



Ohio Judicial Conference

The Voice of Ohio Judges

House Bill 149
Opponent Testimony
House Government Oversight Committee
March 25, 2021

Chair Wilkin, Vice Chair White, Ranking Member Sweeney, and Members of the Committee:

I am Paul Pfeifer, Executive Director of the Ohio Judicial Conference. The Judicial Conference was created by statute in 1963, for the purpose of studying the co-ordination of the work of the courts of Ohio, the encouragement of uniformity in the application of the law, rules, and practice throughout the state and within each division of the courts as an integral part of the judicial system of the state, to promote an exchange of experience and suggestions respecting the operation of the judicial system, and in general to consider the business and problems pertaining to the administration of justice and to make recommendations for its improvement. The Judicial Conference represents the interest of Ohio's 723 judges at all levels of the court system.

The Judicial Conference is opposed to House Bill 149.

While we appreciate the sponsors' interest in bringing attention to judicial races, and how to improve voter "drop off" in these races, I would note that this proposal is not one that judges are asking for, nor were we consulted for our thoughts before its introduction.

Proponents of the bill contend that it simply gives voters more information about the candidates they are considering. Judges certainly would like to see voters have as much information as possible regarding judicial candidates, but H.B. 149 does not give voters a complete, or even an accurate, picture of the candidates before them. There are many aspects of a judicial candidate that

voters might want to, and perhaps should, take into account: the candidates' education, their experience, their judicial ideologies, whether would employ a textualist or originalist approach to interpreting statutes or the Constitution. All of these are factors that voters can and should take into account. However, H.B. 149 instead focuses instead on only one criterion, party affiliation, which is wholly irrelevant to the work of a judge. Educating voters on judicial candidates is a laudable and worthwhile goal. But limiting this education to simply putting a D or an R next to a candidate's name does a disservice to voters, and does little to bring to light the factors that actually make for a good judge.

Proponents also contend that adding party affiliation to the general election ballot will reduce voter drop-off on these down-ballot judicial races. While certainly we would like to see more people voting in judicial races, we do not believe that adding party identification is the proper way to do that. Right now, we know that many voters do not vote for judicial candidates because they simply do not know enough about the candidates. It could be assumed then that those who do vote in those races do so *because* they have researched the candidates and feel confident in making a choice. The bill assumes that adding party affiliation will solve the drop-off problem. But is making a choice based solely on whether the candidate is a Republican or a Democrat really how we want voters to make these decisions? If anything, adding party affiliation could *discourage* voters from seeking out information on judicial candidates and coming to their own conclusions, instead encouraging them to rely simply on the "D" or the "R" next to the candidates' names to tell them everything they need to know.

Drop-off in judicial races is not a new problem, but I am not sure that it is as problematic as it might initially seem. It is true that fewer people vote in judicial elections than in other, higher profile, partisan statewide races. But when you look at the votes received by these non-partisan statewide judicial candidates, you will see an interesting result: those winning candidates often receive the same number of votes, or sometimes more votes, than the candidates in statewide partisan races. For example, just last November, the two winning Supreme Court candidates, Justices Kennedy and Brunner, received 2.73 million votes and 2.69 million votes, respectively. While this was fewer than the 3.15 million votes President Trump received, it was roughly the same as, or slightly more than, the nearly 2.68 votes that President Biden received. In 2018, now-Justice Donnelly received 2.17 million votes, which is about in the middle of the number of votes received by the winning and losing candidates in each of the statewide partisan races that year. In my last contested race for the

Supreme Court in 1998, I received 1.94 million votes, and Chief Justice Moyer received 1.99 million votes, both of which were more than either of the major party candidates for governor.

The absence of partisan affiliation is not the primary reason why voters tend to drop off from judicial races. While drop off does exist in general elections, it also exists in the partisan primary elections, where all candidates on the ballot share the same political affiliation. 2016 was the last year that Ohio saw both a contested presidential nomination at the top of the ticket and a contested Supreme Court nomination on the same primary ballot (in this case, the Republican primary). In that primary, 3.3 million people voted for a presidential nominee, while 1,403,819 people voted in the contested Supreme Court race. Drop-off occurred, and not because the voter did not know what party the judicial candidates belonged to. It thus cannot be said that a lack of party affiliation caused that precipitous drop off in votes, but rather a broader unfamiliarity with judicial candidates.

Much has been made of the fact that Ohio has a unique system whereby judges are nominated in partisan primaries, yet run in non-partisan races for the general election. And while this is not a perfect system, and we are the only state that has such a system in place (although Michigan has a similar system for open Supreme Court races), a fully partisan system is a move in the wrong direction. Currently, only 6-7 other states elect their supreme court justices and appellate court judges in partisan elections. The vast majority of states select their judges either through non-partisan elections, or through some sort of appointment process. This bill would only put Ohio in the small minority of states to elect their judges on a partisan ballot.

I think we also need to pay attention to the distinction between partisan *elections* and a partisan *judiciary*. Interested parties can debate back and forth over the merits of partisan or non-partisan elections of judges. But I think all can agree that we do not want a partisan judiciary, or for our judges to act and make their decisions in a partisan manner, or even to create the *appearance* that judges are acting in a partisan manner. Simply put though, that is what this bill will do.

The integrity of any judicial system demands impartiality. Partisan elections can imply that judges are beholden to the interests of their party, and not to the law. Canon 4 of the Ohio Code of Judicial Conduct provides that judges “shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.” The Comment to this canon reads,

“Though subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of each case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. Canon 4 imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates.”

And further, *“Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence.”*

Judicial candidates are already greatly limited in what they can and cannot say regarding issues of policy and matters that might come before them on the bench. It would be prejudicial to require judges to run as a member of a political party, while at the same time limiting (rightfully so) what they can express as to their political views. To the extent this is not allowed, the public is left to assume that the views of the judge are as expressed by the current positions or platform of the political party that appears after their names. Obviously many judges are affiliated with a party, but do not necessarily agree with certain positions of the party. To require that the judge be promoted as a party candidate but prohibit them from expressing anything that may distinguish their views from a current local, state, or federal administration seems unduly prejudicial to the judicial candidate.

Simply put, judges are constitutionally, ethically, and morally obligated to be neutral. Our judges render their decisions and judgments based on the law and the facts. Our judges go to great lengths to avoid even the appearance of partiality. We believe that H.B. 149 would not only go against the very Canons of Judicial Conduct that exist for the purpose of ensuring a fair and impartial judiciary, but would also erode public confidence in our judicial system.

For all of these reasons, I urge this Committee not report House Bill 149.

Thank you.

Breakdown of Election Results – 1992-2020

Source: Secretary of State

2020 (presidential year)

Total votes counted statewide: 5,974,121

President (Total: 5,922,202)

- Biden: 2,679,165
- Trump: 3,154,834

Supreme Court (Total: 4,966,765)

- Kennedy: 2,735,041
- O'Donnell: 2,231,724

Supreme Court (Total: 4,869,892)

- Brunner: 2,695,072
- French: 2,174,820

2018 (gubernatorial/statewide official year)

Total votes counted statewide: 4,503,116

Governor (DeWine vs. Cordray): 4,435,820

- Dewine: 2,235,825
- Cordray: 2,070,046

Attorney General (Yost vs. Dettelbach): 4,363,129

- Yost: 2,276,414
- Dettelbach: 2,086,715

Auditor (Faber vs. Space): 4,340,920

- Faber: 2,156,663
- Space: 2,008,295

Secretary of State (LaRose vs. Clyde): 4,369,956

- LaRose: 2,214,273
- Clyde: 2,052,098

Treasurer (Sprague vs. Richardson): 4,332,619

- Sprague: 2,308,425
- Richardson: 2,024,194

Supreme Court (Donnelly vs. Baldwin): 3,560,546

- Donnelly: 2,172,912
- Baldwin: 1,387,634

Supreme Court (Stewart vs. DeGenaro): 3,525,473

- Stewart: 1,855,469
- DeGenaro: 1,670,004

2016 General Election

Total votes cast: 5,607,641

Votes for president: 5,496,487 (includes third party and write-in)

- Trump: 2,841,005
- Clinton: 2,394,164

Chief Justice

- O'Connor (unopposed): 3,562,413

Supreme Court (4,067,498 total)

- Fischer: 2,044,984
- O'Donnell: 2,022,514

Supreme Court (4,331,091 total)

- DeWine: 2,438,641
- Rice: 1,892,450

2014 General Election

Total votes cast: 3,149,876

Governor (3,055,913 total)

- Kasich: 1,944,848
- FitzGerald: 1,009,359

Supreme Court (2,520,186 total)

- Kennedy: 1,828,156
- Letson: 692,030

Supreme Court (2,571,042 total)

- French: 1,438,283
- O'Donnell: 1,132,759

2012 General Election

Total votes cast: 5,634,017

President (total: 5,580,939)

- Obama: 2,827,709
- Romney: 2,661,439

Supreme Court (total: 4,057,395)

- O'Donnell: 2,804,680

- Skindell: 1,252,715

Supreme Court (total: 4,028,766)

- O'Neill: 2,115,892
- Cupp: 1,912,874

Supreme Court (total: 4,117,127)

- Kennedy: 2,347,960
- McGee Brown: 1,769,167

2010 General Election

Total votes cast: 3,956,045

Governor (total votes cast: 3,852,469)

- Kasich: 1,889,186
- Strickland: 1,812,059

Chief Justice (total: 3,303,414)

- O'Connor: 2,232,724
- Brown: 1,070,690

Supreme Court (total: 3,032,994)

- Lanzinger: 1,717,889
- Trapp: 1,315,105

Supreme Court

- Pfeifer (unopposed): 2,384,122

2008 General Election

Total votes cast: 5,773,777

President (total: 5,708,350)

- Obama: 2,940,044
- McCain: 2,677,820

Supreme Court (total: 4,424,372)

- O'Connor: 2,970,588
- Russo: 1,453,784

Supreme Court (total: 4,218,658)

- Stratton: 2,664,137
- Sikora: 1,554,521

2006 General Election

Total votes cast: 4,185,597

Governor (total: 4,022,928)

- Strickland: 2,435,505
- Blackwell: 1,474,331

Supreme Court (total: 3,244,960)

- O'Donnell: 1,903,702
- O'Neill: 1,341,258

Supreme Court (total: 3,217,839)

- Cupp: 1,712,584
- Espy: 1,505,255

2004 General Election

Total votes cast: 5,722,443

President (total: 5,627,908)

- Bush: 2,859,768
- Kerry: 2,741,167

Chief Justice (total: 4,432,021)

- Moyer: 2,358,135
- Connally: 2,073,886

Supreme Court – unexpired term (total: 4,232,436)

- O'Donnell: 2,560,609
- O'Neill: 1,671,827

Supreme Court

- Pfeifer (unopposed): 3,384,192

Supreme Court (total: 4,386,925)

- Lanzinger: 2,500,966
- Fuerst: 1,885,959

2002 General Election

Total votes cast: 3,356,285

Governor (total: 3,228,701)

- Taft: 1,865,007
- Hagan: 1,236,924

Supreme Court (total: 2,986,170)

- O'Connor: 1,709,673
- Black: 1,276,497

Supreme Court (total: 3,889,577)

- Stratton: 1,599,165
- Burnside: 1,290,412

2000 General Election

Total votes cast: 4,795,989

President (total: 4,705,457)

- Bush: 2,351,209
- Gore: 2,186,190

Supreme Court (total: 3,880,694)

- Cook: 2,013,140
- Black: 1,867,554

Supreme Court (total: 4,052,589)

- Resnick: 2,312,073
- O'Donnell: 1,740,516

1998 (gubernatorial/statewide official year)

Total number of votes counted: 3,534,782

Governor (Taft vs. Fisher): 3,354,213

- *Taft: 1,678,721*
- *Fisher: 1,498,956*

Chief Justice (Moyer vs. Tyack): 2,768,224

- Moyer: 1,997,455
- Tyack: 770,769

Justice of the Supreme Court (Total: 2,727,352)

- Sweeney: 1,677,791
- Powell: 1,049,561

Justice of the Supreme Court (Total: 2,729,019)

- Pfeifer: 1,947,916
- Suster: 781,103

1996 General Election

President (total: 4,534,434)

- Clinton: 2,148,222
- Dole: 1,859,883

Supreme Court (total: 3,368,707)

- Douglas: 2,230,601
- Sikora: 1,138,106

Supreme Court (total: 3,444,211)

- Stratton: 2,016,264
- Bettman: 1,427,947

1994 General Election

Governor (total: 3,346,238)

- Voinovich: 2,401,572
- Burch: 835,849

Supreme Court (total: 2,706,849)

- Cook: 1,842,063
- Haffey: 864,786

Supreme Court (total: 2,789,204)

- Resnick: 1,645,061
- Harper: 1,144,143

1992 General Election

President (total: 4,939,967)

- Clinton: 1,984,942
- Bush: 1,894,310

Chief Justice (total: 3,800,788)

- Moyer: 1,775,596
- Gorman: 1,670,248
- Haffey: 354,944

Supreme Court (total: 3,847,161)

- Sweeney: 2,008,854
- Painter: 1,838,307

Supreme Court (total: 3,801,080)

- Pfeifer: 2,015,865
- Patton: 1,785,215