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

FROM: Mark D. Katz  
On behalf of the Kansas Association of Defense Counsel

DATE: January 22, 2015

RE: Presentation on Judicial Selection

Chairman Barker, members of the committee, we thank you for this opportunity to submit written testimony about the importance of fair and free 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 business and 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 consistently has 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.

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 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.

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. In 1803, Chief Justice Marshall wrote the opinion in *Marbury v. Madison*<sup>1</sup> that enshrined judicial review of legislative action in our civic 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>2</sup>

These words are 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;<sup>3</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 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>4</sup> 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.<sup>5</sup>

More to the point, judges do not "make law"; they apply it, they interpret it, and

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

<sup>2</sup> 1 Cranch at 178 (emphasis supplied).

<sup>3</sup> 2004 Year-End Report on the Federal Judiciary, <http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf>.

<sup>4</sup> Story, Joseph, *Commentaries on the Constitution of the United States*, vol. III, p. 476 (1833).

<sup>5</sup> 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.

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.

Other modes of judicial selection are fraught with problems, and unlike the concerns related to the merit selection system, these problems exist and have an immediate and detrimental effect on the administration of justice. Direct elections of appellate judges<sup>6</sup> provide for public opinion to have undue influence on judicial decisions. They also create the very real possibility for both the appearance of and actual corruption. Last month, 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>7</sup> In another instance of 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 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 of law.<sup>8</sup> These examples show how the "more democratic" system of direct elections for appellate court judges can undermine the public confidence in the judiciary.

The "federal" plan is susceptible to other 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>9</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>10</sup> The result, he said was the breakdown 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

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<sup>6</sup> This is not meant to suggest that trial-level judges should not be elected. Unlike appellate judges, elected trial judges are not required to undergo the expensive rigors of a state-wide campaign, and their fundraising requirements are correspondingly low.

<sup>7</sup> Mandak, Joe, *Ex-justice Joan Orie Melvin disbarred by consent agreement*, N.J. HERALD, Jan. 17, 2015, <http://www.njherald.com/story/27869582/exjusticejoanoriemelvindisbarredbyconsentagreement>.

<sup>8</sup> *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

<sup>9</sup> Remarks of Attorney General John Ashcroft, Court of Federal Claims Anniversary, October 4, 2002.

<sup>10</sup> *Id.*

their changing political fortunes.<sup>11</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>12</sup> In both the federal and the New Jersey examples, the federal plan has offered the possibility for partisan politics to work mischief on the administration of justice.

Hence, the proposed “solutions” to the non-problem of merit selection are fraught with peril. They open the door to political corruption, unseemly electioneering and fund raising, and brinksmanship at the expense of the administration of justice. The merit selection system that is currently in place has none of these problems. A panel of highly qualified attorneys are provided to the Governor for his consideration and selection of a judge. No money changes hands, and the judgeships are filled in reasonable timeframes.

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; it 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.

Thank you for the opportunity to be heard on this subject.

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<sup>11</sup> 2010 Year-End Report on the Federal Judiciary, <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

<sup>12</sup> Phillis, Michael, *N.J. Supreme Court Associate Justice Solomon sworn in by state's chief justice*, <http://www.northjersey.com/news/njsupremecourtassociatejusticesolomonsworninbystatechiefjustice1.1104644>.