

## **Testimony in support of Senate Bill 269**

Senate Bill 269 as proposed would change mandatory judicial retirement to a judge's 80<sup>th</sup> birthday.

Kansas had no mandatory judicial retirement age from statehood until 1953 when the judicial retirement system was created. From 1953-2004 all state court judges were to retire at age 70, but they could finish their term if it extended beyond that date. K.S.A. 20-2608.

In 2004 the legislature amended the statute so that District Judges could serve until their 75<sup>th</sup> birthday, but the statute remained as it previously had for Supreme Court Justices. At least two prominent judges were affected by this change. Judge Rome of Reno County managed to extend his tenure on the bench, but Justice Kay McFarland was forced into mandatory retirement in January 2009. Even though Judge Rome was an elected judge of a different party, the Reno County legislative delegation worked to assist him on a bipartisan basis.

Judge Rome once again helped motivate change in 2009 with the help of Reno County legislators. That year the current system was created allowing all judges to serve until 75 and allow them to finish a term. The change allowed Judge Rome to remain on the bench until 2011. A bill was introduced in 2013 to lower the retirement age of appellate judges to 65 but it failed to pass.

Many states (31) do have a retirement age for judges with the most common being 70 years of age according to a 2010 report of the National Center for State Courts. The range of these retirement ages though runs from 70 to 90. Nineteen States do not have age limits for judges. Many of these retirement ages were created long before increases in longevity occurred. The increased life expectancy and quality of life experienced by most Americans makes previous retirement ages obsolete.

Though the current retirement age has been in place for ten years, many if not most judges do not wait for mandatory retirement. A review of recent retirements supports that fact. Even Franklin Theis (the longest serving District Judge in Kansas until recently) retired before he was required to, which would have been in January 2021. Justices Nuss and Johnson were not forced into mandatory retirement. Therefore, if the retirement age were changed to a judge's 80<sup>th</sup> birthday or entirely repealed only a few judges would continue to serve longer as a result.

The odd thing about the current rule is that while many judges never bump up against it, some that do are able to exceed it because of when they have a birthday or whether their election or retention is on the presidential election cycle or the governor's election cycle. The mandatory retirement rule uniquely applies to judges of the district court or court of appeals born in an odd year. That is if you were born in a year ending in 1, 3, 5, 7 or 9 your 75<sup>th</sup> birthday will fall in an election year since Kansas elections are held in every even year. Should a judge's re-election or re-retention year correspond with his/her 75<sup>th</sup> year the judge must retire. However, judges born in an even year are much more likely to be able to serve beyond 75. Realistically, most judges leave the bench years before mandatory retirement, but a few can serve to 76-78.

For instance, Judge Reiling of my own district will be able to serve longer for this reason and Justice Johnson and Nuss would have been able to serve beyond 75 if they chose. The Supreme Court is somewhat different because they have six-year terms. Of the current six Justices three could serve until age 79, two to age 76 and one to age 75 under the current rule.

My research shows that only two district judges of 168 face mandatory retirement in 2020. They were both born in 1945 and both served in Vietnam. They are Judge Nafziger of the Second Judicial District and Judge Bednar of the First Judicial District. Judge Paul Monty is the one District Magistrate Judge subject to retirement this year. He was born in 1944. There may be other District Magistrate Judges who also face mandatory retirement, but the information needed to know that is more difficult to obtain since about half the magistrate judges are not attorneys. No appellate judge faces mandatory retirement in 2020.

The current rule for retirement then is somewhat arbitrary depending more on birth year and first retention/election than the judge's ability to continue to serve. Use of a judge's 80<sup>th</sup> birthday would create a uniform standard for all judges.

I understand that at times the Legislature and the Courts are at odds with each other which is why on occasion some have proposed not extending the mandatory judicial retirement age but reducing it with the thought of altering the composition of the judiciary. However, this is unlikely to work since the selection of all appellate judges and many district judges involves the Governor of the State of Kansas. Unless one of the dominant political parties (Democrat or Republican) secures control of Cedar Crest for an extended period of time the overall composition of the judiciary is unlikely to change. Since at least 1956, Kansans have alternated the Governorship between the parties. Four-year governor terms started in 1974, but no parties' administration has exceeded eight years in that time.

Further, since most judges leave the bench prior to mandatory retirement regardless of what age that has been, who serves remains more a question of who the appointing authority is at the time. The chart below illustrates this:

Number of Judges selected

Governor	Court of Appeals	Supreme Court
Finney January 91-Dec.94	Green, Royse	Davis
Graves January 95- Dec.2002	Marquardt, Johnson, Beier, Knudson	Gernon, Nuss, Luckert, Larson
Sebelius/Parkinson January 2003- December 2010	Malone, Greene, Hill, McAnany, Buser, Leben, Standridge, Atcheson, Moritz	Beier, Rosen, Biles, Johnson, Moritz
Brownback/Colyer January 2011- December 2018	Arnold-Burger, Bruns, Powell, Schroeder, Gardner, Stegall	Stegall
Kelly January 2019 - Present	Warner, ?	Wilson, ?

Since January 1991 Democratic Governors have named or will name 13 members of the Court of Appeals and 8 members of the Kansas Supreme Court during approximately thirteen years of governing. Republican Governors have named 10 members of the Court of Appeals and 5 members of the Kansas Supreme Court during sixteen years of governing.

The best illustration that required retirement does not correspond to party dynamics concerns former Chief Justice Kay McFarland. The Justice was appointed by Governor Bennett (R) in 1977. When mandatory judicial retirement was changed in 2004, the Kansas Supreme Court was not covered by the age increase. Therefore, when Justice McFarland reached mandatory retirement in 2009 her replacement was selected by a Democratic administration. There were strong rumors that Justice McFarland would have chosen to serve another term if she could in which case her replacement would have been chosen by a Republican administration.

In truth, Senate Bill 269 benefits neither political party because it would only be used by a small number of judges and it would not change which judges serve while the current pattern of administration alteration continues. The bill is not expected to have a fiscal cost.

Why consider passing this bill?

1. The bill would provide a uniform retirement age for all Kansas Judges.
2. It would allow some judges who are still in the prime of their career to use their considerable experience to serve Kansas. (Around 12% of Kansas legislators were born before 1946.)
3. An age limit of 80 better reflects the current longevity trends for Kansans. (Average life expectancy in Kansas is 78.)

Passage of SB 269 would have a direct affect on the Second Judicial District in 2020. Chief Judge Gary Nafziger will be 75 years old in March 2020. He has served as a judge since 1982 and is currently the longest serving Kansas District Judge in active service. Prior to his appointment Judge Nafziger was the Jefferson County Attorney. He remains mentally, physically and temperamentally able to serve as a judge. He makes use of the most current technology to conduct the business of the court. He is one of the last of the veterans who served the United States Army in Vietnam, where serving as an officer he earned the Bronze Star. This unique combination of experiences will be lost to the district if he can no longer serve.

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