



**KANSAS TRIAL LAWYERS  
ASSOCIATION**

To: Senator Kellie Warren, Chair  
Members of the Senate Judiciary Committee

From: Mike Fleming, Kapke Willerth Attorneys at Law, Kansas City  
On behalf of Kansas Trial Lawyers Association

Date: March 4, 2022

Re: Changes to the Selection Process for Supreme Court Justices, SCR 1621, and SCR 1622  
(Oppose)

I appear today on behalf of the Kansas Trial Lawyers Association (KTLA) to provide testimony on the selection process for Kansas Supreme Court justices and changes proposed by SCR 1621 and SCR 1622. KTLA opposes both resolutions, which would abolish the Supreme Court Nominating Commission and instead establish Senate confirmation of gubernatorial appointment or direct election of Supreme Court justices, respectively.

KTLA appreciates the opportunity to take part in the Legislature's continued study of the selection process for Supreme Court justices. The most recent review was by the Special Committee on the Judiciary during the 2019 interim session. After receiving testimony from stakeholders, including KTLA, the Special Committee made no recommendation to the Legislature other than it should continue its study.

Nothing has changed since 2019 to alter KTLA's strong support for the current Supreme Court Nominating Commission process as outlined in Article 3 of the Kansas Constitution. The Supreme Court Nominating Commission process has stood the test of time. It has proven to be the best system overall for assuring that jurists will be fair and impartial, as well as qualified to serve on the Supreme Court.

Historically, protecting the impartiality of the judicial branch has been the highest priority in Kansas. The Legislature crafted Kansas' unique Nominating Commission process following the "Triple Play" debacle.<sup>1</sup> Two-thirds majorities in both houses of the Legislature and over 70% of voters approved the process needed to adopt it and to amend the Constitution.

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<sup>1</sup> The "Triple Play" involved Chief Justice Bill Smith, Governor Fred C. Hall, and Lieutenant Governor John McCuish. In the 1956 election, Governor Hall was defeated in the Republican primary by Warren Shaw, who then lost the general election to Democrat George Docking. Chief Justice Smith was seriously ill and contemplating retirement. But he supported Gov. Hall and didn't want to give the new Democrat governor an appointment. So Chief Justice Smith, Governor Hall, and Lt. Gov. McCuish devised a plan. Chief Justice Smith resigned on December 31, 1956, followed and Governor Hall resigned on January 3, 1957. Lt. Governor McCuish became governor for 11 days until the inauguration of George Docking. His only official act as governor was to appoint Former Governor Hall as Chief Justice of the Supreme Court. The Kansas Legislature and Kansas voters amended

The Nominating Commission process is far removed from the maneuvering of the political branches of government.<sup>2</sup> Unlike the governor and the Senate who have multiple powers and duties, the only role of the Commission is to recommend to the governor the three most qualified applicants for a Supreme Court vacancy. The Kansas Legislature, and voters, could have chosen the U.S. Senate confirmation model used to approve U.S. Supreme Court justices but overwhelmingly chose the Supreme Court Nominating Commission process instead. By approving the Nominating Commission process, Kansans simultaneously repealed and rejected popular elections of the Supreme Court.

The judicial branch is different from the legislative and executive branches of government. Justices have a constitutional obligation to ensure impartiality for all parties that appear before them and must have greater protections from improper influence than any other constitutional officers. The method of selecting justices must protect them from bias and improper influence so they can fulfill their constitutional roles.

Neither popular elections nor Senate confirmation shield nominees for the Supreme Court from bias as well as the Supreme Court Nominating Commission process does. Popular elections, by their nature, create incentives to consider election outcomes instead of the questions of law, and potentially undermine the ability of justices to be fair and impartial. The public must have confidence that a justice's decision is based on the rule of law and not popular opinion, or partisanship. Elections promote campaigning and campaign fundraising and spending by and on behalf of judicial candidates.

Under U.S. Senate confirmation, Federal courts have become the victim of political game playing between the executive and legislative branches, depending on the party of the President, and the majority party in the U.S. Senate. Senate consent injects politics into the selection process by making it as partisan as any other legislative matter that comes before the U.S. Senate. Partisan politicking does not benefit Kansans or the fair administration of justice.<sup>3</sup> Washington-style politics – delays in filling vacancies, partisan wrangling – have not had a place in Kansas' process for selecting Supreme Court justices since the Nominating Commission process was enacted. Inviting such antics into the selection process for our highest court is a step backward.

No process is perfect. However, the process in the Kansas Constitution -- the Supreme Court Nominating Commission process – has proven to be the best system for protecting the democratic ideals of an impartial judiciary and separation of powers. Other methods of Supreme Court judicial selection fall short. On behalf of the Kansas Trial Lawyers Association, I offer strong support for the current Supreme Court Nominating Commission process for the selection of Supreme Court justices and respectfully request that the committee take no action on either SCR 1621 or SCR 1622.

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the Constitution in 1958 to repeal elections and gubernatorial appointment and replace it with the current Supreme Court Nominating Commission selection process.

<sup>2</sup> The non-partisan, 9-member Supreme Court Nominating Commission is charged with finding, interviewing, and recommending a slate of 3 candidates for a vacancy on the Supreme Court. The Nominating Commission is a geographically and professionally diverse citizen commission that serves voluntarily. Commission meetings are open; in fact, the Commission must work at an even higher standard of transparency and openness than other state bodies.

<sup>3</sup> The Kansas Supreme Court has distinct constitutional duties. The Kansas Constitution specifies that the Supreme Court has original jurisdiction in quo warranto, mandamus, and habeas corpus proceedings, Article 3. The Supreme Court is required to determine the validity of reapportionment statutes. A determination of the Supreme Court that reapportionment is valid is final until legislative districts are again reapportioned, Article 10.