



KANSAS ASSOCIATION OF DEFENSE COUNSEL

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TO: Senator Kellie Warren, Chair
Senate Committee on Judiciary

FROM: Diane Bellquist
On behalf of the Kansas Association of Defense Counsel

DATE: March 4, 2022

RE: Opposition to SCR 1621 and SCR 1622

Chairwoman Warren, thank you for the opportunity to appear today. My name is Diane Bellquist, and I am here today on behalf of the Kansas Association of Defense Counsel to speak 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' current merit selection process for the selection of Kansas Supreme Court Justices.

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.

KADC supports the current merit selection system for Supreme Court Justices.

The current merit selection process has served the citizens of Kansas since 1958 when it was added to the state constitution. Kansans democratically implemented a system of selecting Supreme Court justices that is both open and non-partisan. Applicants for a vacancy on the Supreme Court are thoroughly vetted by an impartial nominating commission comprised of both attorneys and non-attorneys. The nominating commission conducts public interviews of the applicants. A panel of highly qualified attorneys and/or judges is then forwarded to the Governor for consideration and selection. These merit-based nominations ensure the selection of highly qualified jurists with recognized integrity, character, ability, and temperament. Under this process, vacancies are filled within reasonable timeframes.

Kansas' current merit system has allowed the state's highest court to avoid the public's skepticism at a time when government has been the focus of high levels of cynicism. Essential for the operation and respect of the rule of law is the public's confidence in the judicial system. 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 amendment of the Kansas Constitution to insulate the courts from political maneuvering. There has not been a watershed event demonstrating that the system is corrupt, has been misused, or that the constitutional boundaries of the merit selection process have been stretched to a breaking point.

Fair and impartial courts are cornerstone judiciary branch in our democratic government. Justices are held accountable personally and professionally. Additionally, after one year on the court, the justice is subject to a retention vote by the public in the general election. There will always be decisions rejected by politicians. That is the essence of the checks and balances between the governmental branches.

KADC opposes statewide election of Supreme Court Justices

The belief that the judiciary should operate and be treated like other political arms of the government maligns a basic tenet of the judiciary, which is fidelity exclusively to the rule of law. The public benefits from the current merit based selection of an impartial judiciary, free from political partisanship. Problems surrounding judicial elections can include significant spending by interest groups, conflicts of interest for judges who decide cases affecting their campaign supporters, and judges who change their behavior on the bench to avoid being the target of attack ads in the next campaign cycle. Contributions to judicial campaigns at a minimum create the appearance of an indebtedness to the campaign contributors. These pressures impede the impartiality of the judiciary, which can lead to less predictable outcomes. If even the perception of fairness is lost, the public's confidence in our judicial system will be eroded.

Judges should decide cases without taking the popular opinion into account. Today, more than ever, it is crucial our judges remain outside of the political fray. Judges are more frequently tasked with deciding divisive social and political issues. Judges are to decide cases based upon the facts and the law without influence by campaign donors or popular opinion. It is vital for our highest court to uphold the integrity and independence of the judiciary, a task that would be exceedingly difficult if forced to campaign for office. The election of judges has been described as antithetical to the notion of an impartial court.

KADC opposes senate confirmation of Supreme Court Justices

KADC strongly opposes requiring senate confirmation in the selection of Kansas Supreme Court Justices in the interests of preserving the current status of judicial impartiality and for the additional reason of the timeliness in filling vacancies on the seven member court. In 2020, the Governor's appointment of Mr. Carl Folsom for a vacancy on the Kansas Court of Appeals is a prime example of partisanship factoring into the selection of judges when senate confirmation is required. Mr. Folsom was highly qualified, but his experience as a public defender was mischaracterized and ultimately he did not receive the requisite senate confirmation. In this regard, highly qualified individuals can be kept off the court due to partisan interests. Additionally, the process of obtaining senate confirmation can potentially lengthen the timeframe for filling critical vacancies. If protracted disagreement over appointments occurs, it would only lengthen those timeframes.

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*¹ 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.²

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;³ those tensions 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 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 critical goal. “The truth is ... the danger is not, that the judges will be too firm in resisting public opinion, and in defense 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.”⁴

On behalf of the Kansas Association of Defense Counsel—attorneys who represent business interests in the courts every day—the merit system for selecting Kansas Supreme Court Justices is not a problem to be solved; the current method of selection is an efficient, effective, and fair system of ensuring that Kansans have impartial Justices to resolve their disputes. We strongly encourage the Committee to support the current system.

¹ 1 Cranch 137 (1803).

² 1 Cranch at 178 (emphasis supplied).

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

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