



STATE OF KANSAS  
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April 22, 2019

Honorable Susan Wagle  
President of the Kansas Senate  
State Capitol, Room 333-E  
Topeka, Kansas 66612

Dear Senator Wagle:

I have reviewed your letter dated April 12, 2019, regarding the situation that has arisen about the process for filling the current vacancy on the Court of Appeals. You express a variety of thoughts related to this subject, but I have discerned from your letter one request for our legal opinion, *to wit*:

1) whether the current circumstances have created the possibility under K.S.A. 20-3020 that Judge Jack's appointment is currently pending before the Senate; and 2) whether the Senate potentially has a duty to vote on that appointment on or before May 14, 2019 or risk consenting to that appointment due to the Senate's "fail[ure] to vote" pursuant to K.S.A. 20-3020(b).

Under Kansas law, "All appointments of public officers which are subject to confirmation by the Senate" are governed by K.S.A. 75-4315b. *See* K.S.A. 75-4315b(a) (emphasis added). A judge of the Court of Appeals is a state officer, *see* K.S.A. 2018 Supp. 20-3006 (referencing "office" of "Judge of the Court of Appeals"), and is subject to confirmation by the Senate, *see* K.S.A. 2018 Supp. 20-3020(a)(1). Thus, unless a different statute exempts Court of Appeals judges from the general requirements of K.S.A. 75-4315b—and we are aware of none—we think that statute applies to this situation.

Kansas Courts generally read statutes *in pari materia*, which our Supreme Court has explained to mean:

"[S]everal provisions of an act *or acts* . . . must be construed together with a view of reconciling and bringing them into workable harmony if possible. Effect must be given, if possible, to the entire act *and every part thereof*."

*Pankratz Implement Co. v. Citizens Nat. Bank*, 281 Kan. 209, 215, 130 P.3d 57 (2006) (emphases added) (quoting *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003)). The more-specific statute governing the selection of Court of Appeals judges, K.S.A. 2018 Supp. 20-3020, is silent on the question of withdrawal of an appointee, and thus is not in conflict with the general requirements of K.S.A. 75-4315b on that subject. Reading K.S.A. 75-4315b *in pari materia* with K.S.A. 2018 Supp. 20-3020, it seems apparent that K.S.A. 75-4315b(c)<sup>1</sup> applies and the withdrawal of

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<sup>1</sup> K.S.A. 75-4315b(c) provides, in pertinent part: "An appointing authority may withdraw an appointment from consideration by the senate at any time before confirmation if the appointing authority withdrawing the appointment is the same person . . . as the appointing authority that made the appointment." Here, the appointment was both made and withdrawn by Governor Kelly, and the withdrawal occurred before confirmation by the Senate; thus, it appears the withdrawal was authorized by 75-4315b(c)(1), and the nomination has been withdrawn.

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Judge Jack's nomination as occurred in this situation was authorized by statute. If your analysis differs, please let me know. I am aware you publicly called upon the Governor to withdraw the nomination of Judge Jack, and I presume you intended that withdrawal to have the effect of ending further consideration of the nomination by the Senate. Of course, if you have any remaining doubts or concerns, as Senate President it is within your authority to schedule a vote on or in relation to the appointment of Judge Jack prior to the deadline for Senate action. You may also wish to consult with counsel for the Senate to determine whether the Senate wishes to seek a judicial determination on this or any other question affecting the Senate's role in this matter.

In addition to the above, please be advised of the following: In my letters of March 19, 2019, to you and Governor Kelly and March 26, 2019, to Governor Kelly on which you were copied, I recommended no subsequent appointment to fill the current vacancy on the Court of Appeals proceed until there is a definitive determination of who is the proper appointing authority. I further recommended the Legislature enact statutory amendments to address this situation and that remains my recommended course of action. However, in your April 12, 2019, letter to me, you advised that statutory amendment is unlikely during the current legislative session and that, in any event, you do not favor that approach. On April 19, 2019, Governor Kelly announced that she intends to proceed with a subsequent appointment in time for the Senate to consider her new appointee during the upcoming legislative veto session, which begins May 1, 2019.

I construe the combined effect of the above actions by Governor Kelly and you as acting contrary to my advice to fix the statute before proceeding with a new appointment. Therefore, to protect the interests of the State as described in my prior correspondence, I have today filed a lawsuit in the Kansas Supreme Court seeking a definitive interpretation of the statute and clear guidance on how the parties may lawfully proceed. This action is *State of Kansas ex rel. Derek Schmidt, Attorney General, v. Governor Laura Kelly, Chief Justice Lawton R. Nuss and Kansas Senate*. Copies of the Petition in Quo Warranto, Memorandum in Support of Petition in Quo Warranto, and Motion to Expedite are enclosed for your information.

I hope this information is helpful.

Sincerely,



Derek Schmidt  
Kansas Attorney General

Cc: Governor Laura Kelly  
Senate Majority Leader Jim Denning  
Senate Minority Leader Anthony Hensley  
Speaker Ron Ryckman  
Chief Justice Lawton Nuss  
Senator Rick Wilborn, Chairman, Senate Judiciary Committee  
Senator Eric Rucker, Vice Chairman, Senate Judiciary Committee  
Senator Vic Miller, Ranking Member, Senate Judiciary Committee