



Ohio Judicial Conference

The Voice of Ohio Judges

Senate Bill 80
Opponent Testimony
Senate Local Government and Elections Committee
March 23, 2021

Chair Gavarone, Vice Chair O'Brien, Ranking Member Maharath, 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 Senate Bill 80.

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 S.B. 80 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, S.B. 80 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.

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.”*

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 S.B. 80 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 S.B. 80.

Thank you.