Interim Study on Possible Judicial Reforms

Testimony of Carrie Severino
Chief Counsel and Policy Director of the Judicial Crisis Network

October 31, 2013

One of the things that has set our nation apart from all others is the rule of law, and it is always a great privilege to appear before leaders like you to discuss ways that we can improve the administration of justice in our country and in our states. The judicial branch is sometimes the only thing standing between the citizens and an overreaching government, so it is critical that we have men and women of the highest caliber and integrity serving in that branch.

Ponder these rhetorical questions: Would you support a constitutional amendment allowing the nation's most influential bank CEOs to regulate the banking industry? Would you support a constitutional amendment allowing the nation's top insurance executives to regulate the insurance or health care industry? Whether you like that concept or not, that is precisely what Oklahoma did when it adopted the Missouri Plan in 1967, putting the state's lawyers in charge of selecting judges.

And it was no accident. Remember that the Missouri Plan was not born in Oklahoma. It was designed by progressive era intellectuals, and first adopted in Missouri after failed attempts in Ohio and California. One of the hallmarks of the progressive era was the insistence that so-called "experts" should be put in charge of all aspects of American life, and this was the application of that principle in the context of judicial selection. The left-leaning ideologues who designed the Missouri Plan wanted the nation's legal culture to reflect the preferences of the professional bar.

Lawyers are not necessarily bad people. Nor are judges. I am a lawyer. And I clerked for one of this nation's greatest lawyers, Justice Clarence Thomas, on the U.S. Supreme Court.

But we are all humans. And, like all humans, we have self-interest. No one could argue that the lawyers of a particular state don't have a strong ideological and financial interest in the contours of the state's legal climate.

That is why it doesn't make any sense to put them in charge of picking the judges who will decide their cases.

Judges try cases across the state, and involving all Oklahomans, not just lawyers. Unlike federal judges, state judges are not just limited to interpreting the laws passed by the legislature, but have a valid role to play in developing the contours of state common law. Their ability to give content to the law of Oklahoma in certain cases makes it particularly crucial that they reflect the citizens of the state at large, not disproportionately the members of one profession. To paraphrase Clememceau, law is too important to be left to the lawyers.

The Missouri Plan is uniquely susceptible to capture by special interests because it is expressly designed to remove democratic accountability from the judicial selection process, thus leaving the door wide open for interest groups - particularly the bar - to increase their influence without democratic supervision.

This is primary defect in the Missouri Plan: that it places too much control over one particular branch of government in the hands of a group of people who are not accountable to anyone. The six lawyers appointed to Oklahoma's judicial nominating commission never have to respond to anyone for their recommendations to the governor. Similarly, the governor can dodge ultimate accountability for his selections by claiming his hands were tied by the commission's choices.

What's more, the Missouri Plan combines its lack of accountability in the initial nominations process at the front end, with only the illusion of accountability in the form of retention elections at the back end. As Vanderbilt law professor Brian Fitzpatrick has pointed out, sitting judges win retention elections 99% of the time.

This unaccountable system is often defended from the best of motives. Nobody wants to see politics in our judicial system, and no one wants a system that lets the rich buy their own set of rules. That is why the Missouri Plan can seem attractive at first glance - because it promises to remove politics and money from to the judiciary.

Unfortunately, the Missouri Plan doesn't eliminate politics; it simply moves them behind closed doors. If you don't believe that nominating commissioners are being called by people across this state with interests in the outcome of litigation, you are mistaken. If you don't believe that those commissioners are guided by political impulses just like the rest of us, you are naive. If there weren't ideological reasons to support this method of selection, do you believe the prominent left-wing billionaire George Soros would have invested more than $70 million to advance the Missouri Plan across the country? Obviously not.

Empirical studies provide ample evidence of what those ideological reasons are. Professor Brian Fitzpatrick has found that Democrats are the overwhelming beneficiaries of this judicial selection method: a full 87% of Missouri Plan judicial nominees that he studied gave primarily to Democrats, while only 13% gave primarily to Republicans. The numbers are even more overwhelmingly skewed if you consider the aggregate amount of money the nominees gave to each party; 93% of aggregate donations went to Democrats, while only 7% went to Republicans.

We have also seen this play out anecdotally. The purple state of Iowa had a solidly blue Supreme Court that famously redefined marriage in that state. Kansas' Supreme Court has effectively usurped the legislative power of the purse to dictate school funding. And, of course, your own Supreme Court has engaged in judicial activism to strike down the Comprehensive Lawsuit Reform Act on specious legal grounds and recently overturned state regulation regulating RU-486 in a decision virtually devoid of legal reasoning.

So, as this committee considers the alternatives to the Missouri Plan set before it, I would encourage you to follow the lead of other states such as Missouri, Kansas, and Tennessee, who have all started to move away from the Missouri Plan.

The key as you consider your next steps is to establish a process that provides for accountability, while maximizing the ability of judges to fairly and neutrally apply the law. I understand that that some legislators are considering a move to a style of selection like the one set forth in the U.S. Constitution, under which the governor would appoint and the senate confirm.

Alexander Hamilton made a brilliant case for that method of selection, and I believe his arguments still stand up today. As he said in Federalist 76, "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." In other words, unlike the Missouri Plan, the accountability will rest in one person - the democratically elected governor - to ensure that the nominee has the right background. He will not have the "out" of claiming his choice was the best possible given the panel of candidates chosen by the nominating commission.

Oklahoma's legislators - through an advice-and-consent role in the judicial confirmation process - could provide, as Hamilton put it, "an excellent check upon a spirit of favoritism" in the executive, which tends "greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." For James Madison, "this would unite the advantage of responsibility in the Executive with the security afforded in the 2d. branch agst. any incautious or corrupt nomination by the Executive."

Governors and senators are political, obviously, but they are also accountable for their decisions. See, for example, President Bush's decision to withdraw the nomination of Harriet Miers after it became clear to him that critics believed her to be an unqualified crony, or the fate Senator Tom Daschle faced after repeatedly obstructing judicial nominees.

The state could make improvements on that method of selection. For example, you could provide for a 90 day limit on debate, so that nominees would be confirmed by default unless rejected by the senate within 90 days. That is not unlike the method originally proposed by James Madison, which was eventually modified. With a 90-day limit the state cold rest assured that its judges would not be unduly held up by procedural battles.

Alternatively, the state could simply move straight to contested elections. Many lawyers are skeptical of this method of selection, but the fact of the matter is - as Professor Chris Bonneau has shown in an exhaustive review of the scholarly literature - that there is no empirical support for the idea that elected judges are any more corrupt or political than appointed judges. In fact, there is evidence that an elected judiciary actually decreases executive and legislative corruption by serving as a robust check on those branches.

And, as Yale law professor Abbe Gluck explained in a very important law review article a few years ago, it is judges in elected states that are leading what she called a "textualism revolution," returning state supreme courts to the idea that the law ought to be interpreted according to its terms. This is true in Michigan, for example, my home state.

As you have seen from a recent poll commissioned by The Federalist Society, the alternative of elections is probably the most popular among the citizens of Oklahoma, 69% of whom would support amending the state constitution to move toward judicial elections, with only 25% opposed.

We all would like to see a judiciary perfectly free from any political influence, making its decisions based on the law alone and not policy preferences, personal relationships, or ambition. But since we are limited to choosing our judges from among fallen men, we must recognize the role of democratic accountability and public scrutiny in maintaining judicial quality and integrity. I commend Oklahoma for taking steps to restore this accountability to its judiciary and wish it continued success in that project.