VANDERBILT Law School

Before the Kansas House Judiciary Committee, January 16, 2013:

Thank you for allowing me to testify before you today on this very important subject. My name is Brian Fitzpatrick, and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I have studied judicial selection for many years, and I am here as a scholar to share with you some of the academic findings on this subject. In particular, I am here to share with you some of the findings regarding the method of selection you currently use here in Kansas—commission selection—and to give you some thoughts on the alternatives to your method.

But, if you will allow me, I would like to begin with a brief story. It is a true story, a story about the debates that took place at the United States Constitutional Convention in Philadelphia over two hundred years ago. The subject of how best to select and retain judges occupied the delegates to that Convention just as it occupies you today. Some at the Convention favored selection of judges by the President. Some favored selection by the Congress. Some favored selection by a combination of the two. As the debate raged on and on, none other than Benjamin Franklin rose from his seat to address the chamber. He said that he had a proposal for a new way to select judges. His proposal was to ask not the President and not the Congress to do it. His proposal was to ask the legal profession—the members of the bar—to do it. He argued to the delegates that this would be guaranteed—guaranteed, he said—to produce the finest judges of

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any system. Why? Because the legal profession would surely choose the best among them to be judges so as to get rid of the competition for clients.[1]

Just as you have, the delegates at the Convention laughed after Benjamin Franklin finished making his proposal. Everyone knew that Benjamin Franklin had meant his proposal as a joke. But our memories are short, and history gets lost. And what has happened over the ensuing two hundred years is that Benjamin Franklin's joke has become the reality here in Kansas.

Why do I say that this is the reality here in Kansas? It is because no one can become an appellate judge in Kansas unless he or she is nominated to the governor by a special selection commission, and, by law, a majority of the members of this commission are selected by the members of the legal profession—by the members of the bar.

No other state gives the bar majority control over judicial selection. Some states let the governor pick judges. Some states let the legislature pick judges. Some states let the public pick judges. Some states let commissions pick judges like you do, but let the governor, legislature, or public pick a majority of the commission. Some states let the bar pick some of the members of the commission. But you are the only state that lets the bar pick a majority of the commission. Some might say that your system is one of lawyers, by lawyers, and for lawyers.

When I began studying judicial selection many years ago, there were two states in the country that gave the bar majority control over the selection of appellate judges. Those two states were

[1] *See* Daniel A. Farber & Suzanna Sherry, A HISTORY OF THE AMERICAN CONSTITUTION 55 (1990).

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Kansas and my home state of Tennessee. Tennessee has since changed its system. This means that you, Kansas, are the only state left.

Now lawyers are fine people. I myself am one of them. But what good comes from giving the legal profession such an outsized role? Scholars have struggled to find any good that comes from it.

First, scholars have examined whether states that use selection commissions have higher quality judges than states that use elections or appointment by the governor or the legislature. It is hard to define and measure quality, to be sure, but scholars have tried. And they have found no clear evidence that commission judges have more experience, went to better law schools, or write better opinions than judges in other states.[2]

Second, scholars have examined whether states that use selection commissions have better racial and gender diversity on the bench than states that do not. Again, there is no clear evidence in favor of any selection system.[3]

Third, scholars have examined whether states that use selection commissions have done a better job of removing politics from judicial selection. People mean many different things when they use the word "politics," but these studies have looked at whether members of selection commissions rely less on political considerations when they select judges than the governor, legislature, or the public do. The studies have found that selection commissions do not. They have found that political considerations enter into judicial selection no matter who selects judges.

[2] *See* Brian T. Fitzpatrick, *Errors, Omissions, and The Tennessee Plan*, 39 U. MEM. L. REV. 85, 115-117 (2008) (canvassing studies).
[3] *See id.* at 117-119 (canvassing studies).

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The reason for this is easy to see. Judges have a lot of discretion. The law is often ambiguous and judges get to decide what it means. The people who select judges know this, and they select the judges they think will decide cases the way they want cases to be decided. Short of flipping a coin to pick judges, it is impossible to remove politics from judicial selection. The difference between the systems is not *whether* politics enters the process, but, rather, *whose* politics enters the process: the politics of the electorate, the politics of elected officials, or the politics of the bar.[4] In your system, it is the politics of the bar.

There is one benefit that studies have found to the use of selection commissions. Insofar as these commissions relieve judges from having to run for office, they relieve judges from having to raise money from future litigants, and this gives the public more confidence that judges act impartially when they decide cases involving those litigants.[5] But this is not a benefit against all other systems. It is a benefit only against some types of judicial elections. The same benefit is found in other systems where judges do not run for office, such as systems where appointment by the governor or the legislature is unencumbered by a binding selection commission.

The benefits of merit commissions may be hard to find, but are there any costs? Scholars have found some. Perhaps the most important of these is a loss in democratic accountability. Although Kansas and many states that use selection commissions require judges to come before the public periodically in retention referenda, the judges have no opponents in these races and they virtually never lose them. Studies have found they enjoy retention rates that exceed 99% in

[4] *See id.* at 119-122 (canvassing studies).
[5] *See* James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*," 102 AM. POL. SCI. REV. 59-75 (2008).

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most states.[6] In other words, accountability on the back end in your system is largely futile. And, as I noted, the accountability there is on the front end is largely to the legal profession, not to the democratic process.

So what is to be done about all of this? One option is to elect judges. Many states do this. Another option is to cut out the binding selection commission and let the governor and the legislature appoint whom they wish to the appellate courts. This is the option before you today. This is also the option the delegates at the U.S. Constitution selected for the federal system after they stopped laughing at Benjamin Franklin's joke. The federal system ensures democratic accountability on the front end by relying on elected officials to select judges unencumbered by the bar. And it has produced what I think all would agree is a judiciary of nearly uniform excellence.

I do not mean to suggest that lawyers should have no role in the selection of judges. Lawyers will always have at least some role. When the President selects judges, for example, he consults his lawyers for their insights. But some role is different than outright control. As I noted, no other state gives the bar that kind of control any more, and, as I have explained, many scholars have a hard time understanding why any states did it in the first place.

Thank you very much. I am happy to take any questions you might have.

[6] *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 485 (2008) (canvassing studies).

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