

TESTIMONY OF CLAYTON L. BARKER **REGARDING JUDICIAL SELECTION**

I am the executive director of the Kansas Republican Party and have been a Kansas attorney since 1997.

Key Points

- The Key Issue is whether the voters will be given a chance to state their preference on what method is used to select their Supreme Court Justices.
- Supreme Court Justices have immense discretion in making their rulings which can have substantial effect on the lives of Kansas residents. The Judicial selection system, therefore, must ensure selection of Justices who match the general worldview of Kansans.
- Kansas is the **Only** state with a judicial selection board majority of lawyers
- Lawyers purportedly select judges based on “merit” and not on “politics”. The fatal flaw in this argument is that it does not logically follow that lawyers are less inclined to consider the political beliefs of judicial candidates. Indeed, lawyers are as likely, if not more likely, to focus on the politicized decisional propensities of judges compared to voters and elected officials.
- Our current system does not remove politics from judicial selection it merely moves the politics into closer alignment with the ideological preferences of the lawyers who vote for members of the selection board. This has profound consequences for Kansas because the distribution of ideological preferences among members of the bar differs from that of the public. As a result, giving majority control of the judicial nominating process to the bar results in Justices who hold a different worldview than the Kansas public.
- Moreover, unlike the general public, the lawyers who select judges usually practice before the judges and therefore the judicial selection process has direct impact on their personal professional and financial interests.

What Has Changed Since 1958

- **Larger Firms**. In 1958 a 10-lawyer firm was large. Today many firms with KS lawyers have 100s of lawyers. This poses the threat of a single firm organizing its lawyers to vote a particular person on the selection board.
- **Lawyer Specialization**: In 1958 most lawyers had a general practice, some trial work, both plaintiff and defense, some business work. So they would want an all-round fair Justice. Today lawyers specialize in narrow areas.
 - Business lawyers do not go to court, so they care less about Justices

- Trial lawyers specialize in plaintiff/defense and in certain practice areas and will prefer a board member who will pick a Justice who tilts one way or another.
- There is anecdotal evidence of lawyer interest groups organizing their members to vote in judicial selection board elections- (but without a list of who voted, it is impossible to verify)
- Surveys and Studies Show that Since the 1950s Lawyers Have
 - Have gone from being more conservative to being more politically liberal than the general public
 - Become significantly less likely to participate in community service and civic affairs.

Lawyer Turnout for Electing Board Members¹—is Low-

- this was characterized as a group of highly interested experts
- Voting is a simple mail ballot- winner must get a majority, a runoff vote of the top 2 lawyers is used if no one gets an initial majority
- 2014: CD1: 547 (52%)
- 2013 Statewide: 2289 (25%) 1st round; 2481 (27%) runoff
- 2013: CD4: 659 (37%)
- 2012 CD3 – 4 candidates, no majority in 1st round, redistricting took out one of the two finalists, so winner w/o a majority of the vote -
- 2011: CD2 727 (33%) 1st round // 700 (32%) runoff
- 2010: CD1 436 (42%)
- 2009: KS: 2,532 (28%) 1st round // 2,696 (30%) runoff
- 2009: CD4 735 (28%)
- 2008: CD3 723 (20%)
- 2007: CD2 759 (40%) runoff // 765 (40%) initial

Why is participation so low? My belief is that the low turnout is caused by:

- (1) Many lawyers have no connection with judges because the focus of their practice is not litigation, have no greater knowledge of what makes a good judge than the average voter, and feel unqualified to vote.
- (2) Lawyers near Kansas City may live in Kansas but practice primarily in Missouri
- (3) Some lawyers practice primarily in Federal court and are disinterested or feel unqualified to vote for state Justices.
- (4) Some lawyers are uninformed, and simply choose not to vote.

¹ Approx Attorneys: Statewide: 9100; CD1: 1050; CD2: 2200; CD3: 4250; CD4: 1800

No Media Coverage of these elections

- Voters are excluded from this process- no information on who runs for the board

Courts Keeps No Record of who Voted-

- **no ability to analyze who voted** (location, type of lawyer, age, gender, law firm, etc)

Lawyers Generally Do Not Know Much About the Candidates

- no campaigning, or relevant information on lawyer candidates
- generic vote request letter from candidates are used
- generic recommendation letters from peers are used

The Current Judicial Selection System is Partisan

- 2CD: the losing candidate (Trial Lawyer Assoc, \$50K Dem donor)
- Board members said candidate's personal politics are discussed
- Sup Ct Justice held a fund raiser at her home

The Current System is Susceptible to Stealth Control: The current system of placing lawyers on the judicial selection board is highly susceptible to a stealth campaign. A tiny individually-identifiable group of generally disinterested and uniformed voters, the majority of whom do not vote, is easy prey for organized special interest groups with substantial pecuniary interests at stake. This is especially so when the identity of who voted is kept secret and there are no reporting requirements or media attention to the process.

As Senator Fayette Rowe pointed out in 1958, under the Missouri Plan, Tom Pendergast still named all the judges in Kansas City.

Countering Word Games/Arguments:

Calling the current system “the Merit System”

- All judicial selection systems seek merit-- nothing makes the current system the merit based in contrast to the others.
- Every system is a merit system, no system is the merit system.

“If it Ain’t Broke Don’t Fix It”

- Given many court decisions, many consider it broke.
- Indicates resistance to change without a reason. We want continual process improvement, not sitting on a system that is barely functional

- If we followed that advice we'd still be walking everywhere, because walking ain't broke, but cars are so much better.

“Brownback Power Grab”:

- Brownback has been in office 4 years, for 2 years the senate opposed many things he tried to do, so the Senate is not a rubber stamp.
- From 1970 - 2018: Gov was a Republican for 24 years, Gov was a Democrat for 24 years.
- Judicial vacancies do not occur very often, Brownback has had one appointment; he may not get another. Sebelius appointed the other six Justices.

“Judicial Independence”:

- Independence is not based on how the judges are selected, job security is the key to independence. Justices have job security, no justice has ever not been retained

“Medical Board has Doctors”

- Lawyers should participate in the process, but Doctors do not elect the other Doctors on the medical board

Attacking “Voting for Judges . . .”

- This is a critique of the current system, it is not advocating the election of Justices

Claim People favor the Current System

- Then let them vote on it- if you trust your voters

Primary Election turnout is also Low:

- Not relevant to lawyer turnout, they are supposed to be highly interested body of experts

“Retention Elections” show system picks good judges:

- Not relevant, this is about nominating the best, not nominating the good enough to keep
- Every justice is retained

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