SENATE COMMITTEE ON JUDICIARY
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Testimony on behalf of the Kansas District Judges Association in opposition to SB 439

I am a law professor at the University of Missouri – Kansas City (UMKC), where I teach courses including Constitutional Law. I appreciate the opportunity to submit these comments, on behalf of the Kansas District Judges Association (KDJA), in opposition to Senate Bill 439.

Senate Bill 439 lists a dozen grounds for impeaching or otherwise removing a judge from office. The key problem with this proposal is that the grounds for impeachment of state officials have already been specified in the Kansas Constitution. In Article 2, § 28, the Kansas Constitution provides for removal of state officials "on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors."

The grounds for impeachment listed in Senate Bill 439 go far beyond the circumstances in which the Kansas Constitution permits impeachment. The list in Senate Bill 439 begins with treason, bribery, and commission of indictable criminal offenses. But Senate Bill 439 goes on to say that judges would be subject to impeachment and removal for things such as committing a breach of judicial ethics, failing to adequately perform duties, attempting to subvert fundamental laws and introduce arbitrary power, attempting to usurp the power of the legislative or executive

branch of government, exhibiting discourteous conduct, or failing to properly supervise judicial personnel.

These additional grounds for impeachment clearly go beyond treason and bribery. Treason and bribery are very specific and highly serious offenses. For example, the Kansas Constitution defines treason as levying war against the United States or adhering to or giving aid and comfort to its enemies. Kan. Const. Bill of Rights § 13. Likewise, bribery is a serious felony offense that has a specific meaning in Kansas law. Kan. Stat. § 21-6001 (providing that a public official commits bribery by intentionally requesting, receiving or agreeing to receive an improper benefit in exchange for performance or omission of the official's powers or duties).

In addition to treason and bribery, the Kansas Constitution permits impeachment for "other high crimes and misdemeanors." To the extent that Senate Bill 439 relies on that phrase, it once again goes too far. The language in the Kansas Constitution about impeachment was based on that of the U.S. Constitution, which also provides for impeachments for "treason, bribery, and other high crimes and misdemeanors." The Framers of the U.S. Constitution came up with this language very quickly as they neared the completion of their work at the Constitutional Convention in 1787. There was a strong consensus that treason and bribery should be grounds for impeachment, but George Mason of Virginia worried that those two crimes alone might not encompass all of the "many great and dangerous offenses" that might warrant impeachment of an official. *See* 2 *The Records of the Federal Convention of 1787*, at 550 (Max Farrand ed., rev. ed. 1937). Mason proposed adding the word "maladministration" to treason and bribery, but that proposal was rejected. James Madison observed that using a term as vague as "maladministration" would essentially amount to providing executive and judicial officials only "a tenure during the pleasure of the Senate." *Id.* Instead the Framers ultimately settled on adding the phrase "other high crimes and misdemeanors against the United States." *Id.* at 545. The Committee of Style shortened this to simply say "other high crimes and misdemeanors." *Id.* at 600.

That drafting history reinforces what can be gleaned from the text itself, particularly the use of the word "other." By using the word "other," the Framers made it clear that the sorts of high crimes and misdemeanors they had in mind were things akin to treason and bribery. The Framers wanted to be sure that impeachment would cover political crimes against the state equal in seriousness to treason and bribery.

The Kansas Constitution takes the same approach of carefully limiting the grounds for impeachment. The bases for impeachment in Kansas were broader at one time. Until 1974, the Kansas Constitution provided that state officials could be impeached "for any misdemeanor in office." But Kansas amended its Constitution in 1974 and replaced that with the current provision allowing impeachment for treason, bribery, and other high crimes and misdemeanors. *See* Laws 1974, ch. 458, § 1. The language in the Kansas Constitution about impeachment thus did not come about by accident. A specific decision was made to amend the provision, copy the U.S. Constitution's language, and narrow the grounds for impeachment.

The grounds for impeachment in Kansas could be broadened again, but that would require another amendment of the Kanas Constitution. The grounds for impeachment cannot properly be expanded by the enactment of a measure like Senate Bill 439 that conflicts with the explicit terms of the state's Constitution.

Senate Bill 439 does not merely exceed constitutional boundaries in minor, technical, or inconsequential ways. It would dramatically expand the potential grounds for impeachment, making judges subject to impeachment for vague, subjective, and potentially far-reaching grounds such as any "discourteous conduct" or "personal misbehavior or misconduct." These sorts of terms are so vague that they could be stretched to cover just about anything that one person does not like about another. *See* State v. Adams, 254 Kan. 436, 866 P.2d 1017 (1994) ("Due to the great divergence of opinion held in our society as to what is acceptable or proper behavior, misconduct is in the eye of the beholder.").

Senate Bill 439 also would make judges subject to impeachment based on mere disagreement with the substance of their decisions. In other words, a judge who behaved scrupulously in every way and performed his or her duties with the utmost good faith would be subject to impeachment because legislators disagreed with the judge's conclusions about the difficult legal issues on which the judge ruled. For example, Senate Bill 439 would subject judges to impeachment for "attempting to subvert fundamental laws" or "attempting to usurp the power of the legislative or executive branches." Of course, no one wants judges to subvert fundamental laws or usurp the power of the other branches of government. Everyone agrees that judges should not be doing those things. But the inescapable problem is that there are no objective, neutral ways to determine when a court's decision on a difficult, controversial issue is subverting fundamental law or usurping legislative or executive authority.

Those who disagree with a court's decision may strongly feel that the court went too far. Liberal observers may perceive a conservative decision by a court to be an illegitimate subversion of fundamental law, and likewise conservatives may react the same way to liberal rulings. Senate Bill 439 would turn these sorts of disagreements about tough legal issues into a basis for impeaching judges, but the Kansas Constitution has wisely provided that the impeachment power cannot be used in that manner.

The invalidity of Senate Bill 439 does not leave Kansas without valid means for ensuring that courts remain responsive to the people and do not abuse their authority. Through retention elections (and partisan elections in some districts), the people of Kansas have frequent opportunities to assess judges' performance and unlimited discretion to remove those judges that the people find lacking in any way. The Supreme Court of Kansas also has the power to discipline, suspend, and remove lower court judges for cause. *See* Kan. Const. art. 3, § 15. And of course, the legislature has the power of impeachment in appropriate circumstances rising to the serious level of treason, bribery, and other high crimes or misdemeanors.

While serving as Chief Justice of the U.S. Supreme Court, William Rehnquist undertook an extensive analysis of the impeachment power and the most significant occasions in American history in which that power has been invoked. Rehnquist concluded that significant conflicts among the three branches of government are inevitable. When those conflicts arise, use of the impeachment power to check the courts will be tempting. But "[n]o matter how angry or frustrated either of the other branches may be," Rehnquist observed, using the impeachment power to remove judges "because of their judicial philosophy is not permissible." William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 134 (1992).

Chief Justice Rehnquist's observations about the limits of the impeachment power remain sound. And they apply with great force in Kansas, where the state's Constitution, like the U.S. Constitution, permits impeachment only for treason, bribery, or other high crimes and misdemeanors. By attempting to stretch the impeachment power beyond those grounds, Senate 439 would violate the Kansas Constitution.