TO: House Committee on Judiciary
FROM: Jim Robinson for the Kansas Association of Defense Counsel
DATE: February 6, 2005
RE: Judicial Selection

Chairman O'Neal, Members of the Committee:

Thank you for the opportunity to appear today as a conferee on House Concurrent Resolution 5033 and House Bill 2770. My name is Jim Robinson. I have practiced law in Wichita for 22 years. I am on the Board of Directors of the Kansas Association of Defense Counsel (KADC), and appear today as a representative of that group. KADC is a statewide association of lawyers who defend civil damage suits. KADC supports the current merit selection process for selecting justices and judges to the appellate courts.

What is "merit selection" of judges ?

Merit selection focuses on the intellectual and technical abilities of candidates who seek the important job of interpreting the laws. As with any position that requires rigorous analytical ability, the goal of those making the selection is to sift out less qualified and less experienced applicants and search out the most qualified.

The linchpin of merit selection in Kansas is the Supreme Court Nominating Commission. This is a nonpartisan commission composed of four lawyer members who are elected by their peers in each congressional district, four nonlawyer members who are appointed by the governor, and one additional lawyer member who serves as chairperson and who is elected by peers in a statewide election. Each member's term is for four years and terms are staggered so that the terms of only two members'–one a lawyer and one a nonlawyer–expire each year. Currently there are nonlawyer members who were appointed by both Governors Graves and Sebelius. Also, contrary to rumors, most of the current elected lawyers are from law firms of less than five lawyers. None are from firms of more than twenty lawyers.

The Commission's work is familiar to anyone who has made an important hiring decision. It initially reviews resumes and an extensive application that must be completed by all applicants for the Supreme Court and the Court of Appeals. It then screens candidates and interviews the most qualified and investigates their references. After the applicants have been thoroughly vetted, the Commission submits the names of the three that in its consensus are the most technically able and experienced to the

Governor, who must select an applicant from the list. Judges are selected for retention by the voters statewide in an uncontested election every six years for the Supreme Court and every four years for the Court of Appeals.

How does "merit selection" relate to judicial independence?

Judicial independence is the only way to assure fair and impartial justice for all Kansans. Courts have a duty to protect individual rights, including the rights of political, racial and ethnic minorities, no matter how unpopular their rulings may be. The legislative and executive branches may use focus groups or public opinion polls to make decisions; judges may not. The role of the courts is to enforce the law, whether it is the First Amendment rights of some radical group on either end of the spectrum to publish political views which most people find offensive, or the right of a child murderer to a fair and impartial trial. Courts necessarily make tough decisions regardless of whether they are popular at the time. Occasionally, the Kansas Supreme Court as the interpreter of the Constitution makes a tough decision that overturns legislation. The ensuing tension between the two branches is a healthy and expected byproduct of our system of government.

Fair criticism is essential in our democracy even with respect to improving the quality of the courts. But political attacks on the judiciary diminishes its independence and the public's confidence in it. When state court judges are perceived as giving in to political pressures, the credibility of the judiciary suffers. When those responsible for nominating or confirming judges stack the courts with judges who are there to produce certain results, the quality of justice is diminished. When state judges are voted off the bench because of unpopular decisions, courts cease to be independent.

The Report of the American Bar Association Commission on the 21st Century Judiciary, *Justice in Jeopardy,* p. 31 (July 2003) aptly noted that when the political branch actors, whether it is the Governor or the Legislature, "use the weapons at their disposal to retaliate against the courts for making unpopular rulings and to encourage them to be more attentive to the will of the majority when deciding cases in the future, the net effect is to politicize the judiciary and, in some cases, threaten its institutional integrity and independence."

The real value of merit selection is in minimizing the role of politics in selecting judges, which in turn limits the political influences that may hinder fair and impartial justice.

Does "merit selection" eliminate politics from judicial selection ?

No, because one assumes that politics will play into any gubernatorial appointment. However, merit selection minimizes the interplay between partisan politics and judicial selection because the Supreme Court Nominating Commission nominates candidates on the basis of their qualifications, not political affiliation. More importantly, the applicant is not required to raise funds, advertise, stump, or articulate a platform, all of which create a risk that judicial independence could be compromised.

Kansas's merit selection system has avoided the political spectacle played out in the federal appointment process and in many state court judicial elections. Alabama Supreme Court races have been described as "battleground[s] between businesses and those who sue them."[1] A number of other states have witnessed significant political activity and campaign contributions by special interest groups, often led by national, rather than state organizations.[2] The Chief Justice of the Texas Supreme Court noted in his 2003 State of the Judiciary message, "[o]ur partisan, high-dollar judicial selection system has diminished public confidence in our courts, damaged our reputation throughout the country and around the world, and discouraged able lawyers from pursuing a judicial career."[3]

Why should "merit selection" in Kansas differ from the federal selection process used for the United States Supreme Court and the United States Courts of Appeals ?

The state process, unlike the federal process, does not grant lifetime judgeships. State judges, unlike federal judges, are held accountable to the voters in retention elections. Furthermore, under the federal process, unlike the state process described above, the President screens and then nominates a candidate. Senate confirmation in the federal process is a check against the President's exercise of appointment power.

Why not keep the existing process, but require Senate confirmation of the Governor's selection?

Giving the Senate the power to examine and confirm persons approved by the

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[1] Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999) (citing David White, *Campaign Cash Ready to Flow: Siegelman Has a Jump on James*, BIRMINGHAM NEWS, Mar. 26, 1998, at 1B).

[2] Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1395-1403 (2001).

[3] http://www.supreme.courts.state.tx.us/Advisory/SOJ.pdf

Supreme Court Nominating Commission and nominated by the Governor would be a needless duplication of the extensive vetting of applicants by the Commission and would also undermine the input of lawyers in the judicial selection process. One of the reasons for reserving five positions on the Commission for attorneys is that they are most likely to be familiar with the field and the potential candidates.

If the desired purpose of such a confirmation process is to focus on the nominee's judicial philosophy in general or how the nominee might rule on the most divisive legal and constitutional issues of the day, Kansas would likely replicate the protracted and combative process in the federal system, all of which can be exacerbated when coupled with a highly politicized relationship between the Governor and the Legislature. There will be much frustration with the process when nominees invoke the sacred mantra of judicial nominees and refuse to comment on issues that might come before the court. As we have seen at the federal level these discussions can devolve into questioning about points of prejudice and personal pique that are calculated to tarnish the judge in the court of public opinion.

Regardless of whether such a process would be helpful, Senate confirmation introduces a political element into the selection process that diminishes judicial independence.

Why shouldn't the principle of one person, one vote apply to the selection of judges ?

The foundation of justice in our democracy is a fair and independent judiciary. The realities of getting elected can compromise a judge's independence.

This can begin with the nominating process where campaign work in previous party primaries and elections, support of party functions, and fundraising in past elections may be valued more highly than the candidates qualifications to serve as judge.

Raising money can be a problem. The most likely contributors are attorneys, some of whom will likely appear in front of those judges. There is nothing more important to the integrity of our judicial system than the public's expectation of getting a fair hearing. Political contributions naturally cause litigants to question a judge's impartiality. Imagine yourself as a litigant whose case was just dismissed by a judge who received a $500 political contribution from your opponent's attorney.

Addressing issues can be a problem. The Kansas Code of Judicial Conduct says that judges and judicial candidates can't make traditional campaign promises—like promising to decide certain cases a certain way. Judges decide cases on the basis of the facts and the law, not on the basis of pledges or promises. Since candidates can make only general statements about their commitment to faithfully an impartially perform the duties of the office, voters have little or no meaningful information on which to base their choices.

As the federal courts continue to chip away at state restrictions, judicial elections are more likely to look like non-judicial elections. In 2002 the U.S. Supreme Court in *Republican*

Party of Minnesota v. White held that Minnesota's prohibition against judicial candidates stating their views on legal issues that could come before the court for which they were running violated the First Amendment. Last week the U.S. Supreme Court declined to review a decision in *Dimick v. Republican Party of Minnesota* by the 8th Circuit U.S. Court of Appeals which struck down key provisions in Minnesota's code of judicial conduct which barred judicial candidates from personally soliciting contributions from donors and from accepting or using party endorsements and participating in partisan events. The 11th Circuit U.S. Court of Appeals has also stuck down similar judicial campaign rules. Both courts based their decisions on the First Amendment.

As federal courts strike down restrictions on judicial campaign activities, as a practical matter, it will be impossible for states to have nonpartisan elections. This will open the door to activities that at least give the appearance of impropriety and the potential for corruption. If for example this state's prohibition against solicitation activities is invalidated it will be easier for judicial candidates to address parties who may come before them the next day and urge their support in an upcoming election.

As judicial elections become more partisan there will be more pressure on attorneys to seek the recusal of judges based on party affiliation, solicitation of contributions from attorneys or parties, or for pledges or promises made in the campaign. Now pending before the U.S. Supreme Court is a petition for *certiorari* in *Avery v. State Farm Automobile Insurance Co.* That case concerns a decision by the Illinois Supreme Court, which vacated half of a $1.05 billion award against State Farm in a class action. Justice Lloyd Karmeier cast the deciding vote. The petition for *certiorari* alleges that Justice Karmeier spent more than $4.8 million to win his seat on the Illinois Supreme Court and that a group of organizations closely associated with State Farm heavily contributed to his campaign. The petition asks: "May a judge who receives more than $1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?"

On behalf of the Kansas Association of Defense Counsel, I submit that there be no changes to the current merit process for the selection of appellate judges. I have attached a table prepared by the American Judicature Society that describes the current process.

Respectfully submitted,

F. James Robinson, Jr.
robinson@hitefanning.com