

Ohio Constitutional Modernization Commission  
Committee on the Judicial Branch and the  
Administration of Justice  
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Chairwoman Abaray and members of the Committee on the Judicial Branch and the Administration of Justice thank you for allowing me to testify on behalf of the League of Women Voters of Ohio. We welcome the opportunity to share our thoughts on reforms which we believe will promote the independence of the judiciary.

### **Independence of the Judiciary**

An independent judiciary is critical to our system of government. That independence is being challenged by our current system of selecting judges. Although there is no perfect system, electing judges in a partisan system creates the appearance, if not the reality, that judges are accountable to a political party or to the special interests which contribute significantly to their election. Former Justice Otto M. Kaus of the California Supreme Court summed up the problem as follows:

“To this day, I don’t know to what extent I was subliminally motivated by the thing you could not forget - that it might do you some good politically to vote one way or the other.”

### **Appointment/Retention Election System**

The League has long supported an appointment/retention election system, frequently referred to as “merit selection”.<sup>1</sup> I am going to use the term appointment/retention election system, since that more accurately describes the process.

Although Ohio’s system of selecting judges is considered to be an

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<sup>1</sup> An “appointment/retention” system describes a process in which a judge is initially appointed to the bench and then faces a retention election at the end of her term. If the voters elect to keep the judge, she fills that term in office and would face another retention election at the end of her term. If the voters elect not to retain a judge, a new judge would be appointed. This process is also known as “merit selection” because the initial appointment of a judge is supposed to be based on merit, or qualifications to hold judicial office.

electoral system, in reality the current system in Ohio is a mixture of appointment and election. As you have heard before, approximately half the judges in Ohio are first appointed by the Governor following resignations. Such a system allows the Governor to appoint a judge who is a member of his party. That judge will presumably have an advantage as an incumbent in the next election.

Unlike the process in an appointment/retention election system, under our current system the Governor is free to pick whomever he chooses. Excellent candidates may be selected. On the other hand, if the Governor simply gets recommendations from his political party, the selection may be the candidate with the most electable name or who has given most generously to his party. Candidates who run without being thus appointed are also not subject to any rigorous selection process and parties may be more influenced by electability rather than judicial qualifications.

Under the appointment/retention election system, which the League supports, there would be a bipartisan or nonpartisan commission including non-lawyers, which would evaluate candidates and make recommendations to the Governor. If the Governor declined to appoint any of the candidates recommended by the commission, the commission would come up with a new slate. Such a public process takes the mystery out of the selection process and avoids the perception that the appointments are made for political purposes. It also ensures we get the most qualified candidates.<sup>2</sup>

Following appointment, the judge would serve for a set number of years and then face an up or down election. If defeated, the commission would make a new recommendation to the Governor. If retained by the voters, the judge would continue to serve, periodically facing another retention election.

We would further recommend that a separate bipartisan or nonpartisan commission of lawyers and non-lawyers be established to evaluate the judges using appropriate criteria. Its findings would be made public, enabling Ohioans to make an informed vote in the retention elections.

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<sup>2</sup> Currently some highly qualified candidates decline to consider the judiciary because they do not wish to run in the current political process, so arguably a shift to merit selection could yield even more candidates who are well qualified.

As you probably know, former Chief Justice Thomas Moyer convened a very diverse group of politicians, scholars, business people and other community leaders, which heard from legal experts as well as state officials and judges from states which enjoy an appointment/retention election system. The conclusion of those in attendance was that an appointment/retention election system should be pursued and a first draft of a possible system was prepared subsequently. At that time there was considerable optimism that a plan could be developed and presented to the voters of Ohio.

### **Would Ohioans Support Such a System?**

When Ohioans last had an opportunity to vote on merit selection, it was resoundingly defeated in 1987. Since that time we have seen negative TV ads, large amounts of money from unidentifiable PACs and growing concern about the independence of the judiciary. The problem is getting worse.

You may have heard that a recent Quinnipac poll found that over 80% of Ohioans want to continue to elect their judges notwithstanding this problem. In fact, it is important to look at what question was asked in that poll. The question was:

Ohio currently elects its judges on the state supreme court. Some have suggested that be changed so that judges would be appointed by the governor with input from the state bar association and confirmed by the legislature. Which do you prefer: A) Keeping the current system of electing Ohio supreme court judges, or B) Changing to a system in which new judges would be appointed by the governor and confirmed by the legislature?

It is not surprising that Ohioans were not interested in a system where the governor does the appointing with confirmation by the legislature. Unlike an appointment/retention election system, there is no assurance that the appointments would not be political and, most importantly, there would be no opportunity for Ohioans to vote whether to retain the appointed judges. Additional research on more nuanced proposals should be conducted before deciding that an appointment/retention

election system would not be supported by Ohio voters.

### **Need for Education**

We would like to address briefly the need for education, because it is critical to establishing the foundation for reform. The judiciary is the least understood branch of the government and this complicates any discussion of how best to select our judges. In the first instance, it will be important for Ohioans to understand that judges differ from other politicians, whose campaigns focus on what they will do if elected. The only promise a judge can and should make is to faithfully interpret the law and run an efficient courtroom where all parties feel that they are heard and will get a fair trial. As you heard from the Chief Justice a couple of months ago, there is a big drop off in votes when it comes to judges. Although ballot fatigue may be part of the problem, I suspect that the bigger problem is that voters know very little about the judicial candidates and lack sufficient understanding of their roles to cast a meaningful vote.

The League is undertaking to partner with other groups to begin this educational process. The National Association of Women Judges is starting a trial education project in several states. Although Ohio is not one, they are encouraging us to use the materials they are developing, which will include PSA's, videos, draft letters to the editor, etc. The League is starting a court observation project designed to demonstrate to Ohioans that it is possible to learn about whether a judge does a good job. We hope to speak to many groups from high school students to senior citizens.

It is important to keep in mind that voters will need to understand the role of the judiciary and how to cast an informed vote whether we keep the present system of electing judges or move to an appointment/retention election system.

All of this will take time. Reform efforts may be more successful as education has time to take hold and voters gain a better understanding of the strengths and weaknesses of different systems of selecting judges. We have heard that this body is hoping to have a proposal to the legislature by the end of 2014. You might want to consider that you have ten years to build support in the Ohio General Assembly and

among Ohioans. Perhaps it would make sense to approach this incrementally – with an appointment/retention election system as the ultimate goal – but a goal that might be more achievable later in the life of the Commission.

### **Steps to Improve Current System of Electing Judges**

There are a number of steps that might be undertaken immediately as we work toward an appointment/retention election. They include the following, some of which were part of the proposals put forth by Chief Justice Maureen O'Connor:

1. Establish an Appointment Process for Judicial Vacancies

With over 50% of judges in Ohio first coming to the bench by appointment, there is a great opportunity to take some of the politics out of the system and improve public confidence by establishing a nonpartisan or bi-partisan commission to make recommendations to the Governor. Various Governors have used different systems for appointments, but they are free to appoint persons recommended by their political party and to use whatever criteria they see fit. Indeed, it is likely the case that many of the judges who resign before their term is up do so to afford their party the opportunity to make an appointment to the bench – who can then run as an incumbent. If a nonpartisan or bipartisan body were established in the Constitution, it would not be subject to elimination by a Governor or legislature desiring to politicize the courts. The League supports this step immediately and we note that it could ultimately be incorporated in an appointment/retention election plan.

2. Establish a fair, impartial and non or bi-partisan process for Judicial Performance Evaluation

The creation of a body, which could impartially evaluate judges and provide relevant information to voters, could significantly reduce the number of voters who don't vote because they lack information about the judges on the ballot. Such information is relevant in our current system and would be relevant should Ohioans eventually adopt an appointment/retention election system.

### 3. Eliminate party labels in primaries

The Chief Justice has proposed eliminating party labels in the primary election and has pointed out that Ohio is unique in having partisan primaries followed by ostensibly nonpartisan elections. Given the League's interest in taking politics out of the judicial process, we support this proposal. Many voters consider party labels crucial to their decision whether it be for a judge or for a legislator. Yet the truth is, knowing whether a judicial candidate is a Republican or a Democrat or some other party does not provide any information as to their judicial experience, demeanor in the courtroom or any of the other qualities that make up a good judge.

### 4. Transparency and timely reporting of corporate and individual campaign contributions

Money in judicial campaigns is at the heart of the problem. Absent public financing, there is no constitutional way to eliminate or curb the money pouring into judicial elections. But at the very least, the voter should know who is funding the campaign advertisements. Is "Citizens for a Happy Ohio" really a coal company, a progressive coalition or the Chamber of Commerce? The voter needs this information not only about contributors to the candidate's campaign committee, but also about third party interest groups. And the information must be timely, so that to the extent possible, the voter has access to it before the election.

Efforts to pass meaningful disclosure at the Federal and State level have not yet been successful. There is, however, a particular urgency about shining light on the identity of contributors to judicial campaigns. Without such disclosure it is virtually inevitable that voters will assume that undisclosed contributors are attempting to buy justice.

### 5. Public Financing

The threat to judicial independence has been exacerbated in recent years by the large amounts of money that have gone into judicial Supreme Court races around the country. Much of this money does not go to the candidate's campaign committee, but is spent by third party entities with names that do not afford the voter much information about who is really behind them.

How much these contributions influence how the justices vote is open to debate. Some justices would deny any influence, but other have acknowledged a potential problem of perception if not reality. In fact, a recent study by The American Constitution Society, *Justice at Risk, Empirical Analysis of Campaign Contributions And Judicial Decisions* found a significant relationship between business group contributions to state supreme court justices and the voting of such justices in cases involving business. There was no similar correlation found in retention elections. Even if there were no such correlation, the mere fact that many Ohioans believe that judges' decisions might be affected by contributions undercuts the independence of the judiciary.

If we agree that the importance of addressing money in judicial campaigns is uniquely important, another approach that might be considered as long as we continue to elect our judiciary is public financing. Although not a perfect solution, it could go a long way to address the problem of money in judicial campaigns. And if such financing were limited to appellate courts or even just the Supreme Court, the cost could be less formidable. Certainly this could be accomplished by the legislature, but considering the experience in New Jersey, which enjoyed such a system until it was defunded by the legislature, thought might be given to embedding public financing in the Constitution.

#### 6. Other

While the League supports additional reforms, such as stricter recusal standards, they are probably not appropriate to be addressed in the Constitution.

### **Conclusion**

We hope that this Committee will give serious thought not only to small steps that can improve our current system of electing judges, but ultimately a more fulsome approach – appointment/retention election – which offers the prospect of an independent judiciary appointed in an open and careful way subject to review of the voters with retention elections.

Thank you for affording us the opportunity to present. We would be pleased to assist your work in any way we can.