



KANSAS ASSOCIATION OF DEFENSE COUNSEL

825 S Kansas Avenue - Suite 500, Topeka, KS 66612

Telephone: 785.232.9091 Fax: 785.233.2206 www.kadc.org

TO: The Honorable John Barker, Chair
And Members of the House Committee on the Judiciary

FROM: Mark D. Katz
Kansas Association of Defense Counsel

DATE: March 18, 2015

RE: KADC's opposition to Senate Bill 197

Chairman Barker, members of the committee, on behalf of the Kansas Association of Defense Counsel, we thank you for this opportunity to submit written testimony in opposition to Senate Bill 197. KADC generally favors an open process for selecting judges and Supreme Court justices. Unfortunately, SB 197's provisions fail to appropriately safeguard judicial applicant information that is private, and potentially change the balance of the supreme court nominating commission, and therefore, KADC must oppose it.

KADC is a state-wide organization of lawyers admitted to practice law in Kansas who devote a substantial amount of their time to the defending civil cases in litigation. In addition to working to improve the skills of defense attorneys and elevating the standards of trial practice, our organization advocates for the administration of justice, because our clients depend on it.

The failure to safeguard private information.

Section 4 of SB 197 explicitly subjects the supreme court nominating commission to the Kansas Open Meetings Act, but having done so, severely limits the non-partisan commission's ability to avail itself of the closed meeting provisions. In other words, the bill purports to treat the supreme court nominating commission as a "public body," and then it treats it differently. The KOMA permits public bodies to enter closed or executive session in 16 different instances, K.S.A. 75-4319(b), including for the purpose of discussing personnel matters of non-elected personnel. K.S.A. 75-4319(b)(1). In contrast, section 4 permits the nominating commission to go into executive session only to discuss a small slice of personnel matters—"sensitive financial information contained within the personal financial records or official background check of a candidate for judicial nomination." Unlike every other public body, the nominating commission's personnel discussions would be open to the public. Such a result would have a chilling effect, not only on candid discussions of the pros and cons of each candidate, but also on the candidates themselves.

In its current form, Section 4 treats judicial candidates and judges differently from every other employee. For other employees, confidentiality is the rule and disclosure the exception. If SB 197 is enacted, the only information that is protected from disclosure is "sensitive financial information." Such a narrow exception is a distinct disincentive to well-

825 S Kansas Avenue, Suite 500 • Topeka, Kansas 66612

(785) 232-9091 • FAX (785) 233-2206 • www.kadc.org

qualified candidates who are unwilling to be subjected to public scrutiny that is substantially different than that given, for example, to a candidate for city manager. Beyond this relatively obvious disincentive, section 4 of SB 197 runs counter to the intent of the legislation to generate a selection process producing well-qualified candidates. The public benefits from unfettered discussions regarding the relative merits of candidates, many of which are personal in nature and highly subjective—including work ethic, temperament, legal knowledge, judgment, and discretion. Requiring all of the nominating commission’s discussions to be held in public (except for “sensitive financial information”), would make it less likely that a candidate’s subjective traits would be fully discussed and vetted—particularly by those who might have to appear in front of such a candidate in future judicial proceedings.

These reservations apply to Section 10(e) of SB 197 and the selection of district court judges, as well.

We note that SB 197 treats candidates for appointment to the court of appeals significantly differently from candidates who are appointed by the supreme court and district court nominating commissions. Unlike the significant level of disclosure of information required of the nominating commissions—which is far beyond any other personnel matter—the Governor would only be required to identify applicants by name and city of residence. See, SB 197, Sec. 11(a)(3).

Finally, we note, as currently written, the proposed statute would not even permit the nominating commission go into executive session to discuss legal matters which, of course, are important and legitimate topics for confidential and closed discussion.

The provision for filling a vacancy of the nominating commission chair conflicts with the Kansas Constitution.

The Kansas Constitution provides that the non-partisan supreme court nominating commission be selected in part, by the members of the Kansas bar who are residents of the State, and in part by the Governor. Kan. Const. Art. 3, § 5(e). The chair of the nominating commission, along with a single attorney member from each congressional district, are to be selected by the members of the bar, and the Governor has the power to select a single non-attorney member from each congressional district. *Id.* Section 5 of SB 197 would permit the Governor to fill a potential vacancy of the chair, which would, essentially, give the Governor the power to select five members of the nominating commission. This means the Governor would have the power to appoint a majority of the members who determine which candidates would move to the appointment process. Neither the Legislature nor the voters of Kansas envisioned such a result. In fact, the historical event that brought the merit selection plan to Kansas was one in which the Governor abused his power in judicial selection. Hence, giving the Governor the means to control the nominating commission by naming a majority of its members is outside the bounds of the Constitution and is against the clear intent of the people.

Conclusion.

SB 197 is an obviously flawed piece of legislation. While it may have the admirable intent of increasing publicly available information about judges and judicial candidates, its coverage is uneven, and in some instances, mandates disclosure that, in the end, would adversely affect the judicial selection process. Further, SB 197 contains a provision for filling vacancies in the supreme court nominating commission that violates the language and most certainly the spirit of Article 3, Section 5 of the Kansas Constitution. For these reasons, and others, the Kansas Association of Defense Counsel opposes SB 197.