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TO: HOUSE JUDICIARY COMMITTEE
FROM: F. JAMES ROBINSON, JR.
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DRI
DATE: JANUARY 17, 2013
RE: JUDICIAL SELECTION REFORM

Chairman Kinzer, members of the committee, we thank you for the opportunity to appear today and discuss the selection of appellate judges in Kansas. 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.

If those who select judges for our highest courts are knowledgeable and insulated from partisan politics, and if they are guided by proper rules and procedures, they will choose good judges. We have this in Kansas.

The linchpin of our system is a nine member nonpartisan nominating commission. Four of the commission's members are non-attorneys appointed by the Governor. Four of the members are attorneys selected by attorneys in each of the four Congressional Districts. The chairperson of the commission is an attorney elected by attorneys in a state-wide vote. Each member's term is four years and terms are staggered so that the terms of only two members— one a lawyer and one a non-lawyer – expire each year.

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.

Often this process is referred to as “merit selection.” This means that the commission chooses applicants on the basis of their qualifications, not on the basis of political and social connections.

Unlike political appointments, our current Kansas-grown system assures input from the public and the special knowledge of lawyers. Lawyers and non-lawyers alike have valuable perspectives on the qualities that judges should possess.

In 2012, the American Judicature Society, an independent, non-partisan, organization working nationally to promote the administration of justice through research, publications, and education, published *Inside Merit Selection*. http://www.ajs.org/selection/jnc/jnc_report.asp The report was based on anonymous surveys of judicial nominating commissioners, including those from Kansas. The survey results show that: lawyers value the role of non-lawyers in the process and non-lawyers likewise value the input of lawyers; lawyer and non-lawyer members have positive working relationships, and the selection process is not dominated by lawyer members; and both lawyers and non-lawyer members see their commissions as an appropriate check on gubernatorial power and partisan politics in the process, not actively helping or hindering political agendas, but focusing in a non-partisan way on promoting highly qualified candidates.

The work of the nominating commission distinguishes Kansas’s selection process from the federal appointment process. No such commission is mandated by the U.S. Constitution. The President is a commission of one. Since federal judges, unlike our state judges, are given lifetime terms Senate confirmation serves as an important check on the President’s power.

Every two years the U.S. Chamber’s Institute for Legal Reform ranks all states’ litigation environments. <http://www.instituteforlegalreform.com/states>. In the 2012 report four of the five states with the highest overall rankings are states that use a commission-based appointment process for choosing appellate judges. Kansas is ranked 5th overall. Kansas ranks 8th for judicial impartiality and 9th for judicial competence.

This is an important vote of confidence. A vibrant business climate that can create jobs depends upon Kansas’s commitment to the rule of law, especially to fair and impartial courts that bring stability and consistency to economic decision-making. By the Chamber’s measure, the current Kansas process is choosing good judges.

Our founder’s wrote the Constitution so that it would be difficult to amend. They wanted our state to be based on a stable constitutional structure that would create respect for the rule of law. James Madison, in *The Federalist* No. 49, argued that the U.S. Constitution should be amended only on “great and extraordinary occasions.” Indeed, this state has followed his advice, proceeding with extreme caution before ever considering a change.

Merit selection was adopted by Kansas voters after a terrible political scandal in the 1950’s often referred to as “the triple play.”

Today, there is no scandal. Judicial selection in Kansas isn’t broken. There is no “great and extraordinary occasion” for a constitutional change.