

Testimony of Carrie Severino
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Speaker Hickman and distinguished members of the House, thank you for having me today.

For some background, I'm a graduate of Duke University undergrad, have a master's degree in Linguistics from Michigan State University, and got my law degree at Harvard. I clerked for Judge David Sentelle on the D.C. Circuit and then Justice Clarence Thomas on the Supreme Court. In my current position at the Judicial Crisis Network I advocate for constitutionalist judges at the federal and state levels and filing numerous amicus briefs at the Supreme Court including several in which I represented Members of Congress in both major Obamacare cases.

State court selection is a topic I have spent a great deal of time talking about because many people focus on the importance of the federal judiciary without realizing that about 95% of all cases are filed in state courts and state judges often have an even freer hand than federal judges in both deciding those cases and even shaping the content of the law itself.

One of the things that sets 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.

I don't have to tell you about the problems a runaway court can create. Here in Oklahoma the increasing divergence of the state courts from the principles embraced by Oklahomans has brought that issue home, and I commend you for recognizing the role the method of judicial selection plays in enabling the creation of an activist judiciary.

I know the other presenters are going to be talking about the problems that have developed in Oklahoma law, so I want to focus my remarks about some features of commission-based judicial selection and why I believe it is the method of judicial selection that is least-accountable and most prone to capture by the liberal trial bar.

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?

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 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 with regard to 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 Clemenceau, 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 members of Oklahoma's Judicial Nominating Commission never have to respond to anyone for their recommendations to the governor. Even when the JNC recently refused to follow its constitutional mandate and send a full slate of candidates to the governor, there was little the governor or legislature could do to hold the members to account.

If the Missouri Plan allows the nominating commission to escape accountability, it also provides cover to the governor for his own decisions because he can claim his hands are tied by the commission's choices.

Defenders of the Missouri Plan often point to retention elections as a check on the system. But those elections provide only an illusion of accountability. Even including the high-profile losses of retention elections in Iowa after that court struck down its state marriage laws, the national numbers are impossibly skewed: judges are removed in less than 1% of retention elections.

In Oklahoma the numbers are even more stark. After nearly 50 years of retention elections not a single judge has ever lost a retention election. These votes aren't elections; they are coronations.

This unaccountable system is often defended from the best of motives. Nobody wants to see politics in our judicial system, no one wants a system that lets the rich buy their own set of rules, and frankly many judges don't like having to campaign. That is why the Missouri Plan can seem attractive at first glance - because it promises to remove politics and money from 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. And 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 as the other witnesses here will testify. Oklahoma is a conservative state, with a conservative legislature and governor, but is saddled with a liberal Supreme Court bent on reinterpreting the law whenever it gets the chance.

If the Missouri Plan is the least accountable way to choose judges, I would argue that elections produce the most accountable judiciary. As recently as 2013 a poll commissioned by the Federalist Society showed 69% of the citizens of Oklahoma supported amending the state constitution to move toward judicial elections, with only 25% opposed. It simply makes sense to have the judiciary reflect the electorate, just as the other branches of government do. And in those cases where a judge violates the trust placed in him by the electorate, they have a direct method to fix the situation.

Many lawyers are skeptical of this method of selection, and Missouri Plan proponents will claim elections lead to politicized or corrupt judges. But the fact of the matter is - as Professor Chris Bonneau has shown in an exhaustive review of the scholarly literature - there is no evidence for that assertion. In fact, the evidence indicates that an elected judiciary can actually decrease executive and legislative corruption by serving as a robust check on those branches.

Elected judges also have given voice to what most Americans actually believe: that laws should be interpreted according to their own terms rather than reworked by political judges. 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 they should stick to interpreting the text of the law itself. This has been true in Michigan, for example, my home state.

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.

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.