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TO: Rep. John Barker, Chair
And Members of the House Committee on the Judiciary

FROM: Nathan D. Leadstrom
On behalf of the Kansas Association of Defense Counsel

DATE: February 16, 2016

RE: KADC's opposition to proposal to amend the Kansas Constitution—
HCR 5013

Chairman Barker, members of the committee, we thank you for this opportunity to submit written testimony about the importance of fair and impartial courts 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 importance of the separation of powers and impartiality 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 5013, which would alter the current makeup of the Supreme Court nominating commission and have the ultimate effect of threatening the separation of powers and politicizing the judiciary.

KADC <u>supports</u> the current merit selection system for Supreme Court Justices.

The current merit selection process has served the citizens of Kansas well for 57 years because it has ensured the selection of qualified jurists. In Kansas' current system, a panel of highly qualified attorneys and/or judges is provided to the Governor for his consideration and selection of a judge. The judgeships are filled in reasonable timeframes.

Kansas' current system also 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 undermines public confidence in the rule of law. Indeed, it was this level of underhanded manipulation of the system that led to the most

drastic of political measures: the amendment of the Kansas Constitution to insulate the courts from political maneuvering.

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 been stretched to the point of breaking; rather, the opposite. There is no reason to amend the Constitution to change how we select Supreme Court judges.

The merit selection system that is currently in place has resulted in the selection of high quality judges which has been recognized by impartial stakeholders. 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, judges' competence, and judges' fairness. In its most recent survey, the Institute for Legal Reform ranked Kansas in the top 20 states for judicial impartiality, competence, and fairness.[1] 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 75% of participants believed that litigation environment has an impact on important business decisions, such as where to locate or do business.[2]

Accordingly, Kansans have democratically implemented a system of selecting Supreme Court justices 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.

On behalf of the Kansas Association of Defense Counsel—attorneys who represent business interests in the courts every day—the merit system for selecting judges is not a problem to be solved; the current method of selection is an efficient, effective, and fair system of ensuring that Kansans have excellent judges to resolve their disputes. We strongly encourage this Committee to support the current system wherein four members of the non-partisan nominating commission are selected by the Governor and five members of the non-partisan nominating commission are attorneys in good standing, elected by Kansas citizens who are members of the Kansas Bar. [3]

HCR 5013 would threaten the separation of powers.

The proposed system for selecting the Supreme Court Nominating Commission in HCR 5013 would upend the balance crafted by Kansans in the 1950s in the wake of the "Triple Play" and—turning a blind eye to the very history that led to the adoption of the current system—threatens the separation of powers by concentrating the power to select Supreme Court Justices in the Executive and Legislative Branches. Such a concentration of power is an anathema to the well-recognized and

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[1] HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2015: RANKING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 2015), available at:
http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf.

[2] *Id.*, at 4.

[3] Kan. Const. art. 3, § 5(e).

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essential separation of powers necessary for the adequate function of our government.

The doctrine of the separation of powers is a well-recognized as an inherent guarantee of both the Kansas and United States Constitutions.[4] The Framers of the United States Constitutions "recogniz[ed] a strong need to separate legislative and judicial power."[5] Therefore, the Framers created "a three branch system of government, relying on checks and balances, with an independent judiciary that remains a model for the rest of the world."[6] Those three branches of government guaranteed by the Kansas Constitution each have unique powers:

- "[T]he legislative power is to make, amend, or repeal laws."[7]
- "[T]he executive power is the power to enforce the laws."[8]
- "[T]he judicial power is the power to interpret and apply the laws in actual controversies."[9]

This does not mean that everyone agrees with the all of the decisions handed down by the Kansas Supreme Court. Some complain about the Court's opinions that are critical of the Legislature's decisions. But the tension between the legislature and the courts is intentional and is as old as the United States, when Chief Justice Marshall wrote the opinion in *Marbury v. Madison*[10] in 1803.

Thus, judicial review of legislative action forms the foundation of both federal and state constitutional jurisprudence—and of the institutional resentment sometimes 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;[11] those disputes exist by design.

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[4] Natalie Haag, *Separation of Powers: Is There Cause For Concern?*, 82 J. Kan. B.A. 30 (March 2013); *see Miller v. Johnson*, 295 Kan. 636, 670, 289 P.3d 1098 (2012); *Van Sickle v. Shanahan*, 212 Kan. 426, 447, 511 P.2d 223 (1973) ("[T]he doctrine of separation of powers is an inherent and integral element of the republican form of government....").

[5] Kurt Kuhn, *Judicial Remedies and the Constitutional Balancing Act*, 32 The Advoc. (Texas) 55 (Fall 2005).

[6] *Id.*

[7] *State ex rel Stephen v. Kansas House of Representatives*, 236 Kan. 45, 59, 687 P.2d 622 (1984); KANSAS CONST., art. 2 § 1

[8] *State ex rel Stephen*, 236 Kan. at 59, 687 P.2d at 634 (1984); KANSAS CONST., art. 1 § 3

[9] *State ex rel Stephen*, 236 Kan. at 59, 687 P.2d at 634 (1984); KANSAS CONST., art. 3 § 1

[10] 1 Cranch 137 (1803). There, the Court explained: "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*." 1 Cranch at 178 (emphasis added).

[11] 2004 Year-End Report on the Federal Judiciary, http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf.

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HCR 5013 proposes a transition from the current nominating commission which, as addressed above, has resulted in the selection of a high-quality and impartial judiciary. The new nominating commission would result in four attorney members, five members selected by the executive branch, and six members selected by the legislative branch. Thus, a new super-majority of the nominating commission would be directly selected by members of the Executive and Legislative branches, resulting in an inherent power shift wherein the judiciary could be controlled and selected by the exact branches it is designed to be separate and equal from.

"The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[12] A judiciary selected by the Executive and Legislative branches is a judiciary controlled by those branches, and such control threatens the very safeguards that are inherent to the Kansas and United States constitutions for preventing tyranny and the isolation of power in a single branch of the government.

HCR 5013 would politicize the judiciary.

Similar to the issues inherent in stripping the judiciary of its equal powers to the other branches of government, the proposed makeup of the nominating commission in HCR 5013 will politicize the judiciary and make the judiciary subject to the whim of the people, not the law.

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 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."[13] Likewise, some assert that judges are just lawmakers in black robes, barely differentiated from elected representative who sit in the legislature, and therefore they think judges should be selected "more democratically." This position ignores the reality that the merit selection procedure was chosen in a democratic process that involved the Legislature and a vote of the people; it also ignores that the democratically elected Governor selects four members of the nominating commission and ultimately selects the judge.[14]

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[12] *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

[13] Story, Joseph, *Commentaries on the Constitution of the United States*, vol. III, p. 476 (1833).

[14] And merit selection is not entirely insulated from the sway of politics or public opinion. The recent example in Iowa is enlightening. There, three state Supreme Court justices who were up for retention in 2010 were voted out of office as a result of an unpopular decision that overturned a statute banning same-sex marriage. At the time, polling showed that 57% of Iowans opposed same-sex marriage. Krissah Thompson, *Gay marriage fight targeted Iowa judges, politicizing rulings on issue*, WASH. POST, Nov. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110307058.html. Within two years, the tide of public opinion had turned, and a majority of voters expressed the opinion that same-sex marriage should not be banned by the Iowa constitution. William Petroski, *Iowa Poll: Majority opposes ban on same-sex marriage*, DES MOINES REG., Feb. 26, 2012, http://archive.desmoinesregister.com/article/20120227/NEWS09/302270022/Iowa-Poll-Majority-opposes-ban-same-sex-marriage. In 2012, a fourth justice who had sided with the majority to overturn Iowa's same-sex marriage ban garnered 54% of the vote and was retained. Public opinion about same-sex marriage had changed, but the rights secured by the Iowa constitution had not.

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More to the point, judges do not "make law"; they apply it, they interpret it, and they make judgments between conflicting laws. But they do not make law in the sense of legislation. The legal realism school of thought aside, what judges do is far removed from both the process and the effect of legislation. Legislators pick the issues. Courts do not pick the cases they decide. Legislators deal with abstract policies rather than concrete cases. Judges make decisions in the context of actual facts, and their decisions are constrained in part by the arguments and record before the court in a given case, and are subject to being distinguished in later cases with different facts. Further, court cases are laden with procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain their judicial task. Finally, unlike judges, legislators are expected to abide by their constituents' wills. Judges are accountable to the law and the Constitution, and are 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.

The proposed amendment seeks to make judicial selection a part of the public political process. Such a threat has been a reality since at least the 2012 election process. In fact, it has been recognized that during the 2012 Kansas primary election, a candidate for the Kansas Senate stated that he would seek to strengthen abortion laws by changing the selection of appellate judges in his response to a candidate questionnaire in a local paper.[15] The proposed method for creating the nominating commission will create the appearance, if not the reality, that the legislature has the authority to select appellate judges who will vote how the legislature and the people want them to rule even if such a ruling is inconsistent with the law. The judiciary is the one branch designed **not** to be beholden to the political process, and allowing a supermajority of nominating committee members to select judges will create such politicization.

Furthermore, the proposed nominating committee, although labeled "non-partisan," would likely be anything but non-partisan. The proposed selection process would have 5 members selected by the governor, two members selected by the president of the senate, two members selected by the speaker of the house of representatives, one member selected by the minority leader of the senate, and one by the minority leader of the house of representatives. Thus, given the current makeup of the Kansas legislature and executive branches, nine members of the 16 member nominating commission would be appointed by political leaders from the Republican party while only two would be appointed by Democrats and four would be highly qualified attorneys.

While there is a great risk to individual liberty in creating a judiciary beholden to the political process, this should not suggest that the current non-partisan, merit selection system is anything but 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.[16]
- 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.[17]

[15] Natalie Haag, *Separation of Powers: Is There Cause For Concern?*, 82 J. Kan. B.A. 30 (March 2013) (citing *Candidate Survey of Gary Mason*, HUTCHINSON NEWS, published July 20, 2012).

[16] Kan. Const. art. 14, § 1.

[17] *Id.*

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- A majority of Kansas voters voted to put the non-partisan merit selection process in place.[18]
- Four members of the non-partisan nominating commission are selected by the Governor, who is directly elected by Kansas voters.[19]
- Five members of the non-partisan nominating commission are attorneys in good standing, elected by Kansas citizens who are members of the Kansas Bar.[20]
- The non-partisan nominating commission identifies three candidates from whom the directly elected Governor appoints a Supreme Court justice.[21]
- Each Supreme Court justice is subject to a direct vote of the people in a retention election.[22]

Thus, there are sufficient safeguards in place to insure that the judiciary is not subject to certain checks from both the People and other branches of government. However, such safeguards also ensure that the judiciary is given the proper power without being beholden to political parties or the political process.

On behalf of the Kansas Association of Defense Counsel, we respectfully oppose the proposed amendment as an improper encroachment on the separation of powers that inherently protects the people from the tyranny of an overreaching government.

[18] *Id.*

[19] Kan. Const. art. 3, § 5(e).

[20] *Id.*

[21] Kan. Const. art. 3, § 5(a).

[22] Kan. Const. art. 3, § 5(c).

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