Testimony of
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Introduction

Mr. Chairman and Members of the Committee, I come before you today not in my capacity as Kansas Secretary of State but in my capacity as an academic who served as Professor of Constitutional Law at the University of Missouri (Kansas City) from 1996 until 2011. It is an honor and a privilege to testify before you today regarding what is one of the most important votes that you will take as Representatives of the People of Kansas—a vote on the method of selecting appellate judges in Kansas.

I will present two factors that I believe weigh strongly in favor of eliminating the current judicial selection commission and replacing it with either the federal model (of executive appointment and senate confirmation) or an elected judiciary: (1) the understandings of the Framers of the U.S. Constitution when they proposed the federal model on which HCR 5008 is based; and (2) an argument that should be persuasive no matter what your political party or judicial philosophy—that the federal model produces better justices. Before I do so, let me provide some background information that may be useful to the committee.

The Various Systems

In the 1950s, Kansas got caught up in a wave of judicial reform that was sweeping the nation as state after state abandoned systems of judicial election or selection by the executive or legislative branch and replaced such systems with judicial selection commissions. The theory behind the selection commissions was that they would produce courts free of political bias. That theory has proven false after half a century of experience.

Today, the methods of selecting supreme court justices in the 50 states are as follows. 23 states use some system of selection by nominating commission, most with retention elections thereafter. 21 states elect their supreme court justices. And the remaining six states use some variation of the federal model of appointment and confirmation by the political branches of government. (Those six states are California, Maine, New Hampshire, New Jersey, South Carolina, and Virginia.)

The Virtues of the Federal Model

The Founding Fathers of the United States spent a significant amount of time deliberating on, and writing about, the subject of judicial nominations. They arrived at the system of executive appointment and Senate confirmation after extensive debate. This was not an aspect of our federal system that arose by accident or compromise.

The Founding Fathers at the Constitutional Convention voted on the judicial selection clause on September 7, 1787. It was not a close decision. They were *unanimous* in favor of executive appointment and Senate confirmation. The second choice method, which also had received some support earlier in the Convention, was that of vesting the appointment power solely in the Senate. Notably, both of these methods

have an important feature in common: selection was to occur by politically-accountable, elected officials.

The most famous defense of the federal model of judicial appointment was written by Alexander Hamilton in *Federalist Paper No. 76*. Hamilton compared the system of executive appointment to every other framework conceivable. His words ring as true today as they were in 1788. Of particular relevance to our discussion today is Hamilton's reasoning as to why it is better that a single executive be charged with the responsibility of coming up with a nominee, rather than vesting that responsibility in a body of multiple people—or a commission:

> "I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them."

Hamilton correctly surmised that by vesting the responsibility of selecting a nominee in one person—the executive—that executive would realize that his or her own political reputation was on the line. This would serve to focus the attention of the executive on merit, and exclude nominees of dubious quality. As every Member of this Committee knows, elections compel an officeholder to be accountable and to take responsibility for his or her decisions. Hamilton also maintained that the possibility that the Senate would reject the executive's choice would weigh heavily upon on any nomination:

> "The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward … candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."

In short, Hamilton surmised that Senate confirmation "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters…" Plainly the 217 years that this system has been in operation have proven Hamilton correct. Although we all have our favorite Justices and

there may be others whose opinions we dislike, it is difficult to make the case that the justices of the U.S. Supreme Court have been unqualified or mediocre. On the contrary, the federal model has elevated many of the greatest legal minds in history to that august tribunal.

Moreover, it is also correct that the possibility of Senate rejection has pushed presidents to nominate justices with unassailable credentials. Executives whose nominees do not have to run the gauntlet of Senate confirmation may be tempted to nominate judges on the basis of personal loyalty, rather than on the basis of qualifications and experience.

Nominating Commissions: Mediocre Results

In contrast, nominating commissions have proven to be less successful at selecting the best judicial minds that a state has to offer. Although there are certainly some cases in which judges of truly outstanding qualifications rise to the top through the nominating commission process, such cases are the exception and not the rule. This stands in stark contrast to the situation in those states that use the federal model. In those states, a significantly higher percentage of justices are of exceptional caliber.

Placing a "qualified" or "unqualified" label on a judge is a difficult task that inevitably involves some subjectivity. Nevertheless, there are some hallmarks of judicial quality that are relatively objective. The American Bar Association Standing Committee on the Judiciary attempts to identify such objective factors in assessing the qualifications of federal judges in order to produce its well-known ratings. In evaluating the professional competence of appellate judicial nominees, the ABA Standing Committee on the Judiciary looks to academic talent, scholarship, the "ability to write lucidly and persuasively," and "an unusual degree of overall excellence."

Some of these qualifications are evident on the surface of a Justice's resume, such as academic talent and positions held prior to elevation to the Supreme Court. If one compares the biographies of the Justices of the Kansas Supreme Court, to the biographies of the Justices of two states that use the federal model—New Jersey and Maine—it is clear that the federal model yields the more qualified justices.

Another way to assess the performance of the selection commission system is to compare the justices of the Kansas Supreme Court to the federal judges sitting in Kansas (the judges of the U.S. District Court for the District of Kansas, plus Judge Briscoe of the Tenth Circuit of the U.S. Court of Appeals). Both groups consist of judges who hail from the state of Kansas. Both occupy judicial positions of high prestige. But one group was selected through the federal system and the other was selected through the selection commission system. The result of the comparison is clear: the federal judges of Kansas are better qualified than the Justices of the Kansas Supreme Court.

This is not an accident. The federal model forces a governor or president to place his or her reputation on a judicial nominee. The consequences of rejection by the state

Senate, or by the voters are significant. Consequently, executives naturally seek judges with unassailable credentials. Their own political survival may depend on it.

In contrast, the selection commission system operates virtually behind closed doors; and the members of the commission are unknown to the vast majority of people in the state. Indeed, my guess is that most state legislators—people very well acquainted with Kansas government—would be hard pressed to name even one member of the selection commission. No elected official has to stand up and take credit or blame for the nominee. The Governor escapes responsibility because he or she is limited to the names put forward by the commission. Moreover, the size of the commission means that no single member feels the "sole and undivided responsibility" of which Hamilton wrote.

It is an open invitation to dwell on a nominee's connections and politics rather than on his or her credentials. Thus we have the two great ironies of the nominating commission system. First, a system that was sold to the public as a way of producing candidates with the highest merit has had the opposite effect. Second a system that was supposed to remove politics from judicial selection makes it possible for political biases to dominate the system, because there is no public scrutiny of nominees and no single individual must take responsibility before the choice.

In conclusion, let me simply state that Hamilton and the other Founding Fathers were correct. The quality of justices produced by the federal system is hard to deny.