that they consider where the process stops, once you start the process of limiting the jurisdiction of the judiciary.

Donna Whiteman, Kansas Association of School Boards testified that the proposed language in **HCR 5003** was a concern for five reasons ([Attachment 7](#)), (1) Constitutional changes should be carefully considered and analyzed to ensure the proposed changes do not create more problems than the problem meant to be addressed, (2) Consideration must be given to the budgets and services the Legislature funds besides education, (3) Language in the resolution has the potential to upset the separation and delicate balance of powers, (4) The Legislature should not attempt to place itself and its acts above or outside of scrutiny by the courts or any other body, (5) The \$1.7 million it will cost to pay for this special election could be spent to address the Supreme Court's concerns in the school finance ruling.

Michael Donnelly, Disability Rights Center of Kansas (DRC) ([Attachment 8](#)) testified that **HCR 5003** was not just about *Montoy*. DRC is concerned about the impact that this amendment to the Kansas Constitution would have on the due process rights of Kansas with disabilities, including the due process right to a remedy as determined by a Kansas court. He cited possible programs that could be impacted by this amendment, i.e., Medicaid program, powers of eminent domain to seize property, and elimination of all neo-natal care, home

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support and medical care to persons living in a “permanent vegetative state” and breast cancer treatment from the Medicaid budget.

The proposed Constitutional amendment goes far beyond the *Montoy* litigation and touches the very foundation of our constitutional republic. A constitutional republic form of government means that there are certain foundational principles that cannot be voted away. As it relates to our state, the Kansas Supreme Court must have the final word in interpreting and enforcing the Kansas Constitution. Due process of law requires that a wronged party is entitled to a remedy and the Court must maintain its ability to enforce its orders.

The Chairman closed the public hearing on **HCR 5003**.

Chairman Edmonds opened the floor for action on the amendment.

Representative Kinzer made the motion to adopt an amendment on **HCR 5003**. Representative Siegfried seconded the motion. Copies of the amendment were distributed (Attachment 9).

On page 1, line 23, by striking “. The judicial”; by striking all in lines 24 and 25; in line 26, by striking all before the period and inserting “or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States”; in line 33, by striking “nor shall the”; by striking all in lines 34 and 35; in line 36, by striking “money” and inserting “nor to redirect the expenditures of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States “; in line 42, by striking “any” and inserting “a”; in line 43, before the period by inserting “,except as the legislative branch may provide by law or as may be required by the Constitution of the United States”;

On page 2, in line 14, by striking “August 16,”; in line 15, by striking “2005 and inserting “the first Tuesday following 60 calendar days after the approval of this resolution by both the Senate and the House of Representatives of the Kansas legislature”; and the concurrent resolution be adopted as amended.

He explained that after all the striking and inserting changes are done the amendment is identical to the language in **SCR 1603**. He clarified the reason for the change of dates. The Secretary of State has indicated that the cost of the special election would be \$1.7 million and the money would have to be appropriated.

He explained that it adds in, with specificity, the fact that if there is some legislative enactment that specifically says, for example that the Governor has the authority to under a certain emergency contingency to take money from one fund and transfer it to another, that would not violate this provision. If there is a circumstance where it is found by some Court that the United States Constitution requires something that is in conflict with this amendment, we simply acknowledge that the United States Constitution always controls.

Discussion followed regarding concerns of Committee members

Representative Kinzer closed on his motion to amend **HCR 5003** with the changes outlined. The motion carried.

Representative Kinzer moved that they report **HCR 5003**, as amended, favorably for passage. Representative Siegfried seconded the motion.

Staff requested that they consider a language change in lines 36 and 41 to make “nor” and “or” consistent.

Representative Kinzer made the motion to withdraw his motion. Permission of the second.

Representative Kinzer made the motion to allow the Revisor’s staff to make the technical determination as to whether the word “nor” or “or” should be used in the explanatory portion. Representative Brunk seconded the motion. The motion carried.

Representative Kinzer moved that the Federal and State Affairs Committee report out **HCR 5003** favorably, with the stipulation on the language changes just discussed. Representative Brunk seconded the motion.

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After discussion, the Chairman called for a vote. A division was called. The motion carried 12-10.

The following members requested that their NO vote be recorded: Representatives McCray-Miller, Loganbill, Cox, Mah, Burroughs and Henderson.

The Chairman thanked the Committee for their patience and adjourned the meeting at 7:30 p.m.