



**KANSAS BAR
ASSOCIATION**

**TESTIMONY PRESENTED TO THE
HOUSE JUDICIARY COMMITTEE**

**LEE SMITHYMAN
KANSAS BAR ASSOCIATION**

January 22, 2013

HCR 5004

**A PROPOSITION to amend the constitution of the state of Kansas by
revising article 3 thereof, relating to the judiciary.**

Good afternoon Chairman Kinzer and Members of the House Judiciary Committee. I am Lee Smithyman and I am a partner in the Overland Park-based law firm of Smithyman & Zakoura, Chtd. I currently serve as the President of the Kansas Bar Association and I appreciate the opportunity to again appear before you and provide the KBA's position on various proposals to change the state's appellate selection process and to specifically advocate for the support of HCR 5004, which was introduced at the request of the Kansas Bar Association.

The Kansas Bar Association has long supported a merit selection process and the nonpartisan Kansas Supreme Court Nominating Commission for selecting judges and justices for our appellate courts. The system has served our state well since 1958 when 60% of the Kansas electorate approved it.

The Kansas Constitution provides for a nine-member Supreme Court Nominating Commission, which is selected as follows:

- One attorney serves as chair, who is elected by all licensed attorneys residing in Kansas;
- Four attorneys, one elected from each of the state's four congressional districts by licensed attorneys residing in those districts; and
- Four non-attorneys, one selected by the Governor from residents within each of the state's four congressional districts.

The KBA supports the present system; it works well to select our best and our brightest.

Last week I attended all hearings in both the House Judiciary Committee and Senate Committee on Judiciary in which the appellate selection issue was considered. From those hearings as well as historical discussions on the selection process for our appellate courts, the leading criticism of our current system is that the majority of commission members are attorneys selected by attorneys who are not effectively accountable to the public.

However, in contradiction to these criticisms, merit selection works well; merit selection will work well independent of the selection process. As a result of discussions regarding the state's current system for selection appellate judges and justices, at the urging of its membership, the Kansas Bar Association addressed judicial selection and adopted the following resolution at its December 7, 2012 meeting of the KBA Board of Governors:

RESOLVED, that the Kansas Bar Association supports the merit selection system for appellate judges and justices, independent of how merit panel members are selected. The present application, interview, questioning and selection process provides the best available information to identify and select the most qualified appellate judges and justices, independent of political considerations.

Rather than simply recite the previously-referenced statement and/or express general opposition to non-merit selection proposals to amend the appellate selection process in legislative hearings this year, the KBA felt it appropriate to offer specific changes within the merit system process that could be considered alongside other proposals and requested introduction of HCR 5004, which we refer to as the 4-5-6 Plan for Appellate Selection.

In summary, the KBA proposal for amending the Kansas Supreme Court Nominating Commission is as follows:

- Four attorneys elected by registered attorneys within each of the state's four congressional districts;
- Five members selected by the Governor; one each from the state's four congressional districts and a fifth member to serve as the non-voting chair; and,
- Six (non-legislator) members selected by House and Senate Leadership as follows:
 - o Two selected by the President of the Senate;
 - o Two selected by the Speaker of the House;
 - o One selected by the Senate Minority Leader; and,
 - o One selected by the House Minority Leader.

This 4-5-6 Plan proposed by the Kansas Bar Association would protect judicial independence, while opening appointments to a remarkably democratic process, one which the Governor, the House, the Senate and the voters (through retention elections) all would participate.

While we have heard objections to attorneys selected by Kansas attorneys holding a majority of positions on the nominating commission, we have not heard attorneys should be excluded from the commission altogether. The Kansas Bar Association believes attorney involvement is critical to this process, given the administrative and regulatory responsibilities of the Kansas Supreme Court over our state's judicial system.

The KBA also believes any constitutional amendment changing our judicial nominating system should be placed on a general election ballot where the greatest numbers of Kansans vote.

The three best judicial nominees as determined by the Commission would be submitted to the Governor for selection. The Governor and the Legislative leaders could appoint attorneys or non-

attorneys as they deem appropriate; no commission members could be members of the Kansas Legislature or executive branch; and, the members would serve staggered three-year terms.

The benefits of a merit selection system are many and we believe far outweigh any of the attributes of a Federal model or direct elections.

Most important, a merit selection process is open for all Kansas attorneys to apply to the appellate bench, not just those who might be selected by our state's chief executive or those capable of running for election statewide.

The Federal Model has become a politically-charged process that has led to unfilled judicial positions and court backlogs. While we know Kansas Senators would not have the power to block appointees as U.S. Senators can, the fact that nominees will be subjected to a political process will have an unforeseeable impact on our court system that very well could be negative. Elections would be worse, in our opinion and highly disruptive to our courts. Requiring appellate judges to campaign and stand for election, raise campaign funds and moderate their caseloads during their campaigns would come at an extraordinary cost to the credibility of our judicial system.

Under our current merit system, every applicant's credentials and experience are reviewed by the panel and those best qualified are interviewed. Kansas courts will greatly benefit from access to the best and brightest of our attorneys and lower court judges. Each applicant has their credentials vetted by an impartial nominating commission charged with forwarding the three best candidates to the Governor for consideration, rather than the kind of a system that would be created under a Federal Model or direct elections that would arguably set minimum standards for nomination (or election) to our appellate courts and most certainly limit the number of attorneys given consideration for an appellate court position.

The KBA's proposal also brings the Kansas Court of Appeals up to a constitutional level on par with the Kansas Supreme Court, which is where it belongs. The Court of Appeals is the judiciary's workhorse as it annually considers and decides thousands of cases of great importance to business and commerce, our citizens and any number of plaintiffs and defendants seeking redress in our courts. We have also proposed placing in the constitution all fourteen court of appeals judges, although the 14th judge has not been funded since its creation. Furthermore, we do not believe the Court of Appeals should be treated different from the Kansas Supreme Court in regard to the appointment process.

Merit selection should not be discarded. It works. Witness the resolutions passed by bar associations and civic organizations across the state of Kansas that endorse merit selection as the best process for selecting judges and justices in our state independent of how commission members are selected.

In closing, the KBA welcomes the opportunity to discuss the merits of its 4, 5, 6 plan for changing the nominating commission or other alternatives within the framework of a merit selection system. We are opposed to other proposals to change the selection process, including HCR 5002, HCR 5003, HB 2019 and HB 2020. The KBA has not taken a formal position on HCR 5005, but do appreciate the fact Representative Rubin's proposal is focused on changes to the nominating commission. However, the KBA has historically opposed senate confirmation and believe the vetting process of a reformed nominating commission would add a political element into the process that is not necessary, given the changes HCR 5004 or similar proposals would bring into the selection process.

On behalf of the Kansas Bar Association, I thank you for your time and consideration of our thoughts on this important issue and I would stand for questions at the appropriate time.

Lee Smithyman
KBA President
2012-2013

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The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,000 members, including lawyers, judges, law students, and paralegals.

Attachment. (list of bar and civic organizations)