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TO: HOUSE JUDICIARY COMMITTEE
FROM: F. JAMES ROBINSON, JR.
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DRI
DATE: JANUARY 22, 2013

RE: HCR 5002; HCR 5003; HCR 5004

Chairman Kinzer, members of the committee, we thank you for this second opportunity to appear today and comment on your review of House Concurrent Resolutions 5002, 5003 and 5004. I am a past president of Kansas Association of Defense Counsel (KADC), a statewide association of lawyers who defend civil lawsuits and business interests. I am also the state representative of DRI (Defense Research Institute), a national association which is the voice of the defense bar. I am here today on behalf of these groups.

We begin this discussion where we left it last week—with the admonition of James Madison, in *The Federalist* No. 49, that a Constitution should be amended only on "great and extraordinary occasions."

In the selection of judges, Kansas has followed this admonition. When the state entered the Union in 1861, the Kansas Constitution provided that all judges should be elected. KS. Constitution, Art. 3, §11 (1859). Concerns about the involvement of political parties in the selection process led the state in 1913 to approve nonpartisan judicial elections, but this was repealed in 1915. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 Journal of the Kansas Bar Association 32, 33-34 (2000). During a time of renewed criticism about the role of partisan politics in the election of judges a proposal was made in 1953 to amend the Constitution to adopt the nominating commission process, but it was defeated in the House Judiciary Committee. Another similar proposal was defeated in the Senate Judiciary Committee in 1955. *Id.* It was the public outcry over the "triple play" of 1956—certainly a "great and extraordinary occasion"—that led to the adoption of the Supreme Court Nominating Commission in 1958. *Id.*

Today, there is no public scandal. The available data show that the system is producing good outcomes (see attached summary of the U.S. Chamber's rankings of Kansas), which bring stability and consistency to economic decision-making by businesses.

Even if the Committee believes that the current process is not the best one to select judges, this alone is not enough for this Committee to open the gate to begin the solemn and arduous task of overcoming the high hurdles set by our founders to amend the Constitution. There is no occasion, let alone a "great and extraordinary" one, for a constitutional amendment.

There is insufficient empirical research to demonstrate that any of the other processes can ensure that Kansans will have the same fair and impartial judges they have today. The proponents point to other states, but no two states choose, evaluate and retain their judges in exactly the same way. www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= Further, very little is known about the implications of the different processes or how they would work in Kansas.

If there must be a constitutional change it should involve only a restructuring of the nominating commission process to address some of the proponents' criticisms. The Committee should consider the following:

- The Commission should remain constitutional to ensure a stable structure.
- Commission members could be selected by multiple appointing authorities, including leaders in the Legislature, provided there is representation by both parties.
- Racial/ethnic, gender, and geographic diversity among Commission members could be encouraged, if not required.
- Lay members could comprise a substantial portion, or even a majority, of the Commission, but it is important the Commission have the special insights of lawyer members.
- After the initial selection of Commission members, members' terms should be staggered. This offers three advantages: preventing complete turnover in the commission's membership; providing new members with the benefit of existing members' experience; and ensuring rotation among appointing authorities.
- Commission meetings, including interviews, deliberations, and voting, could be open to the public, provided the Commission has the option of meeting in executive session to discuss confidential information regarding applicants upon a super-majority vote of Commission members.

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These changes will address the proponents' concern that "the nominating commission and the nominating process is dominated by attorneys," without eliminating attorneys from the process. In every state with a commission-based appointment system, both attorneys and non-attorneys serve on the nominating commission.

Having multiple appointing authorities for the members of the Commission would make it so that neither the attorneys of the state nor the Governor would have the power to appoint a majority of Commission members and thus further enhance the public's confidence in the Commission's independence.

Certainly, none of these suggested changes fully address some of the proponents' concerns that the Nominating Commission "takes away the citizen's right to vote." There would still be retention elections. Though the proponents note that historically very few judges lose in retention elections, this is due to no fault of the system which does provide for more accountability than the federal system. In addition, the proponents have made no showing that demonstrably bad judges are being retained.

Even in elective states, the voters have a limited voice in the selection of judges. Many times it is not the voters who put judges on the bench. According to a study by the American Judicature Society, 45% of the judges serving in elective states in 2008 were first appointed to their seats to fill vacancies between elections. Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, *Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance–and Inhibit–Judicial Diversity?* American Judicature Society, p. 2 (2010).[1] In addition, voters frequently do not have a choice when incumbent trial court judges come up for reelection. According to a recent study, 78% of the trial court judges who stood for reelection from 2000 to 2008 were unopposed. Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation and the Quest for Accountability in General Jurisdiction Trial Courts*, Judicature 94(5):208 (2011).

And so, even though there is no "great and extraordinary occasion" to amend the Constitution, if there must be a change we support changes to the selection and composition of the Nominating Commission consistent with the principles stated above.

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[1] www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf