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Charleta B. Tavares  
Assistant Minority Leader  
15<sup>th</sup> Senate District



**Co-Chair**  
William G. Batchelder, Speaker  
69<sup>th</sup> House District

## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD  
THURSDAY, SEPTEMBER 11, 2014

#### **Call to Order:**

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:18 a.m.

#### **Members Present:**

A quorum was present with the following members attending: Janet Abaray, Judge Fischer, Professor Sapphire, Rep. Curtin, Jeff Jacobsen, Senator Obhof, Sen. Skindell, and Mark Wagoner

#### **Approval of Minutes:**

The minutes from the previous meeting were read and approved without objection.

#### **Topics Discussed:**

##### *Identification of Obsolete Provisions and Judicial Appointment Proposals*

JoEllen Cline of the Ohio Supreme Court presented on the obsolete provisions. Issue 1 on the Ballot in 2011 was defeated, but would have removed these provisions. Historically, these provisions were adopted because in 1851 the Supreme Court did not have supervisory authority, but now, under the Modern Courts Amendment, it does. These provisions were intended to address a backlog of cases. In 1875, the Supreme Court Commission provision was created, but has only been used two times: immediately after amendment for 3 years, and in 1883 for two years. In 1875, the Supreme Court was 4 years behind in getting cases resolved.

Today, the court has more limited jurisdiction, no more riding the circuit, so no need for these provisions. In 2013, the court had 22,000 cases filed, which represents 9/10% decrease over the prior year. The caseload has gone down, and the court has a 99% clearance rate.

Questions: Chair Janet Abaray asked who JoEllen Cline speaks on behalf of. Answer: she speaks on behalf of Chief Justice Maureen O'Connor, who recommends repeal of these provisions. Richard Saphire asked what happened regarding these provisions in the 1970s Commission, JoEllen Cline does not know, but William Weisenberg, who is also present, may be able to answer this. Judge Pat Fischer asked whether there is a need for a constitutional provision to give the Supreme Court authority for Alternate Dispute Resolution. JoEllen Cline: no, the court has intrinsic authority for that.

Presentation by William Weisenberg: he concurs with JoEllen Cline, issues have never arisen under these provisions regarding arbitration and mediation. The Supreme Court has dealt with mediation for many years, mediation is not new. There was much discussion during the Moyer era about mediation. Judge John McCormac was an early proponent of ADR. In fact, trial is a true form of ADR, but trial is a last resort. The concept of courts of conciliation was never brought up during that time. Nor has the Supreme Court Commission provision been raised. Richard Saphire asked again whether the 1970s Commission had addressed these questions, Weisenberg said he has information in his office about this but did not know why the provisions were not repealed then. He will follow up.

Chair Janet Abaray asked whether we know whether other justices support eliminating these provisions, answer is that we do not know. Rep. Mike Curtain indicated that the 1970s Commission recommendation did not deal with getting rid of these obsolete provisions. Judge Pat Fischer asked how we could get rid of them, there would have to be much public information to get the voters to consider it; might be best to put with other obsolete provisions. William Weisenberg agreed that it needs to be appropriately packaged for voter support. He further stated that it won't be a big deal for the press and doesn't think it is a controversial issue. Editorial writers could support the effort.

Chair Abaray: we could vote that the provisions are obsolete and let the Commission decide what to do next. Mark Wagoner: see the rules we are going to adopt for the relevant procedure.

William Weisenberg then presented on the issue of judicial selection. He directed the committee to some resources on the topic, including the Institution for Advancement of American Legal Systems, which is working on the judicial selection issue. He said they have done a Report on Judicial Nominating Provisions, which provides an update on judicial selection around the country. He also mentioned the American Judicature Society, Judge Carparelli, has done some scholarship studying judicial selection. Finally, Judicature Magazine has an article on Performance Evaluation Standards in various states. William Weisenberg offered to be a contact if the committee wants to pursue information from these resources.

Chair Janet Abaray: if we come up with a proposal on selection, would they be able to get input from these groups? Weisenberg: won't say A versus B, they will say here are states that do X and their experience with that format.

Chair Abaray then presided over a discussion by the committee. First question: are the two provisions obsolete? Senator Obhof suggested that Dean Steinglass talk about the 1970s Commission experience with these provisions. Shari O'Neill also was asked to attempt to

discover what the other Supreme Court justices think about the judicial selection issue. They will wait until the next meeting to conclude the discussion on this point. Mark Wagoner suggested that the committee make its recommendations to the coordinating committee and allow that committee to figure out how to go forward with moving the issue toward voters.

### *Proposals for Appointment Process to Supreme Court of Ohio*

Chair Janet Abaray suggested that if Ohio is going to adopt this, it should start on a limited basis, make this a streamlined proposal. She referenced the proposal from the 1970s, it was cumbersome, providing commissions from each appellate district. Rep. Mike Curtin had suggested following the federal system, but it has its own set of problems and voters lack a choice. Chair Janet Abaray is thinking of a jury system comparison, in which a candidate is “struck” –this would be cleaner and have a time table. By this system, the governor would send names to the senate, and each caucus has one strike.

Another issue is how long a judicial term would be, and when there would be a retention election. This becomes problematic. She proposes a longer term of office, for example a 12 year term, or requiring a candidate to be a licensed attorney for X number of years. Whatever system is adopted, it has to address the problem of too much money spent on judicial elections, the perception of influence that suggests, and what qualifications should a judicial candidate have.

Jeff Jacobson expressed a dislike of the concept of merit selection. He said it is elitist, and is a system controlled by insiders. He is not for this being on the committee’s agenda, as he does not believe a majority of the committee is in favor of a selection plan, regardless of what it would entail. Chair Janet Abaray said the committee decided to put a provision out there for discussion purposes to see if there could be support or consensus on the matter. Jeff Jacobson: no recommendation is a vote, too—he believes this is a “fool’s errand.”

Professor Saphire: we have discussed this for 2 years, and the committee has actually decided to come up with some proposed language for discussion. Could Chair Abaray reduce her proposal to paper so we can review and question it? He wants more opportunity to look at this and give it some thought.

Judge Pat Fischer indicated the Chief Justice likes the proposal that judicial elections be held in the odd year. Chair Abaray raises the problem of the influence of outside money on state judicial elections. Mark Wagoner states that it will not be possible to ban outside money under the U.S. Constitution. Jeff Jacobson indicated that the level of contribution could be limited by the Supreme Court’s rulemaking authority.

Judge Pat Fischer: it is an independent expenditures issue. The state can’t control outside contributions. He references the problem he had: a judge may raise a lot of money, but has to compete for precious television time in a presidential year and so the money isn’t enough. However, independent expenditures will go on no matter whether there is a retention election or a direct election. Those states that experimented with retention elections and didn’t like them are going to a federal type system and not back to direct election. Rep. Mike Curtin: likes the

federal model but won't vote for it because the party will still dictate who gets nominated. Rep. Curtain pointed out that if we don't get reapportionment reform, all else fails. We need to wait to see if reapportionment reform goes through to see if we could get judicial selection reform.

Richard Saphire pointed out a gerrymandering article he read indicating that few people have a true choice because of secure districts, so the money being donated in a district is going outside the district or even the state because it can have more impact elsewhere. Jeff Jacobson said he saw that article as well, and commented that residence patterns matter more than gerrymandering.

Chair Janet Abaray commented that the idea of merit selection was voted down in 1987. In surveys, the people reject the idea, but there has been such a dramatic change regarding the money spent in elections and no ability to control the spending, it is possible that public sentiment may have shifted since then. Richard Saphire agrees but needs to see the model plans to see what might work. It was suggested that the committee work on two tracks: consider two models simultaneously so can compare and contrast. Jeff Jacobson reiterated that the people have a fundamental right to select their judges, and we can't let a lack of control on the money force a relinquishment of the right to vote for judges.

William Weisenberg stated that so long as we elect people, the money will be in the system. Disclosure is the issue that we can deal with legitimately. This is not going to change: people aren't going to vote differently. We can address the issue of money. In the area of independent expenditures: we can deal with it through disqualification and recusal. Create presumptions that judges could recuse based upon the limit. Perception of money as an influence can be dealt with. Let's not forget that the "justice for sale" campaign against Justice Resnick backfired, although campaigns have become more sophisticated since then. Maybe the candidates should be more involved. Judges are vulnerable to recall if they make improper decisions. Need disclosure and recusal standards. The Ohio Supreme Court has recently updated the standards.

Mark Wagoner: the disqualification standards—who sets that? William Weisenberg: the Supreme Court does that by rule. Judge Pat Fischer: this is an ethical issue. Rep. Curtain: could there be some OSBA recommendations given to the Supreme Court after the election? Weisenberg: will try to relay this to the OSBA Board. Jeff Jacobson: naïve to think money doesn't find its way into merit selection. Is there money in the federal system? William Weisenberg, yes, probably, but the question is what system do we really want. People need to trust the system. It is a perception issue. The challenge is to have a system that gives people confidence.

William Weisenberg doesn't like the term "merit selection," instead likes "appointive election." People get appointed all the time because of merit. But "merit" suggests "elitism" in people's minds. C.J. Moyer called it an "appointive elective" system. Chair Abaray says she likes that phrase better. Judge Pat Fischer asks that this issue be given a time frame, when both sides can conclude they have heard all they need to hear and are ready to move on to other matters. Richard Saphire says 2 years is enough. Dennis Mulvihill had volunteered to put together a model election reform plan, Chair Janet Abaray will follow up with him. Chief Justice Maureen O'Connor will present at the next meeting.

**Adjournment:**

With no further business, the committee adjourned at 11:32 a.m.

**Attachments:**

- Notice
- Agenda
- Roll call sheet
- Biographical sketch of Jo Ellen Cline
- Prepared remarks of Jo Ellen Cline
- Biographical sketch of William Weisenberg
- Prepared remarks of William Weisenberg
- Article "*Choosing Judges: Judicial Nominating Commission and the Selection of Supreme Court Justices,*" Institute for the Advancement of the American Legal System

**Approval:**

These minutes of the September 11, 2014 meeting of the Organization and Administration Committee were approved at the November 13, 2014 meeting of the committee

*/s/ Janet Abaray*

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Janet Abaray, Chair

*/s/ Patrick Fischer*

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Patrick Fischer, Vice-chair