



December 11, 2009

Chief Justice Thomas J. Moyer
Supreme Court of Ohio
65 S. Front St.
Columbus, OH 43215

Governor Ted Strickland
Riffe Center, 30th Floor
77 South High Street
Columbus, OH 43215-6108

Dear Chief Justice Moyer and Governor Strickland:

We are writing to express Ohio Right to Life Society's opposition to any constitutional amendment which would remove the power of the people of Ohio to directly elect judges in contested elections.

The appointive-retention system proposed at the recent Joyce Foundation conference you participated in would remove the power to directly elect Supreme Court justices from the voters and give it to others, such as a commission that would nominate a list of individuals from whom the Governor would make an appointment. The only role for the electorate would be to vote whether or not to retain the appointed judge at periodic intervals after appointment.

Under this system, voters accustomed to making comparisons and voting for the better candidate would only be able to remove a judge by voting against him or her without knowing who would be selected as a replacement. Although many have called for more "positive" judicial campaigns, this system will require opponents of a judge's retention to run a purely "negative" campaign.

With no alternative candidate presented and no assurance that the replacement would be an improvement, appointed judges would be extremely difficult to unseat. The experience of states that currently use an appointive-retention system is that judges are rarely, if ever, defeated in "retention" elections. Indeed, a 2007 study in *Judicature* found that only 56 of the 6,306 judicial retention elections between 1964 and 2006 resulted in a judge not being retained. Thus, the power of the voters under this system is largely illusory.

Such a system is sometimes called "merit selection". But the characteristics that "merit" a judicial position under such a system would inevitably reflect the views and values of an elite – those who make the selection – rather than the general public. The current system permits the people to consider not only academic achievement and professional reputation, but also which candidate is more or less likely to view the role of a judge as one which involves making policy and what policies such a candidate would be likely to impose.

Proponents of “merit selection” argue that it will decrease the chances that the courts could be “over-politicized” or perceived as being “bought” by big money interests. However, there is another form of abuse of judicial power which is more common and which represents a far greater threat to democratic values. That abuse is the notion of some judges that they can “make the law”. This abuse finds its worst expression in the fabrication of “constitutional” doctrines designed to invalidate legislation which the judge does not consider desirable.

So-called “merit selection” does not eliminate the abuse of judges “making the law” - it insulates it. It is clearly the role of the people to decide who their policymakers should be. Thus, as long as some judges behave as if they can make public policy, they should be elected by the voters. We are under no illusions that even elected judges will not sometimes exceed their proper role. As the ultimate interpreters of the meaning of the state constitution, state Supreme Court judges who are willing to step beyond fair and reasoned interpretation can become the ultimate policymakers in our state government. As long as judges are human, the temptation of ultimate power may prove irresistible to some, regardless of how they were chosen.

However, in our system, one of the deterrents to abuse of power is the existence of checks and balances. In the case of state Supreme Court justices intentionally distorting the state constitution, there are very few checks. Constitutional amendments and impeachment are intentionally difficult and will rarely be used. The only other check on the judge’s power is removal by the electorate. This check is far more viable in the context of a contested election than a retention election.

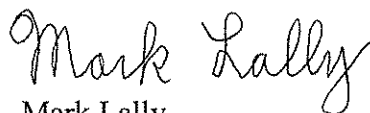
At least, when the people choose judges in the same type of direct, contested elections that elect legislators and executives, there is less chance that, over time, the policies imposed by judges will totally depart from those selected by the legitimate policymakers.

For these reasons, we have concluded that the existing system of direct election of judges by the people in contested elections is preferable to any appointment system, and therefore, Ohio Right to Life is opposed to the adoption of any appointment or “merit selection” system for Ohio judges.

Sincerely,



Mike Gonidakis
Executive Director



Mark Lally
Legislative Counsel