

Legislative Testimony of Stephen Ware

Jan. 2015

My name is Stephen Ware. I am a professor of law at the University of Kansas. I submit this testimony, not on behalf of KU, but on my own as a concerned citizen.

I have been a lawyer since 1991 and a law professor since 1993. I began my scholarly research and writing on judicial selection and retention in the 1990's and have increasingly focused on the topic in the last several years. I have been invited to speak on the topic by a variety of organizations, from universities to chambers of commerce to bar associations to citizen's groups. I have spoken on the topic throughout Kansas and in states ranging from Missouri, Iowa, and Indiana to Florida and Texas. I consider myself one of a handful of law professors in the country with significant expertise on the various methods of judicial selection and retention used around the United States.

I published articles that researched how all 50 states select their supreme court justices.¹ This research shows that the Kansas Supreme Court selection process is:

(1) undemocratic,

(2) extreme,

and

(3) secretive.

All three of these problems would be fixed by a "federal model" senate confirmation system so I strongly support that reform.

I. The Kansas Supreme Court Selection Process is Undemocratic

No one can become a justice on the Kansas Supreme Court without being one of the three finalists chosen by the Kansas Supreme Court Nominating Commission. The Commission is the gatekeeper to the Kansas Supreme Court. However, the Commission is selected in a shockingly undemocratic way.

Most of the members of the Commission are picked in elections open to only about 10,000 people, the members of the state bar. The remaining 2.9 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system concentrates tremendous power in one small group and treats everyone else like second-class citizens. In a democracy, a lawyer's vote should not be worth more than any other citizen's

¹ Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386 (2008); Stephen J. Ware, The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court, 18 Kan. J. L. & Pub. Pol'y 392 (2009); Stephen J. Ware, The Missouri Plan in National Perspective, 74 Mo. L. Rev. 751 (2009).

vote. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process."²

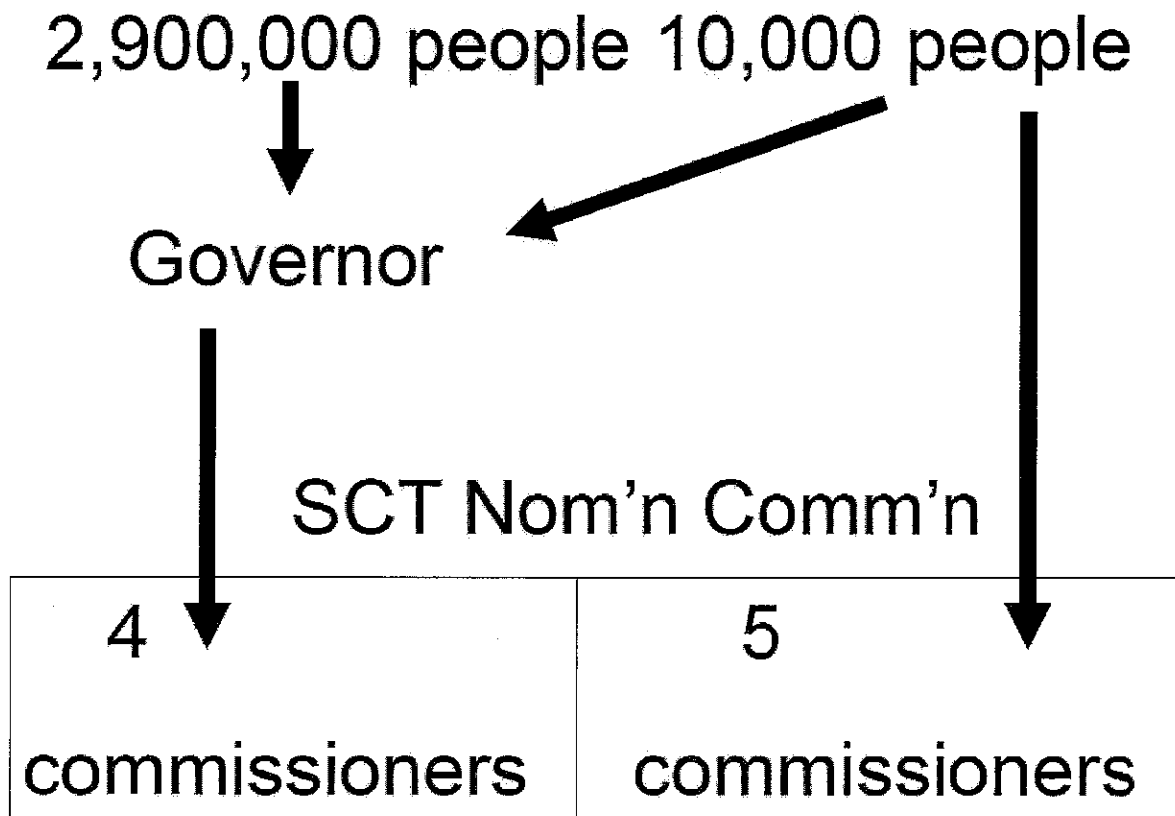
Some Kansas lawyers try to distract attention away from their preferred system's lack of democratic legitimacy by noting that a federal appellate court found this system constitutional.³ However, the federal court did not hold that the current Kansas system is constitutional because it conforms to one-person, one-vote; rather the court held that the system is constitutional even though it does not conform to one-person, one-vote.

To put it another way, federal courts have interpreted the U.S. Constitution to require that some, but not all, elections be conducted in accord with "one-person, one-vote." So as constitutional case law stands today, states are free to adopt a judicial selection system that violates basic democratic equality (like the status quo in Kansas) or one that respects basic democratic equality (judicial elections or judicial appointments by democratically-elected officials like the governor and legislature). We cannot count on federal courts to make our state do the right thing; we need to be responsible citizens and do it ourselves.

The following diagram shows the undemocratic manner in which the Kansas Supreme Court Nominating Commission is selected.

² Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 *Fordham Urb. L.J.* 125, 154 (2007).

³ *Dool v. Burke*, 2012 WL 4017118 (10th Circuit).



II. Kansas is Extreme; No Other State is as Undemocratic as Kansas

Kansas is the only state that allows its bar to select a majority of its supreme court nominating commission. None of the other 49 states gives its bar so much power. Kansas stands alone.

Kansas lawyers defending their extremely high level of power often try to distract from this fact by pointing out that some other states also have nominating commissions with some seats reserved for lawyers. But the important question for democratic legitimacy is not whether a member of the commission is a lawyer; the important question is *who selects* that member of the commission. No other state allows its bar to select a majority of its supreme court nominating commission. No other state's commission is as undemocratic as Kansas's.

Examining judicial selection elsewhere in the country reveals two main approaches. Nearly half the states elect their supreme courts. Elections are direct democracy. They put power directly in the hands of the people, the voters, and give each voter equal power. A lawyer's vote is worth no more than any other citizen's.

The second common method of selecting state supreme court justices is the one used to select federal judges: executive nomination followed by senate confirmation. In twelve states, the governor nominates state supreme court justices but the governor's nominee does not join the court unless confirmed by the state senate or by a similar democratically-elected body. A senate confirmation system is a form of indirect democracy. It has democratic legitimacy because the governor and state senate are elected democratically, according to the principle of one person, one vote.

The indirect democracy of a senate confirmation system is, I believe, better suited to judicial selection than is the direct democracy of judicial elections. At both the state and federal levels, we generally use indirect democracy — appointment by elected officials — to select the leaders of the various government departments and boards. The practical reasons for doing so also counsel for using that indirectly democratic system to select judges.

Our Nation's Founders adopted this wise approach in the United States Constitution, and we Americans have used it at the federal level for well over 200 years. That our federal courts are widely respected in the U.S. and around the world is surely due in part to the caliber of judges selected in the process the Founders adopted and the incentives that process creates. Similarly, about a dozen states also select their supreme courts with confirmation by the senate or similar body. Experience in these states suggests that senate confirmation of judicial nominees works well at the state, as well as the federal, level.

No process of judicial selection is perfect but my research and reflection has convinced me that the senate confirmation is the least imperfect process. That is the best we can achieve so long as — to use James Madison's words — men are not angels.

In short, senate confirmation of Kansas Supreme Court justices is a prudent reform that would move Kansas judicial selection from an extreme to position to the mainstream of the country.

III. Secrecy in Kansas's Current System

The current process for selecting Kansas Supreme Court justices is not only undemocratic but also secretive. Not only does the bar currently exercise a tremendous amount of power, but that power is exercised behind closed doors. The Kansas Supreme Court Nominating Commission's votes are secret. There is no public record of who voted which way. This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. In contrast, senate confirmation votes are public. Replacing the Commission with senate confirmation would increase the openness of the process and increase accountability to the public.

Defenders of the status quo in Kansas often claim that all members of the Nominating Commission consistently succeed in making unbiased assessments of judicial applicants' merits and Commission members are never swayed by inappropriate considerations. If that is true, then why not allow the public to see the votes those members of the Commission cast? Why keep

those votes in the dark? Defenders of the status quo have, for over a generation, fought to keep those votes hidden.⁴

IV. Possible Counterarguments

I expect that opponents of senate confirmation will make the arguments that defenders of the status quo have made in the past. Several of these arguments are misleading.

A. “If it ain’t broke, don’t fix it”

Some members of the Kansas bar defend the current Kansas Supreme Court selection process with the assertion that it is not “broken.” However, the previous paragraphs show that it is broken because it is (1) undemocratic, (2) extreme, and (3) secretive. Each of these problems can and should be fixed.

B. The Empty Claim of “Merit”

Defenders of Kansas’s current lawyer-favoring system often claim that it selects judges based on merit, rather than politics. But this is just an empty assertion. They provide no facts showing that Kansas does better than senate-confirmation states at selecting meritorious judges. In fact, sometimes they point to measures that suggest otherwise. For example, a recent column by the Kansas Bar Association president noted that the U.S. Chamber’s assessment of “lawsuit climates” ranked Kansas highly, but failed to note that the highest-ranked state, Delaware, uses a senate confirmation system to select its supreme court.

It is misleading to suggest that the bar must select members of the Nominating Commission in order to ensure that lawyers’ expertise is brought to bear on judicial selection. In states with senate confirmation, the governor and senate avail themselves of lawyers’ expertise with respect to potential judges. Calling the current Kansas system “merit selection” is propagandistic rhetoric, rather than an accurate statement with factual support. Senate confirmation is as much “merit selection” as is a bar-dominated commission system.

C. The Misleading Phrase, “Non-Partisan”

Defenders of Kansas’s current system often describe it with the word “non-partisan” and suggest that it tends to keep politics out of judicial selection. Compared to a senate confirmation system, there is no evidence that Kansas’s current system involves less politics rather than just a different kind of politics: the politics of the bar, as opposed to the politics of the citizenry.

⁴ A 1982 opinion by the Kansas Attorney General concluded “the Supreme Court Nominating Commission may conduct its meeting in full public view, however, the legislature is without authority to require that meetings of the Commission be open or closed. Nor may the legislature require the Commission to meet in a particular place.” XVI Op. Att’y Gen. Kan. 95 (1982).

In both the current system and a senate-confirmation system, the governor has significant power. The difference between the two systems is who serves as the check on the governor's power and whether that check is exercised in secret or in public. Kansas's current system makes the bar the check on the governor's power and allows the bar to exercise that check in secret. In contrast, I favor a reform that would make the Senate the check on the governor's power and that check would be exercised in a public vote.

D. Senate Confirmation Works Well in the Many States that Use It

Some claim that senate confirmation in Kansas would be a "circus" or present large practical challenges. Rather than speculating about this, one can examine the experience of the twelve states with judicial selection systems that have senate confirmation or confirmation by a similar popularly-elected body. One of my articles researched the last two votes for initial supreme court confirmation in each of these twelve states.⁵ In all twenty four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous. In only two of these twenty four cases was there more than a single dissenting vote. These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus. Nor do these facts suggest that senators always do what governors want. Rather, these facts suggest that governors know that senate confirmation of controversial nominees may be difficult so governors consider, in advance, the wishes of the senate in deciding who to nominate.

For many years, Kansas governors have cooperated with the Kansas Senate to secure confirmation of a wide variety of gubernatorial nominees. Appointments to the Kansas Supreme Court similarly deserve the consent of the executive and legislative branches of government.

E. The Irrelevant "Triple Play"

Some senior members of the Kansas bar like to recall the story of how Kansas got its current Supreme Court selection process, the story of the "triple play" in which a governor essentially got himself appointed to the Court in the mid-1950's. The moral of this story is that governors should not have unchecked power over the selection of supreme court justices. But neither Kansas's current system nor a senate-confirmation system would give the governor such power so the "triple play" story is irrelevant to the issue now before your Committee.

F. Judicial Independence Would Not Be Affected by Senate Confirmation

In defending Kansas's current system for selecting justices, some members of the bar suggest that senate confirmation would reduce the independence of the Kansas appellate courts. By contrast, bar groups have not charged that senate confirmation of federal judges reduces the independence of federal courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure. By contrast, it is judges who are subject to reelection or reappointment that have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not

⁵ Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386, App. B (2008).

by the system of judicial *selection*, but by the system of judicial *retention*, including the length of a justice's term. Senate confirmation would make no change to Kansas's system of judicial retention and would not affect judicial independence.

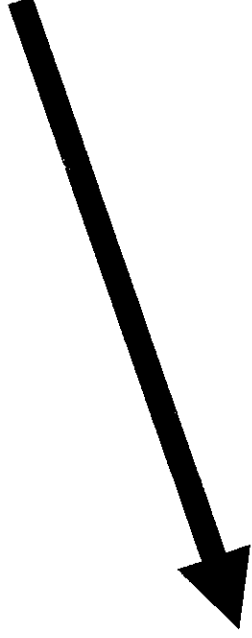
V. Conclusion

The Kansas Supreme Court selection process is broken because it is (1) undemocratic, (2) extreme, and (3) secretive. Each of these problems can and should be fixed. Replacing the nominating commission with senate confirmation would do so and thus deserves your support.

Thank you very much for your time and attention. I would be happy to respond to any questions or comments you have today or in the future.

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Opinion: State's judge selection undemocratic

By Stephen J. Ware

November 29, 2012

In a democracy like ours, should lawmakers be selected democratically? Not according to the *Journal-World* ("Court, politics," Nov. 23), which wants some of our state's most important lawmakers selected in a deeply undemocratic process that makes the votes of some residents count far more than the votes of others.

The lawmakers in question are our state's appellate court judges.

Judges are lawmakers? Yes. Judges have routinely made law throughout our country's history and even earlier, going back to England. This judge-made law, called the "common law," has generally worked well and continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

Common law rules differ from state to state. States with more liberal judges tend to have more liberal common law, while states with more conservative judges tend to have more conservative common law. The political leanings of appellate judges, rather than trial judges, are especially important because appellate judges have much more power over the direction of the law.

In short, the appellate judges of Kansas, like those of other states, are tremendously important lawmakers. What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its two appellate courts. And for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission; most of the members of this commission are picked in elections open to only 10,000 people, the members of the state bar. The remaining 2.8 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group and treats everyone else like second-class citizens.

Kansas lawyers tend to be fine people but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states. In a democracy, a lawyer's vote should not be worth more than any other resident's vote.

So the problem is not that Kansas has a nominating commission but how that commission is selected. As Washburn law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government."

Bar groups in Kansas claim that this violation of our democratic principles is the only way to get competent judges. But the bar provides no evidence that judges selected in lawyer-favoring systems are better than judges selected in the more open and democratic appointment systems used by a dozen other states. Kansas should follow those states' lead so that our state's courts can have democratic legitimacy as well as professional competence.

— *Stephen J. Ware is a professor in the Kansas University School of Law.*

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Guest column: Disorder in the court

Created Mar 15 2011 - 5:05pm

In a democracy like ours, should lawmakers be selected democratically?

Not according to Judge Richard Greene.

In the judge's Feb. 2 guest column in The Capital-Journal, he supported a process in which some of our state's most important lawmakers are selected in a deeply undemocratic process that makes the votes of some citizens count far more than the votes of others.

The lawmakers in question are our state's appellate court judges.

Judges are lawmakers? Yes.

Judges have routinely made law throughout our country's history and even earlier, going back to England. This judge-made law, called the "common law," has generally worked well and continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

Common law rules differ from state to state. States with more liberal judges tend to have more liberal common law, while states with more conservative judges tend to have more conservative common law. The political leanings of appellate judges, rather than trial judges, are especially important because appellate judges have much more power over the direction of the law.

In short, the appellate judges of Kansas, like those of other states, are tremendously important lawmakers.

What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its two appellate courts — and for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission. Most of the members of this commission are picked in elections open to only 9,000 people — the members of the state bar. The remaining 2.8 million people in Kansas have no vote in these elections.

This plainly violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group into a powerful elite and treats everyone else like a second-class citizen.

Kansas lawyers tend to be fine people, but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states.

In a democracy, a lawyer's vote should not be worth more than any other citizen's vote. As Washburn law professor Jeffrey Jackson writes, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process."

Kansas should break the grip its bar holds on the selection of our state's lawmaking judges. Fortunately, the Kansas House of Representatives has passed a bill that would do just that.

Will this responsible, moderate reform be enacted by the Kansas Senate?

Or will our state senators defend the deeply undemocratic view that a lawyer's vote should count far more than another Kansas citizen's vote?

Stephen J. Ware, professor of law at the University of Kansas, can be reached at ware@ku.edu [1].

Source URL: <http://cjonline.com/opinion/2011-03-15/guest-column-disorder-court>

Links:

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Sunday, August 22, 2010

Posted on Sun, Aug. 22, 2010

Stephen J. Ware: Process for selecting judges is undemocratic

By Stephen J. Ware

Lawyers have much more power than their fellow citizens in selecting the Kansas Supreme Court, and Wichita lawyer Richard Hite argued for keeping it that way ("Don't change process for selecting justices," Aug. 15 Opinion). But he is simply wrong in claiming "no viable reason has been shown" to reform this system.

The reason for reform begins with the fact that judges make law. This has been true throughout our country's history and even earlier, going back to England. Judge-made law, called the "common law," continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

State supreme court judges play an especially large lawmaking role because they are the final word on their state's common law. Also, state supreme court judges have enormous lawmaking power because of their role in interpreting their state's constitution.

The power to interpret constitutions enables the Kansas Supreme Court to hold unconstitutional, and thus nullify, laws approved by the Legislature and governor on a variety of topics. The Kansas Supreme Court has done this to laws on public school funding and the death penalty.

In short, judges on the Kansas Supreme Court are, like judges on other state supreme courts, tremendously important lawmakers. What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its Supreme Court. And for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission; most of the members of this commission are picked in elections open to only 9,000 people, the members of the state bar. The remaining 2.7 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group into a powerful elite and treats everyone else like second-class citizens.

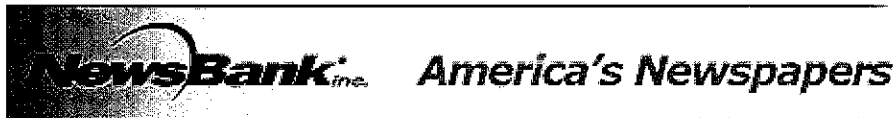
Kansas lawyers tend to be fine people, but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote.

So the problem is not so much that Kansas has a nominating commission but how that commission is selected. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government."

Kansas should break the grip its bar holds on the selection of the judges who have more lawmaking power than any other in the state. To defend the status quo is either to deny the fact that supreme court judges make law or to argue that these powerful lawmakers should be selected in a deeply undemocratic way.

Stephen J. Ware is a professor at the University of Kansas School of Law.

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OPEN UP PROCESS OF PICKING JUSTICES

Wichita Eagle, The (KS) - Friday, January 23, 2009

Author: Stephen J. Ware

Gov. Kathleen Sebelius recently appointed Dan Biles to the Kansas Supreme Court, showing once more what an unusually secretive and clubby process our state uses to select its highest judges.

Biles is the law partner of the Kansas Democratic Party's chairman, and the governor is, of course, a Democrat. Sebelius said that she and Biles have been friends for more than three decades, and he has made campaign contributions to her.

Importantly, Biles is a member of the former Kansas Trial Lawyers Association, now called the Kansas Association for Justice. Sebelius used to be state director of that group of lawyers who most aggressively push to increase lawsuits and expand liability.

People can decide for themselves whether that is the direction they want for Kansas courts, but what is unusual about Kansas is how little the people's views matter. All the power in selecting the justices of the Supreme Court belongs to the governor and the bar (the state's lawyers). So if the governor and bar want to push the state's courts in a particular direction, there are no checks and balances in the judicial-selection process to stop them.

After Kansas justices have gained the advantages of incumbency, they are subject to retention elections. But these "elections" lack rival candidates and thus rarely include any public debate over the direction of the courts. In fact, a retention election is nearly always a rubber stamp, and no Kansas justice has ever lost one. With these judges so entrenched once they are on the court, the process for initially selecting them is all the more decisive.

Kansas is unusual in limiting Supreme Court selection to the governor and the bar. By contrast, when a federal judge is nominated, a Senate confirmation process allows citizens and their representatives to learn about the nominee and play more of a role in selecting judges.

Many states around the country use that process, too. But in Kansas the governor and the bar get all the power, and they exercise that power through a commission's secret vote. There is no public record of who voted which way.

This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. In this closed process, a small group of insiders (members of the Kansas bar) have an extremely high level of control. In fact, Kansas is the only state in which the bar selects a majority of the Supreme Court nominating commission. Why does the division of power between lawyers and nonlawyers lean further toward the lawyers in Kansas than in any of the other 49 states?

The Kansas bar defends this with the claim that the bar keeps judicial selection from being "political." But when the process results in a governor appointing one of her own friends and campaign contributors, you have to wonder what kind of politics goes on behind closed doors or at trial lawyers' cocktail parties.

Politics are inevitable when it comes to picking judges. The question is whether the politics will remain largely confined to the bar or become more open to the public and its elected representatives.

Stephen J. Ware is a professor at the University of Kansas School of Law in Lawrence.

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LJWorld.com

Professor questions judge selection

By Stephen J. Ware

December 8, 2007

State Rep. Paul Davis, speaking for the Kansas Bar Association, says the current judicial selection process allows the Kansas Supreme Court to maintain its independence from politics ("Judicial selection process criticized," *Journal-World*, Dec. 1). But nine of the last 11 people appointed to that court belonged to the same political party as the governor who appointed them. This is a highly partisan outcome from a system advertised as "non-partisan." Moreover, governors consistently appoint only members of their party to the Supreme Court Nominating Commission.

What makes the Kansas Supreme Court selection process unusual is not that it's political, but that it gives so much political power to the bar (the state's lawyers). Kansas is the only state that gives its bar majority control over the commission that nominates Supreme Court justices. It's no surprise that members of the Kansas bar are happy with the current system because it gives them more power than the bar has in any of the other 49 states and allows them to exercise that power in secret, without any accountability to the public.

I recently published a paper (available at www.fed-soc.org/kansaspaper) that researched how all 50 states select their supreme court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

While some states have individual quirks, three basic methods prevail around the country: commissions, elections and senate confirmation. The commission system is the most elitist system because it tends to concentrate power in the bar, a narrow, elite segment of society, (although no state gives the bar quite as much power as Kansas). The other extreme — electing judges — is the most populist method of selecting a supreme court. It risks turning judges into politicians and thus weakening the rule of law. In between these extremes is the more moderate approach of having the governor's nominee win senate confirmation before joining the court.

Our nation's founders adopted this approach in the U.S. Constitution, and today more than a dozen states also select their supreme courts with confirmation by the state senate or similar body. While some claim that senate confirmation in Kansas would be a political "circus," experience in the states that use it contradicts this claim. Experience in these states suggests that senate confirmation of judicial nominees works well and avoids both the extreme of elitist, bar-controlled courts and the extreme of populist courts swaying with the prevailing winds rather than standing firm for the rule of law. In short, senate confirmation of Kansas Supreme Court justices is a worthwhile reform.

— *Stephen J. Ware is a professor in the Kansas University School of Law.*

Originally published at: http://www2.ljworld.com/news/2007/dec/08/professor_questions_judge_selection/



Kansas.com
The Wichita Eagle

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Thursday, Nov 29, 2007

Posted on Thu, Nov. 29, 2007

STEPHEN J. WARE: BAR HAS TOO MUCH POWER IN PICKING STATE'S JUSTICES

BY STEPHEN J. WARE

Kansas is the only state that gives its bar association — the state's lawyers — majority control over the selection of state Supreme Court justices. As a result, lawyers may have more control over the judiciary in Kansas than in any other state. Not only do Kansas lawyers have an extreme amount of power over judicial selection, they exercise this power in secret.

I recently published a paper that researched how all 50 states select their Supreme Court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

The Supreme Court Nominating Commission is now at the center of this process. When there is a vacancy on the Kansas Supreme Court, the commission assesses applicants and submits its three favorites to the governor. The governor must pick one of the three nominees, and that person is thereby appointed a justice on the state Supreme Court, without any further checks on the power of the commission. Therefore, the commission is the gatekeeper to the state Supreme Court.

The bar has majority control over this gatekeeper. The commission consists of nine members, five selected by the bar and four selected by the governor. None of the other 49 states gives its bar majority control over its Supreme Court Nominating Commission.

Kansas has 2.7 million people and only 7,666 lawyers. Yet those few lawyers have more power in selecting our highest court than all other Kansans combined. The bar's majority on the commission can prevent the appointment of an outstanding individual to the Supreme Court, even if that individual is the unanimous choice of the governor, the Legislature and every nonlawyer in Kansas.

Further reducing accountability, the commission's votes are secret. The public can learn the pool of applicants and the three chosen by the commission, but cannot discover which commissioners voted for or against which applicants.

Defenders of this largely secret system claim it selects justices based on merit rather than politics. But 9 of the past 11 people appointed to the Kansas Supreme Court belonged to the same political party as the governor who appointed them. That is a highly partisan outcome from a system advertised as "nonpartisan."

In short, the system gives one small segment of our state (the bar) tremendous power and allows it to exercise that power in secret. Those who hope to join the Kansas Supreme Court — often lower-court judges — know they must curry favor with the bar because that interest group holds the key to advancement. We should not be surprised if this system, controlled by a narrow few, begins to resemble a "good ol' boys" club in which members of the club pick those like themselves, rather than being open to diversity and fresh ideas.

Reform of this system should increase its openness and reduce the bar's power. Options for reform can be found in my paper surveying the 50 states' methods for selecting Supreme Court justices, which can be found on the Web site www.fed-soc.org/kansaspaper.

Stephen J. Ware is a professor of law at the University of Kansas in Lawrence.

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