

## Legislative Testimony of Clayton Barker

### MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE ON THE JUDICIARY:

My name is Clayton Barker. I am a graduate of the University of Kansas School of Law; a resident of Leawood, Kansas (3<sup>RD</sup> District); licensed to practice law in Kansas (Bar # 18555, since 1998), Missouri (since 1997, inactive status since 2009), and in the Federal District of Kansas, Western District of Missouri, and several US Courts of Appeal; and a member of the Kansas Bar Association. I practiced law in Kansas at the firm of Spencer Fane Britt & Browne LLP as a litigation associate and partner for a little over 10 years. I am currently the executive director and general counsel for the Kansas Republican Party.

I submit this testimony in support of the bill, not on behalf of or as a representative of the Republican Party, but on my own as a concerned citizen and Kansas attorney.

**TESTIMONY:** There is a substantial difference between the theory and the reality of how the members of the Kansas Bar select the members of the Nominating Commission.

**Overall Statement:** The current system employed to select appellate-level judges in Kansas is distinctive from every other system used in the United States in the dominant role it accords lawyers. Proponents of the system claim it is superior to elections or appointment by elected officials because lawyers are 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 compares to voters and elected officials.

*Our current so-called “merit selection” system does not in any way remove politics from judicial selection it merely moves the politics into closer alignment with the ideological preferences of the lawyers who bother to 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 materially from the public. Many studies, and my own personal experience, demonstrate that lawyers as a group, and especially litigation or trial lawyers, are more liberal than are members of the general public. As a result, giving majority control of the judicial nominating process to the bar results in judges who are more liberal than the Kansas public and those that would have been selected by the elected representatives of the people.

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.

**POINT 1: Few Lawyers Bother to Vote for the Nomination Board Candidates:** Given that lawyers are, in theory, a tiny select group of experts, both highly informed on judicial matters and highly motivated to ensure quality judges, it is astounding that so few participate in the process.

This is illustrated by recent elections:

- In May 2011, in the run-off round of the 2<sup>nd</sup> District balloting, 727 lawyers voted, about 33% of the 2201 eligible lawyers
- In April 2011, in the first round of the 2<sup>nd</sup> District balloting, 32% of the 2201 eligible lawyers voted
- In April 2010, 436 (42%) of the 1,039 potential lawyer voters in the 1<sup>st</sup> District returned a ballot.
- In July 2009, 2,696 (30%) of the approximately 9,000 potential lawyer voters statewide returned a ballot in the runoff election.
- In May 2009, 2,532 (28%) of the approximately 9,000 potential lawyer voters statewide returned a ballot in the initial election.
- In May 2008, 723 (20%) of the approximately 3,900 potential lawyer voters in the 3<sup>rd</sup> District returned a ballot.
- In July 2007, 759 (40%) of the approximately 1900 lawyer voters in the 2<sup>nd</sup> District runoff returned a ballot.
- In May 2007, 765 (40%) of the approximately 1900 potential lawyer voters in the initial 2<sup>nd</sup> District vote returned a ballot.

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

(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 almost entirely in Missouri or Federal court and likewise feel disinterested or unqualified to vote.

(3) Lawyers are uninformed of the system and the candidates, and simply choose not to vote.

**Impossible to Determine Who Voted:** It is impossible to test these theories. Although the Clerk of the Supreme Court's Office retains the report of canvassers for each election and a list of eligible voters, it **does not** retain a list of who voted – unlike real elections. It is, therefore, impossible to determine if the voting lawyers are representative of the entire universe of eligible lawyers or whether certain sub-groups of lawyers vote in greater proportion to others.

**POINT 2: Most lawyers are not familiar with the system or the candidates:** It is my opinion, based on personal experience and discussions with other attorneys over the years, that most eligible attorneys:

- a. Are unfamiliar with the organization and role of the Supreme Court Nominating Commission.
- b. Are unfamiliar with the attorneys whose names appear on the ballot.

- c. Are lobbied for their vote through solicitations from candidates, usually by letter, and through internal e-mails in law firms urging lawyers to vote for a particular candidate.
- d. Receive no information useful for decision-making- there are no persuasive campaigns, and no independent third parties investigating the candidates and providing information to the lawyers.

**POINT 3: 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 uninformed 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.

**POINT 4: The Results of Judicial Retention Votes Are Irrelevant:** Based on my experience in the 2010 and 2012 elections the fact that judges are always retained in office is not in any way an indication of superior judicial performance justifying the current selection process. Indeed, the people of Kansas retained a deceased jurist in 2012 who received 72% of the vote, more than several others on the retention ballot. Almost all Kansas voters have no idea who the judges are and make uninformed votes, if they even bother to vote – the under vote is considerable. Kansas would save a lot of paper and voter time if it ended the charade of judge retention elections – nice theory, but a failure in practice.

**Reference: (approx. numbers)**

- 1,050 lawyers in District 1
- 2,200 lawyers in District 2
- 4,250 lawyer in District 3
- 1,800 lawyers in District 4

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