

Legislative Testimony of Stephen Ware, Feb. 17, 2015

In support of SB 197, before the Senate Judiciary Committee

My name is Stephen Ware. I am a professor of law at the University of Kansas. I submit this testimony in support of SB 197, not on behalf of KU, but on my own as a concerned citizen.

I have been 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 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 senate confirmation process like HCR 5005, so I strongly support it. One of these problems (secrecy) would be fixed by SB 197 so I support it as an improvement over current law.

Currently, the Kansas Supreme Court Nominating Commission's votes are secret. There is no public record of which members of the Commission voted for whom. This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our State's highest judges. By contrast, senate confirmation votes are public.

The current secret votes of the Commission aggravate its core problem, which is the shockingly undemocratic way some of its members are selected—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. Kansas is extreme as it is the only state in which the bar selects a majority of its supreme court nominating commission. It is bad enough to concentrate power in a small, unaccountable group of people, still worse to have them exercise that power behind closed doors.²

SB 197 seeks to fix this secrecy problem. SB 197 says “The supreme court nominating commission shall be and is hereby deemed to be a public body and shall be subject to the open meetings act, K.S.A. 75-4317 et seq., and amendments thereto.” To the extent the Open Meetings Act requires nonsecret ballots,³ SB 197 would require nonsecret ballots of the Judicial Nominating Commission. If there is any doubt about whether the Open Meetings Act requires

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).

² Defenders of the status quo have for over a generation fought to keep those votes hidden. 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).

³ Kan. Stat. § 75-4318 (“no binding action by such bodies shall be by secret ballot”).

publicly recorded votes, then SB 197 could be amended to expressly require publicly recorded votes by members of the Commission. This would be an important reform in the direction of open government and accountability by those who exercise tremendous power in the selection of our state supreme court.

Some try to defend the current secrecy of the Commission's votes by pointing out that the names of applicants to the Commission are public while the Kansas Court of Appeals senate confirmation system does not necessarily make applicants' names public. This argument fails because a senate confirmation vote is public and it is the analog to the vote of the Commission. Both a senate confirmation system and the Kansas Supreme Court Nominating Commission system give some power to the governor and have a key vote serving as a check or constraint on the governor's power. The key vote—whether by the senate or the Commission—should be publicly recorded.

In contrast, how a governor exercises his or her discretion may warrant privacy. A governor may not have a formal, routinized judicial-application process and those interested in being considered may not want their interest publicized if they are not chosen. Keeping privacy for those being considered—and allowing them to speak discretely about their willingness to be nominated—is a reasonable way to recruit highly talented people who may already hold important positions.

Moreover, privacy is not mandatory. Anyone who wants publicly to express interest in being a judge is free to do so. And that person's supporters are similarly free to express their views publicly and privately as they choose. The case for legally-requiring openness is not nearly as strong with respect to one's interest in a judgeship than with respect to the key vote of our State's official body—Commission or Senate—that checks the governor's power in appointing judges, particularly those on the Kansas Supreme Court.

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.

Stephen J. Ware
1535 West 15th Street
Lawrence, KS 66045
785-864-9209
ware@ku.edu