



**KANSAS ASSOCIATION OF DEFENSE COUNSEL**  
825 S Kansas Avenue - Suite 500, Topeka, KS 66612  
Telephone: 785.232.9091 Fax: 785.233.2206 [www.kadc.org](http://www.kadc.org)

TO: The Honorable John Barker, Chair  
And Members of the House Committee on the Judiciary

FROM: Mark D. Katz  
Kansas Association of Defense Counsel

DATE: February 10, 2015

RE: KADC's opposition to proposals to amend the Kansas Constitution—  
HCR 5004 and HCR 5005

Chairman Barker, members of the committee, on behalf of the Kansas Association of Defense Counsel, we thank you for this opportunity to submit written testimony about the importance of a fair and impartial judiciary and the role that merit selection plays in a healthy justice system.

KADC is a state-wide organization of lawyers admitted to practice law in Kansas who devote a substantial amount of their time to the defense of litigating civil cases. In addition to working to improve the skills of defense attorneys and elevating the standards of trial practice, our organization advocates for the administration of justice, because our clients depend on it. For this reason, KADC has consistently spoken out in favor of the independence of the judiciary, and in particular, Kansas' merit selection process. KADC strongly favors our current system for selecting judges to serve on the Kansas Supreme Court, and it strongly opposes efforts to change that system. In particular, we oppose HCR 5004, which would select judges to sit on the Court of Appeals and Supreme Court by direct vote of the electorate, and HCR 5005, which would institute a version of the "federal" system for selecting the Kansas appellate bench.

***KADC supports the current, merit selection system for Supreme Court justices.***

The merit selection process has served the citizens of Kansas well for 57 years because it has ensured the selection of qualified jurists. More importantly, it has allowed the appellate courts to avoid the public's skepticism at a time when government has been the focus of high levels of cynicism. That the public holds courts in high esteem is essential for the operation and respect of the rule of law. The infamous "Triple Play" was precisely the sort of political gamesmanship that undermined public confidence in the rule of law, and it was this level of underhanded manipulation of the system that led to the most drastic of political measures: the amendment of the Constitution. No comparable problem exists today. No fundamental, systemic

unfairness has been identified. No political corruption has been associated with an appointment. The constitutional boundaries of the merit selection process have not be stretched to the point of breaking; rather, the opposite: Kansas merit selection has proceeded in an orderly, non-controversial fashion; and Kansans have had the benefit of excellent jurists.

The Kansas non-partisan, merit selection system is fundamentally democratic:

- A supermajority of the representatives of the Kansas House voted to amend the Kansas Constitution to put the non-partisan, merit selection process in place.<sup>1</sup>
- A supermajority of the senators of the Kansas Senate voted to amend the Kansas Constitution to put the non-partisan, merit selection process in place.<sup>2</sup>
- A majority of Kansas voters voted to put the non-partisan merit selection process in place.<sup>3</sup>
- Four members of the non-partisan nominating commission are selected by the Governor, who is directly elected by Kansas voters.<sup>4</sup>
- Five members of the non-partisan nominating commission are attorneys in good standing, elected by Kansas citizens who are members of the Kansas Bar.<sup>5</sup>
- The non-partisan nominating commission identifies three candidates from whom the directly-elected Governor appoints a Supreme Court justice.<sup>6</sup>
- Each Supreme Court justice is subject to a direct vote of the people in a retention election—first, in the first general election after the justice has served twelve months in office, and then every six years, thereafter.<sup>7</sup>

The Kansas non-partisan, merit selection system is fundamentally open:

- The non-partisan nominating commission makes its application form available to the public.
- When a vacancy occurs, the non-partisan nominating commission advertises the application process, including deadlines for submitting applications.
- The non-partisan nominating commission identifies the names of all applicants.
- The non-partisan nominating commission makes portions of the applicants' applications open to the public.
- The non-partisan nominating commission conducts interviews that are open to the public.
- The non-partisan nominating commission publishes its guidelines for open interviews.
- The non-partisan nominating commission has a statutorily mandated yardstick by which to

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<sup>1</sup> Kan. Const. art. 14, § 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Kan. Const. art. 3, § 5(e).

<sup>5</sup> *Id.*

<sup>6</sup> Kan. Const. art. 3, § 5(a).

<sup>7</sup> Kan. Const. art. 3, § 5(c).

measure candidates.<sup>8</sup>

Impartial stakeholders acknowledge the high quality of Kansas judges:

The U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, publishes a lawsuit climate survey, which ranks states according to a variety of criteria, including judges' impartiality and judges' competence. In its most recent survey, the Institute for Legal Reform ranked Kansas 8<sup>th</sup> and 9<sup>th</sup>, respectively, for judicial impartiality and competence.<sup>9</sup> In fact, according to the survey, 10 of the states ranked in the top 15 for judicial impartiality and competence employ some form of merit selection.<sup>10</sup> The survey, which comprised a national sample of in-house general counsel, senior litigators, and other senior executives knowledgeable about litigation matters at companies with at least \$100 million in annual revenues, noted that 70% of participants believed that litigation environment has an impact on important business decisions, such as where to locate or do business.<sup>11</sup>

Accordingly, Kansans have democratically implemented a system of selecting Supreme Court judges that is non-partisan. Unlike previous systems, there has not been a watershed event demonstrating that the system is corrupt or has been misused. The system is open and gives the people a democratic voice in who will sit on the bench, while also providing a means to ensure that judges are of recognized integrity, character, ability, and temperament. And finally, the system has put in place a judiciary that is recognized by the U.S. Chamber of Commerce as being impartial and competent, and part of a legal environment that attracts and retains businesses to Kansas.

***History has already addressed the complaints registered against non-partisan, merit selection.***

The proponents for abandoning non-partisan, merit selection raise complaints that have been addressed many times during our history. Some complain about the Court's opinions that are critical of the Kansas Legislature's decisions. The tension between the legislature and the courts is intentional and is as old as the United States. In 1803, Chief Justice Marshall wrote the opinion in *Marbury v. Madison*<sup>12</sup> that enshrined judicial review of legislative action in our civic

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<sup>8</sup> K.S.A. 20-133 (instructing the nominating commission to "recommend for appointment on the supreme court only lawyers or judges of recognized integrity, character, ability and judicial temperament, and whose conduct will conform to the letter and spirit of the constitutional amendment implemented by this act").

<sup>9</sup> HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2012: RANKING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 2012), available at:

[http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit\\_Climate\\_Report\\_2012.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf). These figures have been consistent over time, see, e.g.: HARRIS INTERACTIVE, INC., 2008 U.S. CHAMBER OF COMMERCE RANKING STUDY (2008), available at:

<http://www.instituteforlegalreform.com/uploads/sites/1/FullHarrisSurvey.pdf>; and HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2012: RANKING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (2010), available at:

<http://www.instituteforlegalreform.com/uploads/sites/1/2010LawsuitClimateReport.pdf>.

<sup>10</sup> HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2012: RANKING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 2012).

<sup>11</sup> *Id.*, p. 6.

<sup>12</sup> 1 Cranch 137 (1803).

canon.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.<sup>13</sup>

These words are the foundation of both federal and state constitutional jurisprudence—and the institutional resentment felt by American legislatures toward the judiciary. This tension existed when Kansans adopted merit selection. Our state’s citizens knew the Supreme Court would engage in review of legislation, and they chose a method of judicial selection that would insulate appellate judges from legislative and executive branches seeking to influence that review. Disputes between the branches of government do not constitute a reason to amend the Constitution or to go in search of ways to kick judges to the curb;<sup>14</sup> those disputes exist by design.

Some complain that the Court’s decisions do not reflect current public feelings; yet resistance to the sometimes fickle winds of public opinion in service of the rule of law is the touchstone of American courts. The harsh, and sometimes difficult fact, is that the function of our courts is to apply the law without regard to public opinion. The people have their say about what the law should be through their representatives in the legislative branch; but when it comes to the application of those laws, the justice system is meant to speak without regard for whether a person or a cause is popular or not. Each individual and his or her cause, regardless of public favor, stands equal before our courts, and making our judges more susceptible to public opinion would not serve this essential purpose and right. “The truth is ... the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day.”<sup>15</sup>

***KADC opposes HCR 5004, which institutes state-wide elections for appellate judges.***

The incentives and potential conflicts inherent in the state-wide election of appellate judges can reduce the respect for the rule of law.<sup>16</sup> The funding requirements of state-wide races create the very real possibility for both the appearance of and actual corruption. In December, 2014, a former Pennsylvania Supreme Court justice was disbarred for ethical violations stemming from campaign corruption convictions—she had used her state-paid court staff to work on her two campaigns for the Supreme Court.<sup>17</sup> In another instance of state-wide elections gone wrong, in West Virginia, a jury found a coal company liable for fraud and other civil wrongs and awarded the plaintiffs \$50 million. Knowing the case was going before the West

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<sup>13</sup> 1 Cranch at 178 (emphasis supplied).

<sup>14</sup> 2004 Year-End Report on the Federal Judiciary, <http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf>.

<sup>15</sup> Story, Joseph, *Commentaries on the Constitution of the United States*, vol. III, p. 476 (1833).

<sup>16</sup> We recognize an important distinction between local and state-wide elected judges, in this regard, in that the differences between funding local and state-wide races are significant.

<sup>17</sup> Mandak, Joe, *Ex-justice Joan Orie Melvin disbarred by consent agreement*, N.J. HERALD, Jan. 17, 2015, available at: <http://www.njherald.com/story/27869582/exjusticejoanoriemelvindisbarredbyconsentagreement>.

Virginia Supreme Court of Appeals, the coal company's chairman gave \$3 million in campaign donations to the challenger of one of the justices. Not surprisingly, the challenger won, and he was the deciding vote in a 3-2 decision to overturn the jury's verdict. On review, the United States Supreme Court found that the judge should have recused himself, and his participation in the decision on appeal was so egregious that it constituted a violation of the plaintiff's right to due process.<sup>18</sup> As recently as February 4, 2015, Illinois Governor Bruce Rauner, a Republican, decried the influence of campaign donations to elected judges and supported moving "toward merit-based judicial reform."<sup>19</sup> These examples show how the "more democratic" system of direct, state-wide elections for appellate court judges can undermine the public confidence in the judiciary.

***KADC opposes HCR 5005, which institutes the "federal" system for selecting appellate judges.***

The federal plan is not an improvement over non-partisan merit selection. It is susceptible to problems that are detrimental to the administration of justice. In 2002, then-Attorney General John Ashcroft complained of a "crisis in the federal judiciary."<sup>20</sup> "[T]his process, which was designed to ensure the integrity, fitness, and fidelity to the law of the nation's judges, has broken down."<sup>21</sup> The result, he said was the break-down of the administration of justice. The problem of filling federal judgeships has continued, unabated, without regard to the party of the President or the party controlling Congress.

Over many years, however, a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes.<sup>22</sup>

The inability to fill judicial vacancies extends to states that have adopted the federal model. In New Jersey, the state Supreme Court operated with three long-standing vacancies until Governor Christie was able to cut a deal with the legislature this past fall. Even so, only two judges were appointed, and the court continues to operate with less than its full complement of judges. Meanwhile, Bergen County, New Jersey is attempting to operate without nine of its allotted thirty-six judges.<sup>23</sup> In both the federal and the New Jersey cases, the federal plan has offered the possibility for partisan politics to work mischief on the administration of justice.

These openly political squabbles over filling judicial vacancies tend to distract the public from the central role of the courts and turn the process of judicial selection into partisan efforts and "gotcha" moments that do not reflect well on candidates, or for that matter, their later

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<sup>18</sup> *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

<sup>19</sup> Gov. Bruce Rauner, STATE OF THE STATE ADDRESS, February 4, 2015, available at: <http://chicago.suntimes.com/politics/7/71/344389/full-text-gov-bruce-rauners-state-state-address>.

<sup>20</sup> Remarks of Attorney General John Ashcroft, Court of Federal Claims Anniversary, October 4, 2002.

<sup>21</sup> *Id.*

<sup>22</sup> 2010 Year-End Report on the Federal Judiciary, <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

<sup>23</sup> Phillis, Michael, *N. J. Supreme Court Associate Justice Solomon sworn in by state's chief justice*, <http://www.northjersey.com/news/njsupremecourtassociatejusticesolomonsworninbystatechiefjustice1.1104644>.

decisions. Whenever the U.S. Supreme Court issues a controversial decision, we are reminded of which President appointed which justice—and did each justice “vote” the way his or her appointing President would have wanted or expected. If so, aspersions are cast, because the decision appears to be a *fait accompli*; if not, aspersions are cast because the justice has not “held the line.” What we know is that the politicization of judicial selection, creates expectations of appointed judges, and these expectations, whether or not they are fulfilled, can have a corrosive effect on the respect for the judiciary and the rule of law.

***Conclusion.***

On behalf of the Kansas Association of Defense Counsel, we appreciate the opportunity to be heard on this vital subject. We, and certainly our clients, benefit from the non-partisan, merit selection of qualified, fair and impartial judges. These benefits are shared equally by each and every citizen of the State of Kansas, and they are a critical part of upholding each person’s individual rights. We believe Kansas citizens and businesses have been well-served by merit selection, and we ask this Committee to oppose HCR 5004 and HCR 5005.