Ohio Constitution Modernization Commission
Judicial Branch and Administration of Justice Committee

Written Testimony of Michael E. Solimine

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1. Brief History of Judicial Selection in Ohio

Under Ohio's first constitution adopted in 1802, judges were selected by the legislature, as were most states judges at that time. But Ohio, like many other states at about the same, shifted to an elected judiciary in the 1851 Constitution. To this day, the reasons for the shift are not clear. Usually the influence of Jacksonian populism is given major credit. In Ohio, there also was concern that the legislative appointment had become too politicized, and it was thought that selection of judges by election would depoliticize the process. These hopes were not realized, as the political parties in the late 19 th and early 20th centuries began to dominate the process and openly campaign for particular candidates. Reacting to that politicization, Ohio in a constitutional amendment in 1912 mandated that there be no party label for judges in the general election, though judges (like candidates for other offices) still ran in party primaries.

The constitutional parameters for judicial selection in Ohio have not changed since 1912. Nor has dissatisfaction with the system abated from that date. Major initiatives to amend the constitution to provide some form of merit selection for some judges were made, and were defeated, in 1938 and 1987. The 1938 proposal would have created an appointment system for appellate judges. The 1987 proposal would have established a merit-selection process, with retention elections thereafter (i.e., a variant of the Missouri Plan) for appellate judges. Advocates of reforms have continued to advance proposals despite these defeats. For example, the late Chief Justice Thomas Moyer took a series of steps to generate conversation about rethinking and possibly changing some aspects ofjudicial selection. In the 1990s he appointed two groups (the McQuade Commission in 1995, and the Ohio Courts Futures Commission in 1999) which publicly discussed the merits and demerits ofjudicial elections, issued reports, and (in the case of the former) advocated a variety of reforms. In the following decade he convened The Next Steps conference in 2003, and the Forum on Judicial Selection in 2009, likewise bringing together stakeholders with a variety of perspectives to discuss possible reforms. Most recently, Chief Justice Maureen O'Connor has issued a report, and convened meetings, discussing ways to reform perceived deficiencies in current judicial elections, and moving away entirely from elections for selection to the Supreme Court, The latter proposal would adopt the model for

selection of federal judges, with the governor nominating and the Ohio Senate confirming an appointee.'

2. The Current State of Judicial Elections in Ohio

No matter one's stance on judicial selection, most people would probably agree that since Ohio follows the separation of powers for its government, it follows that at least at a high level of generality, the judiciary should act independently of and where necessary serve as a check upon the other branches of state government. Likewise, it would seem that given the historic role of judges in this country, most people would agree that judges should objectively apply the law and render decisions in a fair and impartial manner, without favoring or disfavoring one political party or any other group or individual.

Unfortunately, the current system of putatively competitive, nonpartisan elections for judges in Ohio does a poor job of advancing these laudable goals. It is well documented that for many decades, "politics" in all senses of that word is heavily involved in the selection of judges in Ohio.[2] The majority of judicial elections for the lower courts are not competitive at all, either because most judges run unopposed (sometimes due to informal deals between the political parties to protect incumbents), or because of the high reelection rate for incumbents. Since 1851, the Constitution has vested sole authority in the Governor to fill any judicial vacancy. A majority of judges initially begin serving by being named by the Governor to fill a vacancy, and with rare exceptions Governors of both parties have filled vacancies on a partisan and patronage basis. Indeed, it is not unknown for judges to strategically resign or retire, to enable a governor of the judges' party to fill the vacancy and give an advantage to an incumbent.

The media does a poor job of covering the judiciary, so understandably voters are uninformed about judicial races, and rely heavily on such factors as partisan affiliation, incumbency, or name recognition, when they vote for the judicial office at all, as opposed to the quality for the candidate for judicial office. Most candidates for judicial office at all levels have been active in one of the political parties, to gain the financial and other support of that party for election and

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For further details on the history of judicial selection in Ohio, see Michael E. Solimine & Richard B. Saphire, "The Selection of Judges in Ohio," in 1 The History of Ohio Law 211 (Michael Les Benedict & John F. Winkler, eds., Ohio University Press 2003); Jacob H. Huebert, Judicial Elections and Their Opponents in Ohio (Federalist Society 2010), available at www. fed-soc.org. Chief Justice O'Connor's report is Maureen O'Connor, A Proposal for Strengthening Judicial Elections, May 2013, available at w%vw. 0 h io C rts2 0 1 3 . org

[2] For a sampling of the large literature which supports the description of judicial selection in Ohio which follows, see, e.g., Bruce I. Petrie, Sr., "Political Patronage in Ohio: Governor Taft's Judicial Appointees," 77 University of Cincinnati Law Review 645 (2008); Bradley Link, "Had Enough in Ohio? Time to Reform Ohio's Judicial Selection Process," 51 Cleveland State Law Review 123 (2004); Michael E. Solimine, "The False Promise of Judicial Elections in Ohio," 30 Capital University Law Review 559 (2002); Michael E. Solimine & Richard B. Saphire, "The Selection of Judges in Ohio," in 1 The History of Ohio Law 211 (Michael Les Benedict & John F. Winkler, eds., 2004); Emily Rock & Lawrence Baum, "The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections," 10 State Politics & Policy Quarterly 368 (2010); Michael J. Nelson, Rachel Paine Caufield & Andrew D. Martin, "OH, MI: A Note on Empirical Examinations of Judicial Elections," State Politics & Policy Quarterly (forthcoming, available at www.spa.sagepub.com).

reelection. Public opinion polls show that Ohioans believe that judges are influenced by monetary contributions to campaigns.

In recent decades most races for the Ohio Supreme Court have been extremely competitive, but the elections for the Court have been subject to the problems described above. Most voters again know little about the candidates, and rely on partisan affiliation and the sound-bites of television ads in deciding how to vote. Understandably, many frustrated voters simply don't vote at all for judges on a ballot (called roll-off) given the lack of information. As just one example, consider the election for two Justices in the fall of 2012. Two highly regarded incumbents, one affiliated with each party, given top evaluations by the Ohio State Bar Association (OSBA), their peers in the legal community, and most Ohio newspapers, were nonetheless defeated for reelection. Many observers concluded that name and political affiliation played a large role in the election. At the same time, according to statistics on the website of the Ohio Secretary of State, the voter roll-off for those two races (using the votes for the President as a baseline) was a remarkable 28% and 26%.[3] It is no criticism of the able winning candidates, current or past lower-court judges themselves, to conclude that the present system of elections deprived Ohio of the service of two outstanding Supreme Court Justices.4

3. Maintaining the Status Quo

The current Chief Justice, her immediate predecessor, the OSBA, the Ohio League of Women Voters, and a variety of other groups and individuals have long recognized these problems. In various ways they have all taken steps to actively support reforms and maintain discussion of these issues on the public agenda. Yet virtually no reform takes place.

One reason, of course, is genuine, principled disagreement among Ohio policymakers regarding the strengths and weaknesses of the current system and proposed alternatives. This was demonstrated by the deliberations and the Report of the Ohio Courts Futures Commission. The Report declined to take a position on whether any reform of judicial selection was appropriate.5 Instead, the Report summarized the contrasting arguments for and against the current system of judicial selection.

Regarding systems with a merit selection component, the Report argued that while partisan elections are appropriate for the executive and legislative branches, judges are and should considered a different type of public office, since they are sworn to enforce the law in an impartial, nonpartisan manner. They should be not pressured to make decisions that favor one side, in ways that would be appropriate for the other branches. Judges should be accountable for

[3] The roll-off in the Robert Cupp/William O'Neil race was 28%, and 26% in the Yvette Brown/Sharon Kennedy race.

[4] One of the winning candidates was former student of mine, an outstanding graduate of the law school where I teach, who had a distinguished career as a lower court judge before her election to the Supreme Court. All that remains true despite my reservations about the process that led to her becoming a Justice.

[5] Report of the Ohio Courts Futures Commission 74 (2000)[hereinafter OCFC Report], available at mvw.supremecourt.ohio.gov/Publications/futures/complete.pdf. I was an academic advisor to the OCFC Access and Quality Task Force, which was responsible for that portion of the Report dealing with judicial selection.

their decisions, but the appellate process and adherence to canons of judicial conduct are the best ways to ensure that, as opposed to rewarding or punishing judges at the ballot box. Current competitive judicial elections are subject to numerous ills (mentioned above), but most appointive systems with a merit component preserve public accountability through retention elections. There is also some evidence that merit selection is more likely to increase the representation of women and African-Americans on the bench.6

In contrast, the Report also presented arguments in favor of the current elective system. All important public officers are subject to periodic competitive elections, and there are no strong reasons to carve out an exception for judges. At some level judges make policy which has important consequences for the public, and the public should be able to hold them accountable. Judges who are doing a good job can and should be reelected. It is true that judicial elections are not perfect, with low turnout and a lack for information, and thus can be improved, but those characteristics are also true for elections to nonjudicial offices. Merit selection is no panacea, since the composition and decision making of nominating commissions can be as political as elections themselves. That is, the commissions can be driven by elitism and interest group politics. The evidence that elected judges are somehow less qualified than appointed ones, or that competitive elections lead to fewer female and minority judges, is at best ambiguous.?

Another reason for the durability of the current system is also that powerful forces are in favor of the status quo. Many current judges, often elected unopposed or enjoying the support of a political party, see no reason to change. The political parties often see judicial offices as a source of patronage and as agents to achieve policy goals. (Both political parties successfully opposed the 1987 initiative.) Similarly, interest groups across the ideological spectrum have opposed change, given the perception (and perhaps the occasional reality) that the current system leads to judges who they consider to be reliable supporters of their policy positions. Some of these groups unapologetically refer to judges as policymakers and argue that they should be elected, like those in the other branches.8

Despite these formidable barriers, some progress has been made. Two recent Governors (Gilligan and Strickland) have established screening commissions to enable them to fill judicial vacancies by inviting nominations from anyone, no matter her political background, followed by selection at least ostensibly on a merit-basis. The Cleveland Metropolitan Bar Association has established a bipartisan committee to evaluate judicial candidates to aid voters. Sen. Bill Seitz of Cincinnati has in the past introduced legislation which would have institutionalized a form of merit selection, to make recommendations to aid Governors when they fill judicial vacancies.

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[6] OCFC Report at 90.

' OCFC Report at 90-91. A later report by then- Justice Evelyn Lundberg Stratton, Election vs. Political Appointment of Judges: A Counterpoint to the Merit Selection Debate (2010), elaborated on these criticisms.

[8] See, e.g., Letter from Mike Gonidakis & Mark Lally, Ohio Right to Life, to Chief Justice Thomas Moyer & Governor Ted Strickland (December 11, 2009)(on file with author)(opposing any constitutional amendment which would change "the power of the people of Ohio to directly elect judges in contested elections," in part because merit selection "insulates" judges and it is "the role of the people to decide who their policymakers should be.")

But the status quo remains largely intact. The successors to the governors mentioned abandoned the screening commissions, returning to the usual practice of filing vacancies almost exclusively from members of their own parties. (To he fair, some recent governors, including Taft and Kasich, have established party committees to offer recommendations regarding the quality of multiple candidates to fill a vacancy.) Sen. Seitz' bills did not pass. The Cincinnati Bar Association recently discontinued its long-standing practice of releasing the ratings of lawyers on judicial candidates, for the asserted reason that the news media paid no attention to the results.9

4. Reforms, Constitutional and Otherwise

Many states other than Ohio have struggled in recent decades with the perceived deficiencies of judicial elections and what, if anything, to do about it. About 29 states use the merit plan and/or an appointive system, usually combined with retention elections, to select at least some of their judges. The rest use partisan or nonpartisan elections. Ohio is usually listed as a nonpartisan election state though it (and Michigan) is in the unique situation of combining partisan primaries with nonpartisan general elections. The adoption of merit plans stalled in the 1980s; since then, most activity has been states switching from partisan to nonpartisan elections.1°

Ohio has been discussing possibly changing judicial selection for the better part of the past three decades. There seems to be some support for some change, yet the support fades once specific proposals are advanced. Significant change of the current system has been rejected by voters and resisted by elected officials and a variety of interest groups. The obvious conclusion is that incremental change, at best, is the only option.

One path would be to build upon the fact that most Ohio judges are initially appointed to their positions to fill a vacancy, and that most Ohio judges run for election unopposed. As noted above, Chief Justice O'Connor has proposed serious discussion of the options of Ohio adopting some version of merit selection for filling judicial vacancies, Likewise, she has proposed for discussion the initial appointment of judges, presumably followed by periodic retention elections, at least for the Supreme Court Justices.

These reforms would require amending the Ohio Constitution. In my view they are worth serious consideration by this committee. The appointment/election process has been used with success in many other states. It has the virtue of promoting qualified lawyers, picked by nonpartisan or bipartisan commissions, and insures accountability by voters through the subsequent retention election. The system would not "take away" the right to vote, but rather *restore* the vote for judicial races. All judges would need to run in a retention election and receive a majority or supermajority of votes to retain office. As noted above, many current judges run unopposed or face no meaningful opposition, or are initially appointed without an election in the first instance. Retention elections would improve public accountability for many judges.

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[9] Jean Geoppinger McCoy, "Are They? Are There? Do You?," CBA Report, at 4 (October 2013).
[10] For useful overviews of these developments, see G. Alan Tarr, Without Fear or Favor: Judicial Independence and Judicial Accountability in the States (Stanford University Press 2012); Rebecca D. Gill, "Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States," 96 Judicature 278 (2013).

Some critics of the appointive/election system claim, largely on the basis of anecdotal evidence in other states, that the appointment commissions would be dominated by lawyers or other special interests. This has not been the case in most instances, and need not be true in Ohio. The commissions and other aspects of the process can and should be constituted and administered in fair and transparent ways, based on the guidelines of the American Judicature Society. Both judicial impartiality and accountability to voters are important principles, and the appointment/election process is a way to accomplish both. Indeed, some critics of the merit/ retention election system often either endorse full-fledged competitive elections, *or* the federal system of executive nomination and legislative confirmation!' We should take them at their word and refer to them as supporters of gubernatorial appointment of judges (for the Supreme Court, and perhaps all appellate judges), with confirmation by the Ohio Senate.

Other reforms are worthy of continued public debate, but do not need to be reflected in amendments to the constitution. They can be enacted by the legislature, voluntarily adopted by the Governor (for filling vacancies), or the political parties, or judicial candidates themselves, or adopted by rulemaking by the Supreme Court. Such reforms include public financing of judicial campaigns, modifying recusal standards when judges receive large campaign contributions, and limiting candidate statements during judicial campaigns.12

## 5. Conclusion

In my view, most state judges in Ohio are well-qualified and take their oaths of office seriously, and decide most cases fairly and free of political pressure. [13] But this is despite, not because of, the current selection system. No system of judicial selection is perfect, but some systems are better than others. The judicial office is significantly different from the other branches of government to justify different methods of selection, other than competitive elections. This committee should seriously consider some changes to the current system, including (1) the gubernatorial appointment of Supreme Court Justices with Senate confirmation, followed by later retention elections, and (2) some version of an appointive system with merit components to guide governors in filling judicial vacancies.

Thank you for considering these views.

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[11] E.g., Stephen J. Ware, "The Missouri Plan in National Perspective," 74 Missouri Law Review 751, 772-74 (2009); Federalist Society, "Judicial Selection While Papers: The Case for Judicial Appointments," reprinted in 33 University of Toledo Law Review 353 (2002).

[12] I take no stand on the legality or desirability of such reforms for purposes of this testimony.

[13] For an overview of the empirical evidence of the effect of different methods of selection on decision-making by state judges, see Richard B. Saphire & Paul Moke, "The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate," 39 University of Toledo Law Review 551 (2008). In prior work I have supported the argument that, on the whole, elected state judges (including those in Ohio) are capable of fairly and fully adjudicating federal constitutional and statutory rights, much like their life-tenured federal court brethren. Michael E. Solimine & James L. Walker, Respecting State Courts: The Inevitability of Judicial Federalism (Greenwood Press 1999); Michael E. Solimine, "The Future of Parity," 46 William and Mary Law Review 1457 (2005). I adhere to that view but still maintain that improvements in judicial selection in both systems are desirable and possible.