Merit Selection of the Ohio Judiciary: An Analysis of S.J.R. 6 and a Proposal for Implementation

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The Ohio constitution provides for popular election of judges to the supreme court, the courts of appeals, and the courts of common pleas. Senate Joint Resolution Six is a proposed amendment which would convert the state's judicial selection process to a "merit plan," under which judges are appointed by the Governor from a list of candidates recommended by a nominating commission. The author analyzes S.J.R. 6, which he supports in principle, and suggests amendments which would improve its operation. He then proposes a legislative program designed to fully implement the merit plan concept.

... I'll tell you how I came to be a judge.
When I, good friends, was called to the bar
I'd an appetite fresh and hearty,
But I was, as many young barristers are,
An impecunious party.  .  .  .
But soon I got tired of third class journeys,
And dinners of bread and water;
So I fell in love with a rich attorney's
Elderly, ugly daughter.  .  .  .
The rich attorney, he jumped with joy,
And replied to my fond professions:
"You shall reap the reward of your pluck, my boy,
At the Bailey and Middlesex Sessions.  .  .  ."
The rich attorney was good as his word;
The briefs came trooping gaily,
And every day my voice was heard
At the sessions or Ancient Bailey.  .  .  .
At length I became as rich as the Gurneys—
An incubus then I thought her,
So I threw over that rich attorney's
Elderly, ugly daughter.
... For now I'm a judge!  .  .  .**

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** W. GILBERT & A. SULLIVAN, TRIAL BY JURY (Libretto, Decca Record Co., 1975).
INTRODUCTION

THE METHODS BY WHICH STATE JUDGES are selected and their tenure determined have been subjects of increasingly fierce debate in recent years.\(^1\) Several states have abandoned provisions in their earliest constitutions which authorized legislative or executive appointments to judicial offices in favor of direct election of judges.\(^2\) At the same time, a growing number of legislators, citizen's groups, and judges have urged that popular election of judges is not only an imperfect procedure for selecting competent jurists, but that it is also counterproductive.\(^3\) During the last thirty years, several states have discarded the elective process in favor of merit selection, a procedure by which judicial vacancies are filled through appointments.\(^4\)

Although Ohio judges continue to be selected through the elective process,\(^5\) this state was one of the first to consider merit selection.\(^6\) There have been several legislative proposals, none of which has been successful, to amend the Ohio constitution to provide for merit selection of our appellate judiciary.\(^7\) The latest legislative effort is Senate Joint Resolution Number 6,\(^8\) which is presently pending in the Ohio Senate. If enacted by both houses of the General Assembly, this legislation would submit to the voters the question whether the constitution should be amended to permit the appointment of Justices of the Ohio Supreme Court and judges of the Ohio Courts of Appeals by the Governor, subject to confirmation by the Ohio Senate, from a list of nominees recommended by a judicial nominating commission.

The purpose of this article is to demonstrate that merit selection is a worthy concept which, if adopted, would improve the Ohio judiciary.\(^9\)

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1. See section II infra.
2. E.g., Georgia (Ga. Const. art. III, § 4 (1812)), and Mississippi (Miss. Const. art. IV, §§ 2, 11, 16 (1832)).
4. E.g., Missouri (Mo. Const. art. V, § 29(a)), and Kansas (Kan. Const. art. III, §§ 2, 8, 9).
5. Ohio Const. art. IV, § 6.
8. S.J.R. 6, 112th Gen. Assem. (1977) [hereinafter referred to as S.J.R.6] (Introduced February 2, 1977 by Senators Hall, Celebrezze, Millerson, Roberto, Cox, and Bowen). See Appendix. The bill was referred to the Senate Judiciary Committee and hearings were held on May 18, June 14, and June 22, 1977. The committee has not yet submitted a report to the senate.
9. In this article, the term "judge" will be used in a selective sense. There are a number of judicial positions and functions which are of such a limited nature that they
The legislation will be analyzed and amendments proposed to improve it. Finally, a proposal will be offered for implementing a comprehensive merit plan in this state.

I. BRIEF HISTORY OF JUDICIAL SELECTION

A. The American Experience

The history of the methods by which state judges have been selected in this country has been exhaustively treated elsewhere. In order to place S.J.R. 6 in perspective, however, there should be some mention here of the major developments in the nation and in Ohio which account for the present state of the law.

At the beginning of the republic, all of the original states provided for judicial selection by means other than popular election. Some state constitutions authorized the Governor to appoint all judges in conjunction with the legislature or council, while others provided that judges be appointed by one or both houses of the legislature. Thus, the founding fathers apparently did not countenance direct, popular election of judicial officers; rather, they favored the English practice of appointment, but opposed the absolute control of the crown resulting from the fact that judges served at the pleasure of the monarch. That pleasure was usually offended when the judiciary did not support the crown.

have been excluded from the analysis and proposal that follow. The term "judge" is herein defined to mean a person elected to a court of general jurisdiction which is not less than that exercised by a municipal court. Thus, the supreme court, the courts of appeals, the courts of common pleas and the municipal courts are included; county courts, mayor's courts, and police courts are not. See OHIO REV. CODE ANN. §§ 1903.01–.96 (police courts), 1905.01–.37 (mayor's courts), 1907.01–.47 (county courts) (Page 1968).


11. E. Haynes, supra note 10, at 98.


13. Connecticut, Rhode Island, New York, Virginia, North Carolina, South Carolina, and Georgia. Id. at 1082 n.3.

14. This sentiment is reflected in the Ninth Specification of the Declaration of Independence, which includes the following indictment of the King: "He has made Judges dependent of his Will alone, for the tenure of their offices, and the amount of payment of their salaries."
In the early nineteenth century, a trend developed toward removing the authority of public officials to appoint judges. This development has been attributed to the brand of populism which led to the election of President Andrew Jackson in 1824 and ushered in the era of Jacksonian Democracy. It has also been suggested, however, that other factors were involved. First, the decision of the Supreme Court in *Marbury v. Madison,* that the judiciary had constitutional authority to review legislative enactments, caused some to call for an end to the practice of legislative selection of judges. Second, the judiciary developed the image of being insensitive and hostile to the poor. Third, public officials empowered to select judges used appointments to the judiciary as rewards within the political spoils system and appointments were made according to political expediency. Finally, the judiciary was perceived as lazy and ineffective because it often took years for cases to wend their way through the courts. In 1832, Mississippi became the first state to amend its constitution to provide for direct election of all judges. New York followed suit fourteen years later and, thereafter, the trend toward direct election quickly gained momentum, resulting in the widespread adoption of direct election provisions in new as well as existing states.

Almost as soon as the election process became entrenched, it became the subject of criticism from lawyers and laymen alike. The industrialization which followed the Civil War brought with it the rise of powerful political parties. This development placed such political power in the hands of party leaders that the selection of judges in effect was made by these leaders, rather than by the free choice of the electorate. In addition, as the legal profession grew in numbers and organization, there developed increased frustration with the elective system among lawyers because of the limited amount of influence

15. Georgia began electing some lower court judges in 1812. See Winters, supra note 10, at 1082 n.7.
17. 5 U.S. (1 Cranch) 137 (1803).
22. MISS. CONST. art. IV, §§ 2, 11, 16 (1832); see Winters, supra note 10, at 1082.
23. See Winters, supra note 10, at 1082.
25. Winters, supra note 10, at 1083.
which could be exercised by the profession upon judicial selection.\(^\text{27}\)

Shortly after the turn of the century, such notables as Roscoe Pound and former President William Howard Taft were calling for the abandonment of popular elections for judges.\(^\text{28}\) The founding of the American Judicature Society in 1913 was based in part on the profession's growing support for reform and served as a forum for advocacy against judicial politics.\(^\text{29}\) The reform movement culminated in the endorsement by the American Bar Association of the principle of merit selection of judges in 1937\(^\text{30}\) and the adoption, three years later, of the first merit plan by the state of Missouri.\(^\text{31}\) In essence, the plan provided that certain judges would be selected from nominees recommended to the Governor by a nonpartisan nominating commission.\(^\text{32}\) The members of the nominating commission were themselves appointed by the Governor and were charged with the responsibility of reviewing the qualifications of those persons available to fill vacancies on the bench.\(^\text{33}\)

Since 1940, sixteen states have enacted legislation containing some elements of the Missouri Plan, as it has become known.\(^\text{34}\) These plans

\(^{27}\) Id. at 8.

\(^{28}\) Pound, The Causes of Popular Dissatisfaction With the Administration of Justice (1906), reprinted in 46 J. AM. JUD. SOC'Y 55 (1962). Taft's often quoted remarks were contained in a speech delivered to the 1913 meeting of the American Bar Association. See 38 A.B.A. REP. 418 (1918).

\(^{29}\) R. WATSON & R. DOWNING, supra note 24, at 8.

\(^{30}\) 62 A.B.A. REP. 893 (1937). By this time Messrs. Laski and Kales had made their very significant contributions to the literature on this subject. Kales is credited with the development of the first refined proposal for combining certain features of the appointive and elective processes for the selection of judges. See A. KALES, supra note 10. In 1926, Professor Laski proposed variations on the Kales model which were incorporated into the ABA resolution adopted eleven years later. See Laski, supra note 10.

\(^{31}\) MO. CONST. art. V, § 29(a). See note 56 infra. California amended its constitution in 1934 to provide for a form of merit plan. It differed from the Missouri Plan in that it provided for a confirming rather than a nominating body and applied only to appellate courts. CAL. CONST. art. VI, § 26, cited in Winters, supra note 10, at 1085.

\(^{32}\) R. WATSON & R. DOWNING, supra note 24, at 13.

\(^{33}\) Id.

\(^{34}\) The following states presently employ some type of merit plan for selection of judges: Alabama (ALA. CONST. art. VI, §§ 152, 153); Alaska (ALASKA CONST. art. IV, §§ 5–8; ALASKA STAT. §§ 22.05.070–100, 22.10.090–150, 22.15.160–195 (1976)); Arizona (ARIZ. CONST. art. VI, §§ 12, 30, 36, 37); Colorado (COLO. CONST. art. VI, §§ 20, 24); Indiana (IND. CONST. art. VII, §§ 9, 10, 11; IND. CODE ANN. §§ 4-7801–18 (Burns Supp. 1972)); Iowa (IOWA CONST. art. V, § 3; IOWA CODE ANN. §§ 46.1-46.24 (West Supp. 1977)); Kansas (KAN. CONST. art. III, §§ 2, 8); Massachusetts (MASS. CONST. pt. II, ch. 3, art. 1; Exec. Order No. 114 (1975); Opinion of the Justices to Council, 334 N.E.2d 604 (1975)); Missouri (MO. CONST. art. V, §§ 29(a)–(e)); Nebraska (NEB. CONST. art. V, § 21); New York (N.Y. CONST. art. VI, §§ 2, 22); Oklahoma (OKLA. CONST. art. VII, §§ 3, 6, 8, 9, 10); Tennessee (TENN. CONST. art. VI, §§ 3, 4; TENN. CODE ANN. §§ 17-103, 17-701–16 (Supp. 1976)); Utah (UTAH CONST. art. VIII, § 3; UTAH CODE ANN. §§ 20-1.7.1–1.7.9
provide for the appointment of some or all judges by means other than direct election. Other states provide for legislative or gubernatorial appointment of judges, but candidates are not chosen from nominees selected by a nominating commission. A majority of the states, however, still employ some form of popular election as the chief method of selecting judges. In some states, these elections are part of the partisan political process. In others, nonpartisan elections, sometimes held at times other than partisan elections, are utilized to select judges.


35. For example, in Missouri judges sitting on the supreme court, court of appeals, certain county courts and the St. Louis Courts of Criminal Correction are appointed. All other state judges are elected. Mo. CONST. art. 5, § 29(a).


Five states select judges by gubernatorial appointment: Delaware (DEL. CONST. art. IV, § 3); Hawaii (HAW. CONST. art. V, § 3); Maine (ME. CONST. art. V, pt. 1, § 8; ME. REV. STAT. ANN. tit. 4, § 157 (West Supp. 1977)); and New Hampshire (N.H. CONST. pt. 2, art. 46 (recent legislative effort to create a judicial nominating commission held unconstitutional under this Article, Opinion of the Justices, 335 A.2d 642 (1975))); and New Jersey (N.J. CONST. art. VI, § 6, ¶ 1).

37. Twenty-five states elect judges to office: Arkansas (ARK. CONST. art. VII, §§ 6, 17, 29, 38; ARK. STAT. ANN. §§ 22-200, 22-409, 22-703, 22-810 (1962)); California (CAL. CONST. art. VI, §§ 3, 8, 16, 26); Florida (FLA. CONST. art. V, § 10); Georgia (GA. CONST. art. VI, §§ 2-3103, 2-3108, 2-3202); Idaho (IDAHO CONST. art. V, §§ 6, 11, 19; art. VI, § 7); Illinois (ILL. CONST. art. VI, § 12); Kentucky (KY. CONST. §§ 99, 114, 115, 116, 129, 142); Louisiana (LA. CONST. art. V, §§ 4, 9, 22); Maryland (MD. CONST. art. IV, §§ 3, 14, 31, 40, 41D); Michigan (MICH. CONST. art. VI, §§ 2, 8, 12, 16); Minnesota (MINN. CONST. art. VI, § 7); Mississippi (MISS. CONST. art. VI, §§ 145, 145A, 145B); Montana (MONT. CONST. art. VIII, §§ 6, 8, 12, 19, 20; MONT. REV. CODES ANN. §§ 93-201, 93-302, 93-401 (Supp. 1977)); Nevada (NEV. CONST. art. VI, §§ 3, 5, 8, 9, 18); New Mexico (N.M. CONST. art. VI, §§ 4, 12, 28); North Carolina (N.C. CONST. art. IV, § 16; N.C. GEN. STAT. §§ 7A-10 (1969), 7A-16 (Supp. 1977), 7A-140 (1969)); North Dakota (N.D. CONST. art. IV, §§ 91, 93); Ohio (OHIO CONST. art. IV, § 6); OHIO REV. CODE ANN. §§ 2501.02 (Page Supp. 1977), 2503.02, 2503.03 (Page 1954)); Oregon (OR. CONST. art. VII §§ 2, 11, OR. REV. STAT. §§ 252.010–252.080 (1977)); Pennsylvania (PA. CONST. art. V, § 13); South Dakota (S.D. CONST. art. V, § 7; S.D. CODE §§ 16-1-2, 16-6-3 (Supp. 1977)); Texas (TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18; TEX. STAT. ANN. tit. 1715 (Vernon 1962), tit. 58, art. 1801, tit. 39, art. 1813 (Vernon 1964)); Washington (WASH. CONST. art. IV, §§ 3, 5; WASH. REV. CODE ANN. §§ 2.04.071 (Supp. 1976), 2.08.060 (1961)); West Virginia (W. VA. CONST. art. VIII, §§ 2, 5, 10; W. VA. CODE §§ 3-1-16, 3-1-17 (1971)); Wisconsin (WIS. CONST. art. VII, §§ 2, 4, 7, 9, 14, 15).

38. E.g., Arkansas (ARK. CONST. art. 7, §§ 6, 17, 29, 38; ARK. STAT. ANN. §§ 22-409, 22-703, 22-810 (1962)); and Pennsylvania (PA. CONST. art. 5, §§ 13, 15; PA. STAT. ANN. tit. 17, §§ 2, 111 (Purdon 1962)).
In several states, legislatures and civic groups have recently considered enacting or expanding the merit plan concept. 40

B. Judicial Selection in Ohio

Ohio history indicates that this state was in step with its predecessors in initially accepting and later rejecting the appointment process for the judiciary. 41 Prior to Ohio's admission to the Union in 1803, the Governor and the state's three judges were appointed first by the Congress and later by the President. 42 The Constitution of 1802 provided for appointment of all judges by joint resolution of both houses of the General Assembly. 43 This remained the case until 1851, when the populist spirit of Jacksonian Democracy had become entrenched in Ohio. 44 The Ohio Constitution was amended that year to provide for judicial selection by the people in partisan elections after candidates were chosen by their respective political parties at nominating conventions. 45 Thus, sentiment went, democracy was restored to the process of judicial selection because the voters had a voice in the matter. 46

The rise of political parties and the events surrounding the Tammany Hall scandal in New York City during the post-Civil War period probably had much to do with the growing belief that partisan politics ought not to play a major role in the election of judges. 47 In Ohio, this led to the passage of the Nonpartisan Judiciary Act of 1911, 48 which required that all judges be elected in nonpartisan elections. The following year, the General Assembly enacted legislation which made possible another constitutional amendment which ended the practice of

39. E.g., Ohio (OHIO CONST. art. 4, §§ 2, 3, 6); Florida (FLA. CONST. art. 5, §§ 10, 15); FLA. STAT. ANN. §§ 105.021, 105.041, 105.051, 105.071, 105.08, 105.09 (West 1973); and Wisconsin (WIS. CONST. art. 7, §§ 2, 4, 7, 14; WIS. STAT. ANN. § 253.05 (West 1971)).

40. In New York, the legislature submitted to the voters in last fall's general election the question of expanding merit selection to the court of appeals, the state's highest court. The voters approved the proposed constitutional amendment. N.Y. CONST. art. 6, § 2 (amended Nov. 8, 1977). In Oregon, the Oregon Citizens' Conference on the Courts recommended last year that a merit plan be adopted to replace the elective process by which all state judges are presently elected. 61 JUD. 291-93 (1978).


42. Milligan, supra note 41, at 159.

43. OHIO CONST. OF 1802, art. III, § 8; Aumann, supra note 41, at 408. The term of office was seven years.

44. See text accompanying notes 14-16 supra; Aumann, supra note 41, at 409–10.

45. Milligan, supra note 41, at 159.

46. Aumann, supra note 41, at 410.

47. Id. at 412. See also Note, supra note 41, at 261.

nominating judicial candidates in political conventions and implement-
ed instead direct election of judicial candidates through partisan, pri-
mary elections.49

At about the same time that Pound and Taft began to criticize the
unhealthy state of judicial politics,50 a movement was born in Ohio to
repair the mistakes of populism and to return to an appointive method
of judicial selection, at least for the judgships viewed as the most
important in the state.51 This culminated in a conference in 1934
sponsored by the Cincinnati Bar Association and the University of
Cincinnati Law School.52 The conference crystalized and publicized
the growing support of Ohio lawyers for merit selection of judges on
the Ohio Supreme Court and the district courts of appeals.53

The endorsement by the American Bar Association of the principle
of merit selection in 193754 provided additional impetus for the Gener-
al Assembly to act. In the following year, legislation was adopted
which submitted to the voters the question whether the constitution
should be amended to provide for the selection of supreme court
justices and judges on the courts of appeals by the Governor after
recommendation by a nominating commission.55 The proposed amend-

49. Milligan, supra note 41, at 159.
50. See text accompanying note 28 supra.
51. Taft, The Selection and Tenure of Judges, 11 OHio L. REP. 277 (1914). See also
THE CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND (1922). This is an
interesting account of a study directed by Roscoe Pound and Felix Frankfurter for the
Cleveland Foundation. Although limited to the Cleveland area, it illustrates the growing
trend in the 1920's and 1930's toward abandoning the election of judges. The elected
judiciary was described as follows:

The local organization is not made up, in the main, of men of great intelligence
or vision, because of the abhorrence of politics felt by men of this type. Selfish
personal motives or the instinct of political self-preservation dominate the local
machine, and its nominations . . . are apt to represent payments for political
debts, or the best chance to win. . . . "Has he earned it and can he win?" asks
the local committee. . . .

Id. at 274. The authors of the study recommended the adoption of "the appointive
method [of judicial selection] with provision for a retirement election whereby a judge
runs against his own record." Id. at 276.
52. Report, The Selection and Tenure of Judges in Ohio, 8 U. CIN. L. REV. 359
(1934).
53. A poll of Ohio lawyers taken the following year by the Ohio State Bar Associa-
tion indicates that a majority of its members favored appointment during good behavior
of supreme court justices and judges of the courts of appeals. The concept of retention
elections was also favored by a majority. Milligan, supra note 41, at 162-64.
54. See text accompanying note 30 supra.
55. Milligan, supra note 41, at 166-67. The nominating commission which was
proposed would have consisted of eight members: The chief justice, four lesser judges
(one representative from the court of appeals, one from the court of common pleas, one
from the probate court, and one from the municipal court), and three attorneys appoint-
ment was defeated in the general election of 1938 by a large margin. Since this initial defeat, merit selection has been legislatively proposed in the General Assembly on eight occasions. However, these proposals have consistently failed to win approval in both houses and, as a result, the voters have not had the opportunity to reconsider the matter in the last forty years.

The movement for reform in Ohio has not been entirely dormant, however, despite the failure of the legislature to submit the question to the electorate. In 1975, the Judiciary Committee of the Ohio Constitutional Revision Commission recommended to the Commission that a merit selection plan be submitted to the General Assembly in conjunction with other proposed amendments affecting the state judiciary. The Judiciary Committee's report was narrowly rejected by the Commission in July, 1975 and the recommendations which were ultimately transmitted to the General Assembly in March, 1976, did not propose any change in the present system. The proponents of merit selection on the Commission submitted a minority report urging the General Assembly to adopt a merit plan in any event. S.J.R. 6, which was introduced less than one year later, embodies the concepts recommended by the Judiciary Committee of the Commission and favored in the minority report.

56. Barkdull, Analysis of Ohio Vote on Appointed Judiciary, 22 J. AM. JUD. SOC'TY 197 (1938). Two years later, Missouri became the first state to adopt merit selection when its voters approved a similar proposal, and merit selection has since become known as the Missouri Plan. Mo. CONST. art. V, § 29. See text accompanying notes 31-33 supra.


58. This legislative reluctance to approve such proposals is due in part to the normal political inertia opposing change in the present system. See text accompanying note 84 infra. Furthermore, it has been suggested that the Ohio General Assembly has been dominated by the Republican party to a great extent during the period under discussion. The fact that the Ohio appellate judiciary is also heavily Republican may explain further the lack of success of previous legislative proposals to implement a merit plan. See Barber, Ohio Judicial Elections—Nonpartisan Premises With Partisan Results, 32 OHIO ST. L.J. 762, 774-77 (1971).

59. The Commission was created by the General Assembly during the 1969-1970 session. OHIO REV. CODE ANN. § 103.52 (Page 1978).

60. OHIO CONSTITUTIONAL REVISION COMMISSION, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION, PART 10, JUDICIARY 44 (1976).

61. Id. at 73.

62. Id.

63. S.J.R. 6 was introduced on February 2, 1977.
In addition to the efforts of the Ohio Constitutional Revision Commission, former Governor John Gilligan embarked upon a voluntary merit selection plan by Executive Order in 1972\textsuperscript{64} applicable to all judicial appointments made by the Governor pursuant to the Ohio Constitution.\textsuperscript{65} Nominating Commissions were appointed for each of the state's eleven appellate districts and were authorized to nominate candidates for appointment to vacant judicial posts. The Governor was to appoint one of the nominees unless all of them were deemed unacceptable, in which event the commissions could submit additional nominations. This Executive Order was rescinded by the present Governor shortly after he assumed office because of its "doubtful Constitutional validity."\textsuperscript{66}

II. ELECTION VS. APPOINTMENT: A DIP IN THE QUAGMIRE

A growing number of states have adopted merit selection procedures for choosing some or all of their judges. There are strong feelings against abandoning the election process, however, and the arguments which have been advanced in support of this position have undoubtedly delayed the movement for reform in several states including Ohio.\textsuperscript{67} The theme of this article is that in the selection of the judiciary the elective process is dysfunctional, and that a merit selection process is not only preferable but sorely needed. This section will summarize the major criticisms which have been leveled against merit selection and describe the rationale for changing the selection process in Ohio.

A. Major Arguments Against Merit Selection

1. Fanfare for the Common Man

Whenever the subject of merit selection is discussed, one of the first negative comments one is likely to encounter is that the elective

\begin{itemize}
\item \textsuperscript{64} Exec. Order of Governor John J. Gilligan (June 14, 1972).
\item \textsuperscript{65} OHIO CONST. art. IV § 13. See text accompanying note 133 infra.
\item \textsuperscript{66} Exec. Order of Governor James A. Rhodes (Jan. 17, 1975).
\end{itemize}
process, as poor as it might be, is preferable to any indirect method of selection because the selectors will appoint a judiciary which is not necessarily representative of the people who will have to abide by their decisions.68 Close on the heels of that statement usually follows the charge that the elective process at least insures the presence on the bench of judges who are, by necessity, sensitive to the problems and concerns of the average citizen.69 Merit selection is thus viewed as an effort to populate the judiciary with elitists who may have impressive credentials but who are unaccountable to the public if they prove to be incompetent in practice.70

2. No Proof in the Pudding

Other critics of merit selection focus upon the inability of its proponents to provide conclusive proof that the elective process produces notably worse or less competent judges than those who attain the bench by appointment.71 In addition, the critics argue that the best judges are those who not only aspire to the bench but who are also willing to seek the job, as if that aspiration imports some judicial quality which is desirable in our jurists.72

Studies of merit plans currently in effect indicate that the process is not without its pitfalls. For example, a minimal number of judges fail to be retained once appointed; this has led some critics to charge that merit selection is tantamount to a lifetime appointment and is not as effective as the elective process in weeding out the unfit.73 Since there is no absolute means of gauging a prospective judge's performance in advance, it is at least possible for an appointing authority to make the same mistakes that voters do and less likely that the "club" which appointed an unfit judge will be inclined to reverse itself at some later date. This argument highlights one of the primary problems encountered in considering the matter of merit selection: What objective criteria should be employed to decide who is best qualified to serve as a judge, if the prerogatives of the electorate are to be curtailed?74 The suggestion is that a reduction in the number of people who control the selection process will not eliminate the factor of human error.

68. Harding, supra note 67, at 1163.
69. Spence, supra note 67, at 1152.
70. Mullinax, supra note 67, at 24.
71. Golomb, supra note 67, at 77.
72. Roth, supra note 67, at 355.
73. Spence, supra note 67, at 1149; Burnett, supra note 67, at 1099.
74. Spence, supra note 67, at 1151. See text accompanying notes 85-89 infra.
3. To Whom Is the Judiciary Accountable: The People or the Politicians?

The proponents and opponents of merit selection have made the mutual mistake of injecting into the debate the question whether judges "make" law or merely interpret and apply the law as enacted by the legislature. Opponents of merit selection claim that since judges make law inasmuch as they give meaning to legislative policy, judges should be accountable to the public to the same extent that legislators are. Proponents counter that judges do not make law, at least not in the legislative sense; therefore, the best judges are those who are above the political pressures which tend to diminish judicial independence.

Both positions, however, beg the central question, which is whether there is a more effective and fair manner to select the judiciary. The debate over whether judges make law has little to do with the role of the judiciary as the third branch of government. If that branch has, as it obviously does, a function to perform in our government which is different from the executive and the legislative functions, then the criteria for service in that branch ought to be peculiarly suited to it.

An important corollary to this argument is that appointed judges are less independent than their elected counterparts. It has been suggested that appointing authorities such as Governors, nominating commissions, and legislatures are likely to exercise inordinate control over the judges they nominate, appoint, or confirm, thus rendering the judiciary subservient to the other branches. In support of this assertion, critics point to the provisions in some state statutes which empower the commission which appointed or recommended a prospective judge to review his or her performance for purposes of rating that judge in connection with a retention election. Since, in many cases, the Governor makes most if not all of the appointments to such commis-

75. Mullinax, supra note 67, at 33–34; Harding, supra note 67, at 1163.
77. Spaeth, Reflections On a Judicial Campaign, 60 Jud. 10 (1976). The author suggests an important distinction:

[T]here is an important difference between the legislative and executive branches and the judicial branch. A legislator or executive may to some extent represent special interests to whom he owes his election. To be sure, he should not put those interests ahead of the general welfare, but no one expects him to be impartial. A judge, however, who is not impartial is nothing. Worse, he is an oppression; only because of her blindfold is the goddess of justice given a sword.

Id. at 14.
78. Nagel, supra note 67, at 24; Mullinax, supra note 67, at 25.
79. Mullinax, supra note 67, at 32.
sions, it is only natural that appointed judges would be especially sensitive to the views of the Governor in the performance of their duties.

4. Politics Now and Forever

The most frequent, and perhaps the most persuasive argument against merit selection, is the inevitability of political influence in the judicial selection process. Critics argue that the very fact that selection has to be made by some political authority permanently injects partisan politics into the matter. Therefore, they argue, the shift from an elective process to an appointive one results only in transferring the matter from an overtly political arena to one where the politicking is more subtle because it is less visible to the public and thus more "clubby" than it should be.

It is also argued that the political process is not a negative but rather a positive influence in the selection of judges. The publicity and visibility of campaigning for public office serve to educate the electorate about the function of the judiciary and the views and backgrounds of candidates for judicial office. This feature of public education and scrutiny is destroyed by an appointive system because it removes from public view the judicial process as well as the personalities and qualifications of the candidates. In a society which relies upon the willingness of the majority to follow the law, it is critical that those involved in the processes of articulating the law not be shielded from public attention.

Finally, merit selection is opposed by political interests because judgeships are important "political plums" within the system by which the organized political parties reward the faithful, induce the reluctant, and provide employment for party functionaries. The loss

80. Roth, supra note 67, at 352; Harding, supra note 67, at 1163; Golomb, supra note 67, at 76. See also Alfini, Partisan Pressures on the Nonpartisan Plan, 58 Jud. 216 (1974).

81. Spence, supra note 67, at 1148; Barber, supra note 58, at 788.

82. Mullinax, supra note 67, at 25.

83. Barber, supra note 58, at 767.

84. See text accompanying note 95 infra. See also H. JACOB, JUSTICE IN AMERICA 114-15 (2d ed. 1972); K. VINES & H. JACOB, STUDIES IN JUDICIAL POLITICS 118-19 (Tulane Studies in Political Science, Vol. VIII, 1962); Gordon, Judicial Reform: A Legislative Viewpoint, 48 N.Y. St. B.J. 284, 286 (1976); Lindsay, The Selection of Judges, 21 Rec. N.Y. City B.A. 514 (1966). The then mayor of New York City stated: "Trading and dealing by party leaders not only vitiates the basis for direct election of judges, but virtually ensures that any outstanding judges who appear on the bench will not be products of the elective system but its survivors." Lindsay, supra at 517.
of an important part of the spoils system would hardly be greeted with enthusiasm.

B. An Argument for Merit Selection

Proponents and opponents of merit selection can be characterized as soldiers in different camps looking at the same mountain from opposite sides. Proponents speak of the lofty goals of a competent, impartial, and depoliticized judiciary; opponents focus on the practical difficulties inherent in any process of judicial selection and the realistic possibility (or probability) that we will never have perfect judges or a perfect process for choosing them. Perhaps the most which can be said is that both positions are supportable. On balance, however, it is submitted that merit selection is demonstrably preferable to popular election and that the Ohio General Assembly should submit S.J.R. 6 or comparable legislation to the voters for their approval.

1. The Case for Competence

It is unquestionably true that many able judges have obtained their positions through the elective process. It is also true that the debate over merit selection persists in part because of the inability of commentators and public officials to agree on the question of who is best suited to judge a civil dispute or a criminal prosecution. Both proponents and opponents of merit selection have attempted to quantify the factors which appear to be most relevant to determining the suitability of judicial candidates. It is beyond the scope of this article


86. Compare Roth, supra note 67, at 355:

All we need is a pool of men, men who want to be judges, men who are devoted to the principles upon which this government has been founded, and upon which it has grown great. Men who are dedicated, men of competence and character who like their jobs. If we have such men, we don't need [judicial] commissions. If we don't, commissions won't help.


Political leaders probably do know what judicial abilities and qualities are essential; they presumably have the means of finding the facts about candidates; they might even be capable of making comparative judgments. But what makes the present system inferior is that political leaders are not motivated to use these faculties with independence and with the single purpose of finding the best available candidates. There are many able lawyers who are not available; members of other parties, men who do not want political obligations, men who are unwilling to raise campaign funds or to engage in vote-getting self-promotion. Approval of the organized bar is disdained by many political leaders and is seldom influential with voters in partisan elections.
to redefine the criteria for judicial competence. It is sufficient to note that those who have studied the question agree that honesty, competence, and impartiality are indispensable qualities for effective judicial service.\textsuperscript{87} The fact that judicial candidates in the elective arena stress their years of experience, church and family ties, and pledge firmness with fairness\textsuperscript{88} suggests that the public to whom these candidates appeal would agree with the scholars. The inquiry here focuses on whether the elective process or merit selection affords the better means of producing the judiciary we desire.

Perhaps it must be assumed that those who aspire to serve on the bench are honest. In any case, the scrutiny inherent in both electioneering and judicial recruiting will likely disclose evidence to the contrary. By contrast, the competence and impartiality of judicial candidates may be more insurable than is presently the case, in spite of the difficulty of measuring these qualities in advance. If this is so, then a system of judicial selection which provides reasonable assurances that these traits will exist in our judges is to be preferred over one which flatly does not, or leaves the matter to chance.

Whether or not judges make law, it is inescapable that the role and importance of government in our lives has grown tremendously in the last century.\textsuperscript{89} This growth has fostered legal complexity; in any given dispute or criminal trial, there are a host of competing interests and issues which must be considered in reaching a just decision. Thus, while we have always maintained that the judiciary should contain the best minds and the fairest hearts, the current state of American jurisprudence demands that every possible step be taken to insure that this objective be realized.

2. The Dynamics of the Political Process

It is a fact that the elective process does not guarantee that either competent or incompetent judges will be elected. It guarantees only that vacancies on the bench will be filled by one of several candidates for the position. Since there are few statutory standards of ability which must be met by a judicial aspirant,\textsuperscript{90} the elective process can be best described as neutral.

\textsuperscript{87} See note 85 supra.

\textsuperscript{88} See, e.g., Spaeth, supra note 77, at 13.

\textsuperscript{89} Pound, Introduction to E. HAYNES, SELECTION AND TENURE OF JUDGES at x (1944).

\textsuperscript{90} In Ohio, for example, a judicial candidate need only be admitted to the bar, have a minimum number of years of law practice (usually six), and reside within the jurisdictional area of the court to which he seeks election. See OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. §§ 2501.02, 2301.01, 2701.04 (Page Supp. 1977).
This neutrality is more justified in the executive and legislative branches of government than in the judicial branch. The first two are generally subject to greater public scrutiny and thus provide the electorate with a greater and more constant flow of information than the third. Executive and legislative decisions and policies are more frequently subject to public review via the election process, and those decisions and policies are generally more easily understood. The judicial branch receives less public attention, affects only a small number of people directly, and review by reelection is hampered by constraints upon judicial campaigning and the relatively greater length of judicial terms. Put another way, the neutrality of the elective process is not an impediment to effective government by the executive and legislative branches because the competence of officials in those branches is more easily ascertainable and is subject to intense and frequent popular review. But neutrality does impede an effective judiciary because the judiciary is not subject to the same kind or amount of public scrutiny that will insure that its members perform adequately, however that term may be defined.

3. The Role of the Electorate

As a result of the neutrality of the elective process, the selection of judges is in a very real sense left to a small number of "opinion

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91. Canon 7 of the Code of Judicial Conduct as adopted by the Supreme Court of Ohio and effective since December 20, 1973 provides:

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

.. .

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or fact. [Emphasis added.]

92. Local officials are generally elected to office for terms of four years, e.g., OHIO REV. CODE ANN. §§ 733.02 (Page 1976) (mayors of cities), 733.24 (Page 1976) (mayors of villages). County and state officials generally serve terms of four years, e.g., OHIO REV. CODE ANN. § 305.01 (Page Supp. 1976) (county commissioners). The minimum term of office for a trial judge is four years and most judges serve terms of six years, e.g., OHIO REV. CODE ANN. §§ 1907.051 (Page Supp. 1977) (four year term for county court judges), 1901.07 (Page Supp. 1977) (six year term for municipal court judges).

93. For example, Democratic voters in Cuyahoga County, which has the largest population in Ohio, were confronted with the following situation in the 1976 primary election. Twenty judges were to be selected, including 14 in the court of common pleas, 4 in the court of appeals, and 2 in the supreme court. Twelve of the incumbent judges in these positions ran unopposed. The remaining eight judgeships were contested by a total of forty candidates. Thus, the diligent voter in the Democratic primary was required to review the qualifications of 52 candidates for election or reelection. SECRETARY OF STATE, OHIO ELECTION STATISTICS 87, 165–67, 168 (1975–1976 ed.).
makers." The electorate does not have sufficient knowledge of the nuances of judicial craftsmanship to have a clear notion of judicial competence. Lacking this expertise, it relies heavily on community leaders, political party officials, and media policy shapers who publicly endorse and support judicial candidates. Thus, a small number of people exercise a disproportionate influence upon judicial elections. The voters act simply to ratify the positions of the opinion makers rather than to evaluate critically the suitability of aspirants according to their qualifications and performance.

Opinion makers tend to be highly pragmatic. They often make decisions on matters of interest to them with a view toward expanding and preserving their respective spheres of influence. This philosophy tends to make them result oriented rather than goal oriented. In judicial elections, this result orientation manifests itself when opinion makers support the candidate who is most likely to be elected so that the opinion maker can thereby expand or preserve his sphere of influence. At the same time the object of goal orientation—the selection of persons with the best minds and the fairest hearts—is often lost. As a result, often judges are selected whose competence and independence are less well established than their loyalties, prominence, and attractiveness to the electorate. And since the elective process is neutral with respect to the judiciary, the candidates supported by the opinion


95. See C. Philip, P. Nejeski, & A. Press, Where Do Judges Come From? 1–19 (1976). This is a fascinating study of the 1973 campaign for the position of Chief Judge of New York’s highest court. The political maneuvering between party leaders, candidates, and would-be candidates clearly illustrates the dynamics involved in judicial elections.


One of the findings made by the task force should be addressed in detail. It was found that even in elective jurisdictions a majority of those elected to the bench run as incumbents, having been previously appointed by various political means. Id. This not only indicates that the voters are often merely ratifiers of political decisions; it also supports recent findings that even fewer minority group judges would be on the bench if they had to run without the benefit of an incumbency resulting from a previous appointment.

A recent survey by the American Judicature Society reported that only about one percent of the judges in America are black. All identifiable black judges were contacted by mail and, of those who responded, over 60% reported that they had been either appointed for a full term of office by some competent authority or elected after serving for a period pursuant to an appointment. The Black Judge in America: A Statistical Profile, 57 Jud. 18, 19, 25 (1973). Nevertheless, it has been asserted that blacks have the best chance to obtain judgeships—regardless of the method of selection—in areas which are heavily populated by black residents. See Coalition of Concerned Black Americans, A Preliminary Report of the Experiences of the Minority Judiciary in the City of New York, 18 How. L.J. 495, 504 (1975).
Makers are likely to be elected despite whatever shortcomings they may have in terms of competence and impartiality.

There is no indication that the process of judicial selection by opinion makers with ratification by the electorate will, in the future, become any more goal oriented than it is at present. The critics of merit selection are correct when they argue that the influence of partisan politics can never be entirely eliminated from judicial selection. But that is no reason not to alter the status quo. It would be preferable to create a mechanism to insure that the factors of competence and impartiality are incorporated into the result oriented criteria which most often dominate the elective process.

A partnership between political feasibility and professional superiority can best be accomplished through the adoption of a merit plan of judicial selection which recognizes the realities of partisan politics while adding a dimension of utilitarianism to the process. Of course, a merit plan, like any other concept, is only as good as the machinery created to implement it. The realities discussed above indicate that a goal oriented plan should be visible and structured in a representative manner which allows the electorate to retain its present level of indirect participation. Such a plan would be more likely than the present system to produce judges who are the most competent persons available at any given time.

4. Summary

In sum, the argument against merit selection withers when it is realized that such a position advocates the retention in the electorate of power that it does not possess. Elected judges are not accountable to the people and the value of an incumbency at the time of reelection proves it. Nor would the appointment of judges under a suitable merit plan produce a judiciary which is any more or less elitist than it is at present. The alleged lack of proof that an appointive system fails to produce measurably superior jurists is no reason to ignore its value. Any system which imposes some minimum standards of competence and which allows the healthy competition for judgeships to be waged according to established rules is to be preferred to a system which has

97. Jackson summed up the present state of affairs as follows:

[V]oters are inclined to choose on the basis of unexamined impulses or slogans—law and order, permissiveness, crime in the streets—and not because of a candidate's qualifications of temperament, ability and judgment. The electoral choice is seldom a real choice at all; . . . judicial slates are often determined in bipartisan arrangements that leave no room for opposition; voters merely ratify the bosses' selections.

D. Jackson, supra note 94, at 382.
no standards of competence and in which the "rules" of competition are set by the opinion makers.

III. THE OHIO PLAN

A. Merit Plans Generally

The basic merit plan model employed by those states which have rejected popular election provides for gubernatorial selection of judges from a list of candidates submitted by a nominating commission.\textsuperscript{98} The commissioners, some of whom are usually appointed by the Governor, are charged with the responsibility of seeking applications from qualified individuals, reviewing the records, backgrounds, and general fitness of all applicants and recommending from their number several persons for the Governor's consideration.\textsuperscript{99} From these names, the Governor either appoints someone or submits someone to the legislature for its approval. In the event that the Governor selects no one, some other official, usually the chief justice, makes the appointment.\textsuperscript{100}

The procedure outlined above is most often used to select the state's appellate judges.\textsuperscript{101} However, many of the merit plan jurisdictions utilize a merit plan to fill all vacancies in the judiciary.\textsuperscript{102} In addition, several merit plans provide for retention elections to be held within one or two years after appointment, in order to give the electorate the opportunity to reject any appointee whose performance has been unsatisfactory.\textsuperscript{103} There is no unanimity among merit plan juris-

\textsuperscript{98} See text accompanying notes 32-33 supra.

\textsuperscript{99} E.g., Arizona (ARIZ. CONST. art. 6, §§ 12, 30, 36, 37); and Utah (UTAH. CONST. art. VIII, § 3, UTAH CODE ANN. §§ 20-1-7.1-7.8, 55-10-70 (1973)).

\textsuperscript{100} In Nebraska, the Governor makes the appointment without further confirmation. NEB. CONST. art. V, § 21. In New Jersey, the Governor's appointment is subject to the advice and consent of the Senate. N.J. CONST. art. VI, § 6 pt. 1. In Iowa, as in several other states, the Governor's failure to act upon a nomination with thirty days after receipt operates as an authorization for the chief justice to make an appointment from the same list of nominees submitted to the chief executive. IOWA CONST. art. V, § 15. Delaware, Hawaii, and Maine also have judiciaries appointed by the Governor. See note 36 supra. In New Hampshire, the Governor appoints judicial officers, but appointments are subject to confirmation by a judicial council which is elected by the voters. N.H. CONST. pt. 2, arts. 46, 60. In a few states some or all judges are selected by the legislature. See note 36 supra.

\textsuperscript{101} E.g., Kansas (KAN. CONST. art. III, §§ 2, 8, 9) (supreme court only); Oklahoma (OKLA. CONST. art. VII-B) (supreme court and court of criminal appeals).

\textsuperscript{102} E.g., Alaska (ALASKA STAT. §§ 22.05.070-..100, 22.10.090-..150, 22.15.160-..195 (1976)). See note 34 supra.

\textsuperscript{103} E.g., Wyoming (WYO. CONST. art. V, § 4; WYO. STAT. §§ 5-114.12, 5-114.13, 5-114.17 (Supp. 1975) (after one year); Colorado (COLO. CONST. art. VI, §§ 20, 25) (after two years).
dictions as to the politics of the commissions themselves. In some states, political leaders and office holders are barred from participating as commission members,\(^\text{104}\) while in other states, this prohibition does not appear.\(^\text{105}\) Similarly, in some states, no commission member may be considered for appointment to the bench until a fixed period of time has passed after the expiration of his term of service on the commission.\(^\text{106}\) Some plans require that a fixed percentage of the members of the nominating commission be admitted to the bar\(^\text{107}\) and, frequently, limitations are placed upon the number of members who may belong to the same political party.\(^\text{108}\)

Overall, the merit plan models in existence in the various states are calculated to limit or negate political influence in the judicial selection process.\(^\text{109}\) However, these plans tend to vest a great deal of power in the Governor, a consequence which could be as unfortunate as the ills which gave rise to reform.\(^\text{110}\)

B. S.J.R. 6

S.J.R. 6\(^\text{111}\) contains variations on the themes reflected in other merit plans. The following is an examination of the salient provisions of this proposed amendment to the Ohio constitution, and their potential impact upon existing law.

1. The Constitution

All Ohio judges are presently elected in nonpartisan general elections.\(^\text{112}\) Candidates are named several months prior to the general elections through partisan primary elections.\(^\text{113}\) If S.J.R. 6 is approved

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104. E.g., Alaska (Alaska Const. art. IV, § 8).
106. E.g., Oklahoma (Okla. Const. art. VII-B, § 3).
107. E.g., Indiana (Ind. Const. art. VII, § 9) (the judicial nominating commission must be lawyers, by a majority of one, including the Chief Justice or his designee, who serves as chairman).
108. E.g., Arizona (Ariz. Const. art. 6, § 36) (not more than 3 of the 5 laymen nor more than 2 of the 4 lawyers serving on the judicial nominating commission may belong to the same political party).
109. See text accompanying notes 27–29 supra.
111. See Appendix.
112. Section 6 of Article IV provides for popular election of judges on the supreme court, courts of appeals, and the courts of common pleas. Ohio Const. art. IV, § 6. Section 13 of that article confers upon the Governor the right to fill vacancies which occur prior to the expiration of a judicial term. Ohio Const. art. IV, § 13.
113. Primary elections are held by political parties to nominate candidates for offices to be voted for at the next succeeding general election. These elections are held on the first Tuesday after the first Monday in June of each year. Ohio Rev. Code Ann. §
by the General Assembly, the Ohio electorate will then have to ap-
prove it in order to effectuate the proposed merit plan.114 As noted 
earlier,115 the voters soundly defeated such a proposal nearly forty 
years ago.

2. Judges affected

If enacted and approved, S.J.R. 6 would not affect a large number 
of judgeships in this state. Only the chief justice and six associate 
justices of the supreme court, the thirty-eight judges of the courts of 
appeals, and judges of any other courts superior to the courts of 
common pleas116 would be chosen by merit selection without further 
electoral action.117 All other judges would still be selected by popular 
election.

3. Who is eligible

The bill does not impose any constitutional limitations upon the 
persons to be considered for appointment, except that a candidate may 
not be more than seventy years of age at the time he assumes the 
office.118 While there are other general requirements and prohibitions 
contained in Ohio law,119 the amendment does not attempt to constitu-
tionally define criteria for judicial fitness.

3513.01 (Page 1972). Judges are elected at the general election held on the first Tuesday 
after the first Monday in November of each year. OHIO REV. CODE ANN. § 3501.01 (Page 
1972). Judicial elections are nonpartisan in the sense that the political affiliation of the 
candidates may not appear on the election ballot. OHIO REV. CODE ANN. § 3505.04 (Page 
1972).

Candidates for public office, including judicial candidates, may avoid the primary 
election process by seeking nomination by petition. OHIO REV. CODE ANN. § 3513.257 
(Page 1972). Candidates seeking nomination to a countywide office such as the court of 
common pleas must obtain the signatures of enough voters to equal one percent of the 
total vote for the office of Governor in that county in the previous election. By way of 
illustration, the total vote cast for the office of Governor in Cuyahoga County in 1974 
was 457,600. SECRETARY OF STATE, OHIO ELECTION STATISTICS 137 (1973–1974 ed.). 
Thus, an independent candidate would have had to obtain the signatures of at least 4,576 
voters to be nominated by this procedure. The same statute which imposes this require-
ment provides that an independent candidate for statewide office must obtain the 
signature of only five thousand voters. OHIO REV. CODE ANN. § 3513.257(A) (Page 1972).

114. OHIO CONST. art. XVI, § 1.
115. See text accompanying note 49 supra.
116. At present there are no such “other” courts in Ohio; a catch-all clause of S.J.R. 
6 anticipates the creation of such courts, and provides for selection of judges on those 
courts under the merit plan.
118. S.J.R. 6, art. IV, § 6(C); see Appendix at 5.
119. Candidates for the supreme court, the courts of-appeals, courts of common 
pleas, and municipal courts must have been admitted to the bar and engaged in the 
practice of law in this state for at least six years (including any prior judicial service in
4. The Judicial Nominating Commission

All recommendations for appointments to the judgeships affected by the legislation are to come from judicial nominating commissions. The proposal authorizes the legislature to fix the organizational structure and method of selection of the nominating commissions. In the event of enactment and approval, it will be necessary for the General Assembly to pass additional legislation providing for means of selecting the selectors. There are, however, some important conditions in S.J.R. 6 regarding the political and professional makeup of the commissions. It is specifically provided that at least half the members of any commission must be admitted to the practice of law in Ohio and that not more than half of such membership may belong to the same political party. A commission member may be an incumbent office holder.

5. Nominees

The bill requires that a commission considering the filling of vacancies in the courts affected submit the names of not fewer than three nominees for appointment by the Governor. No maximum number is provided. There is nothing in the bill regarding the political affiliations of those nominated; conceivably all of them could be members of the Governor's political party. It is customary for the Governor, like the President, to appoint members of his own political party to judicial posts. This may be the reason for the omission of any provision requiring that a certain number of nominees be submitted who are affiliated with each of the major parties.

6. Confirmation

Upon receipt of a list of nominees from the nominating commission, the Governor is required to select one of them for appointment.

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any jurisdiction) preceding appointment or election. Candidates must reside within the jurisdictional area of the court which they seek to serve. OHIO REV. CODE ANN. §§ 2503.01, 2501.02, 2301.01, 1901.06 (Page Supp. 1977).

120. S.J.R. 6, art. IV, § 6(A)(2), (3); see Appendix at 2.
121. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
122. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
123. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
124. S.J.R. 6, art. IV, § 6(A)(2); see Appendix at 2.
126. S.J.R. 6, art. IV, § 6(A)(2); see Appendix at 2.
The appointment must then be confirmed by the Ohio Senate.\textsuperscript{127} Thus, under S.J.R. 6, the Governor becomes, in effect, a second nominating authority because a nominee selected by the chief executive is not entitled to assume office until the appointment is acted upon favorably by the senate. Since the confirmation procedure could take time, the bill authorizes the Chief Justice to appoint judges to fill vacancies during the pendency of the appointment-confirmation process.\textsuperscript{128}

Since the bill provides that the Governor is to make an appointment from a list of three or more candidates, it is possible for the Governor to reject effectively all of the candidates recommended by the nominating commission simply by requesting additional names. This could cause delays in the process and lead to "candidate shopping" by the Governor.

7. Other judges

As stated above,\textsuperscript{129} the merit plan proposed by S.J.R. 6 would affect only Ohio's highest courts. The remainder—and the majority—of our state judges would continue to be selected by popular election even if the bill becomes law.\textsuperscript{130} There is, however, a provision in the legislation which would authorize the extension of the merit plan concept to other judgeships in the jurisdictions, counties, or municipalities in which they are presently elected.\textsuperscript{131} This "local option" provision is designed to accommodate the significant differences between Ohio's most populous counties and those with sparse population.\textsuperscript{132} In the former, it is possible that the large numbers of unknown candidates and highly structured and influential political parties might lead to voter approval of a merit plan, while in smaller counties, where there are fewer judges, the voters might not favor the concept of merit selection.

Finally, the bill provides that in the event the local option is not exercised, vacancies occurring in the trial judiciary are to be filled by the Governor in the same manner as is presently in effect.\textsuperscript{133} That is,

\textsuperscript{127} S.J.R. 6, art. IV, § 6(A)(2); see Appendix at 2.
\textsuperscript{128} S.J.R. 6, art. IV, § 13(B)(4); see Appendix at 7.
\textsuperscript{129} See text accompanying note 117 supra.
\textsuperscript{130} According to the most recent data available, there are 296 common pleas court judgeships and 181 municipal judgeships in Ohio. Supreme Court of Ohio, supra note 117, at 21, 76.
\textsuperscript{131} S.J.R. 6, art. IV, § 6(A)(7); see Appendix at 4.
\textsuperscript{132} There was a similar provision in the constitutional amendment providing for merit selection of Ohio appellate judges which was submitted to the voters and defeated in 1938. This explanation was given for its inclusion during the campaign for its adoption. Milligan, The Proposed Changes in the Selection and Tenure of Judges in Ohio, 4 Ohio St. L.J. 157, 165 (1938).
\textsuperscript{133} S.J.R. 6, art. IV, § 13(A); see Appendix at 6.
the Governor fills the vacancy with no obligation to accept recommendations from any nominating commission; nor must he submit the name of the appointee to the senate for confirmation.

8. Terms of office and unexpired terms

All supreme court justices, judges of the courts of appeals, and judges of the courts of common pleas are to serve staggered terms of six years under the legislation. This is identical to present law. It is in the area of unexpired terms that S.J.R. 6 departs from the existing constitutional law. At present, the Governor fills vacancies arising in any court by appointing a successor who serves until the next general election; then, a candidate is elected to serve the balance of the unexpired term. S.J.R. 6 provides that vacancies in the courts subject to the merit plan will be filled by the Governor in conjunction with the nominating commission and the senate. However, in the event that the vacancy to be filled occurs more than eighteen months before the end of the term of office, the nominee approved by the senate is entitled to hold office for the remainder of the unexpired term and full term thereafter. The reasoning underlying this provision is unclear.

9. Retention Elections

The bill provides that a judge appointed under the merit plan may succeed to another term of office without limit upon the number of terms. The judge simply files a declaration of candidacy which sets the retention process in motion. One effect of the filing of a declaration of candidacy is to subject the judge to the rating system provided for in the bill. The other is to require that such judge’s name be placed on

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134. S.J.R. 6, art. IV, §§ 6(A)(1), 6(A)(5); see Appendix at 1, 3.
135. OHIO CONST. art. IV, § 6.
136. OHIO CONST. art. IV, § 13. The constitution provides that in the event such an unexpired term ends within one year following the next general election, the appointee shall serve the remainder of the term and no election shall be held. Id.
137. S.J.R. 6, art. IV, § 13(B)(1); see Appendix at 6.
138. S.J.R. 6, art. IV, § 13(B)(1); see Appendix at 6.
139. It is probably a drafting error. The desirability of appointing a judge to a full term in addition to an unexpired term is based upon the fact that it is difficult to assess performance immediately following an appointment. If a substantial period of service remains before a term expires, however, an assessment can be made. It therefore seems reasonable to conclude that the drafters of S.J.R. 6 intended to authorize an appointment to the remainder of an unexpired term plus a full term if there are less than eighteen months remaining to be served. This interpretation is consistent with existing law. OHIO CONST. art. IV, § 13.
140. S.J.R. 6, art. IV, § 6(A)(4); see Appendix at 2.
141. S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4. See text accompanying notes 151-52 infra.
the ballot at the general election immediately preceding the end of the term.\textsuperscript{142} In the event that fifty-five percent of those who vote on the question of retention vote in favor, the judge is retained in office for another full term.\textsuperscript{143} In the event that fifty-five percent do not respond favorably, the office is considered vacant and shall be filled by the appointment-confirmation procedure.\textsuperscript{144}

10. \textit{Retirement}

As noted,\textsuperscript{145} no candidate will be eligible if he attains the age of seventy years on or before the commencement of the term he seeks by retention election or appointment.\textsuperscript{146} "Appointment" is defined as "assum[ing] the office and enter[ing] upon the discharge of its duties;"\textsuperscript{147} thus, it is possible that the senate could delay confirmation long enough to disqualify certain nominees.

11. \textit{Evaluation}

As stated above,\textsuperscript{148} the filing of a declaration of candidacy by a judge appointed under the merit plan subjects that judge to a public evaluation. The evaluation is performed by the nominating commission which recommended the judge for appointment.\textsuperscript{149} The only language regarding the criteria for evaluation is that which requires the commission to "review the record of a judge." It is further provided that the method of review is to be determined by the implementing legislation.\textsuperscript{150} Once the evaluation is made, the commission must determine whether the judge is "well qualified," "qualified," or "not qualified."\textsuperscript{151} The rating, which must be disclosed to the judge, is then placed on the ballot along with the judge's name. There is language which suggests that the judge is entitled to know his rating before filing a declaration of candidacy,\textsuperscript{152} but this is unclear in view of the requirement for implementing legislation.

\textsuperscript{142} S.J.R. 6, art. IV, § 6(A)(4); see Appendix at 2.
\textsuperscript{143} S.J.R. 6, art. IV, § 6(A)(4); see Appendix at 2.
\textsuperscript{144} S.J.R. 6, art. IV, § 6(A)(4); see Appendix at 2.
\textsuperscript{145} See text accompanying note 118 \textit{supra}.
\textsuperscript{146} There is, however, a provision for temporary appointment of retired judges by the Chief Justice during periods of vacancy prior to gubernatorial appointment of a permanent successor. S.J.R. 6, art. IV, § 13(B)(4); see Appendix at 7; \textit{Ohio Const.} art. IV, § 6(C).
\textsuperscript{147} S.J.R. 6, art. IV, § 6(C); see Appendix at 5.
\textsuperscript{148} See text accompanying note 141 \textit{supra}.
\textsuperscript{149} S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.
\textsuperscript{150} S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.
\textsuperscript{151} S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.
\textsuperscript{152} S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4. The troublesome language is: "The method of review, informing the judge of his rating prior to his filing of a
12. Implementation

The bill provides that in the event of enactment and approval by the voters, the merit plan would not become effective until 1980. Existing law would govern all judgeships until January 1 of that year. All judges in office on that date would serve the remainder of their terms before becoming subject to the appointment-confirmation process. Further, it is provided that beginning with the 1982 general election, the rating system would be utilized in retention elections. Finally, the implementing legislation required to effectuate the spirit of the amendment must be enacted by July 1, 1980.

C. An Analysis of the Ohio Plan

S.J.R. 6 represents an attempt to reduce the impact of the political process upon the selection of those who would serve in the most important judicial posts in this state. It is ironic, then, that the legislation contains several obvious concessions to political reality. An examination of its major provisions leads to the conclusion that the bill is basically sound but it has deficiencies which should be corrected by amendment.

1. Courts affected and unaffected

It is difficult to explain the focus of the bill upon the highest courts in the state, though most merit plan jurisdictions have enacted legislation which similarly applies only to the highest courts. The difficulty stems from the inconsistency between the arguments in favor of merit selection and the judicial offices involved. The argument that the voters cannot adequately inform themselves concerning the qualifications and general suitability of candidates for judgeships probably is weakest when applied to the highest courts in the state. The candidates for appellate and supreme court judgeships are more likely to have

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declaration of candidacy to succeed himself . . . shall be provided by law." S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4. Presumably, this language provides for evaluation prior to the seventy-five day deadline for filing a declaration of candidacy as a constitutional requirement. Failure to adhere to it could invalidate an evaluation, or at least keep it off the ballot.

153. S.J.R. 6, Schedule; see Appendix at 7.
154. S.J.R. 6, Schedule; see Appendix at 7.
155. S.J.R. 6, Schedule; see Appendix at 7.
156. S.J.R. 6, Schedule; see Appendix at 7.
157. See text accompanying note 101 supra.
158. See text accompanying note 93 supra.
some sort of "judicial track record" and be familiar to the public than the persons who aspire to embark upon or continue a judicial career at the trial court level. Thus, the bill appears to attack the problems inherent in the elective process at the wrong end.

If enacted and approved, S.J.R. 6 will affect only a small number of Ohio judges. Unaffected will be the state's 296 common pleas judgeships and the 181 municipal court judgeships.159 This scheme no doubt is based upon an apprehension that the voters will not approve a wholesale appointment system and the thought that the merit plan will be more valuable at certain levels than at others. The point is, however, that the elimination of trial courts from inclusion in the legislation is the strongest argument against it. This is true because it is at the trial court level that confusion reigns, politics abound, and voter apathy is at its highest.160 In addition, it is at the trial court level that most law is "made," as that law actually affects litigants. Appellate courts rarely reverse on factual issues or on issues decided at trial within the unabused discretion of the trial court.161 The result is that bad trial judges who reach bad decisions are often upheld on appeal because of the nature of the appellate process. Because of this, any improvement in the quality of appellate judges will have only minimal impact upon the judicial process as a whole.

S.J.R. 6 should be amended to provide for the merit selection of all Ohio judges, from municipal courts to the state supreme court. In light of the fact that nominees to the appellate courts often rise from the trial court level, this measure would further insure that those selected for appellate and supreme court judgeships have entered the judiciary with appropriate qualifications. In other words, to the extent that a merit plan is preferable to election because it reduces the impact of partisan politics, that objective is far more attainable if the merit plan is employed at every level of the state's judiciary.

2. Retention Elections

It has been observed that retention elections held in merit plan jurisdictions are no more than a sop to the voters because it is rare for

159. See note 130 supra.

160. See note 95 supra. See generally, K. Dolbeare, Trial Courts in Urban Politics (1967). The author paints a clear picture of the political web which entangles urban trial judges.

161. It is provided by statute that the supreme court need not determine the weight of the evidence when hearing an appeal. Ohio Rev. Code Ann. § 2505.31 (Page 1954). In addition, it is well recognized that appellate courts defer to the discretion of the trial court and the triers of fact regarding all but the narrowest questions of law properly preserved for appeal. See generally, O. Jur. 2d Appellate Review, §§ 663–82, 714–18, 746, 805–26 (1953).
an incumbent judge to be turned out of office, especially when there is no opposition candidate on the ballot. This criticism can be leveled at the provisions in S.J.R. 6, particularly in view of the relatively low percentage of favorable votes required for a judge to retain office. Yet, retention elections provide an important mechanism for the electorate to express itself regarding a judge's philosophy or performance. This argument is reinforced by the fact that there is no way to recall an incumbent judge in Ohio. The retention election serves the dual purpose of providing indirect participation and of preserving the visibility of the judiciary in the public's awareness. Review by re-election does not undercut the primary objective of merit selection, which is to assure that those who ascend the bench are the most competent persons available. In fact, the retention election process would further insure that judges appointed to office remain sensitive to the views of those who are affected by their decisions. While this consideration is frequently cited to justify the continued election of judges, it is more appropriate to utilize the elective process for purposes of review rather than initial selection because only then will there be a record of performance for the voters to evaluate.

3. The Nominating Process

The provisions for the composition of the nominating commission and the procedures for the selection, appointment, and confirmation of judges which are contained in S.J.R. 6 are similar to constitutional language employed in other states which have merit plans. The most important feature of the scheme envisioned by the bill is the requirement of bipartisan nominating bodies. The requirement that no more

163. It should be remembered that only fifty-five percent of those voting on the question of retention must vote affirmatively for a particular judge to be entitled to serve another term. S.J.R. 6 art. IV, § 6(A)(4); see Appendix at 2. Thus, assuming an eighty percent vote on the retention issue, only 44 of every one hundred voters who go to the polls need vote in favor. The eighty percent rate may be high. See Barber, Ohio Judicial Elections—Nonpartisan Premises With Partisan Results, 32 Ohio St. L.J. 762, 773 (1971).
164. It appears that there has never been a provision for recalling an incumbent judge in Ohio. See Aumann, The Selection, Tenure, Retirement and Compensation of Judges in Ohio, 5 U. Cin. L. Rev. 408, 424-25 (1931). There is a constitutional provision which authorizes the removal of a judge by concurrent resolution of both houses of the General Assembly. Ohio Const. art. IV, § 17. However, it is unrealistic to view this provision as a viable mechanism for voters to review judicial performance.
165. See text accompanying notes 92-95 supra.
166. See text accompanying notes 68-69 supra.
167. See Mo. Const. art. 5, § 29.
168. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
than half of the members may belong to the same political party insures that partisan politics plays a lesser role in the selection process. The requirement that commissioners serve staggered terms is also desirable because, in the event that the implementing legislation authorizes the Governor to appoint some or all of its members, there will be less likelihood that the makeup of the commission will be drastically altered during a particular administration.

The inclusion of laymen in the selection process is also a positive development. Some opponents of merit selection argue that laymen are likely to be intimidated by lawyers to the point that they exercise little influence. But this problem is ameliorated where, as here, lay members can account for one-half of the commission's membership. In addition, lay participation increases the likelihood that the commission will be a diverse group of people who represent the ethnic and racial makeup of the community.

The unfortunate aspect of this section of the bill is the authorization for elected officials to serve on the commissions. This is regrettable because the inclusion of partisans in what should be a nonpartisan process endangers its potential effectiveness. The persons appointed to the nominating commission should be capable of the greatest possible objectivity in the recruitment and recommendation of nominees. Elected officials subject to the pressures of partisan politics in their own positions are less likely than non-office holders to possess that kind of detachment. The provision can be defended on the ground that it makes possible the inclusion of incumbent judges on nominating commissions. If this was the reason for the provision, it should have been clearly stated in the bill.

A further problem with this section is that it fails to prevent the commissions from nominating one of their own members; nor are there any restrictions against a member seeking a judicial appointment upon the completion of his term on the commission. The bill should be amended to limit public officials eligible for commission service to judges and to impose restrictions upon the eligibility of commissioners

169. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
171. This is not assured, however. Ashman and Alfini found that notwithstanding lay involvement, judicial nominating commissions tend to be restricted to white, male lawyers and businessmen. Id. at 228. This fact is a product of the process by which commission members are selected or, in some cases, elected. There are ways, however, to minimize or even eliminate this problem. See text accompanying note 206 infra.
172. S.J.R. 6, art. IV, § 6(A)(3); see Appendix at 2.
for judicial appointments until some fixed period following their service.

Finally, the requirement of senate confirmation appears to be desirable. It may be argued that this provision potentially defeats the concepts which underlie merit selection because it injects political considerations into the appointment process.173 This potential problem is outweighed, however, by the need for public awareness of the selection process. The principal advantage of senate confirmation is that it places the qualifications and background of a prospective appointee into the public arena prior to appointment. The opportunity for public scrutiny of a prospective appointee's suitability for judicial service is highly desirable, as has been demonstrated on the federal level,174 because it insures that factors which might disqualify a nominee are known before that person ascends the bench. In addition, the process of legislative confirmation is consistent with the objective of joint participation by the executive and legislative branches of government. In this way, the judiciary will not be under the exclusive control of either of the other two branches. There should, however, be safeguards in the implementing legislation to prevent the confirmation process from becoming a political football. For example, there should be a limit imposed upon the amount of time available to the senate for confirmation; for the same reason, it would be advantageous to provide for confirmation by a simple majority vote, rather than some greater mandate.

4. Evaluation of Judges

Most commentators agree that the persons responsible for nominations to the judiciary should not be involved in any process by which the performance of appointed judges is reviewed.175 In combining these functions,176 S.J.R. 6 exhibits two weaknesses. First, what criteria will be used to evaluate our "independent" judiciary? Second, to what extent is a nominating commission likely to recommend rejection of an incumbent judge who previously received its approval, often over other highly qualified candidates?

173. See text accompanying notes 80-84 supra.
176. S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.
The language empowering the commission to "review the record of a judge"\textsuperscript{177} is downright dangerous. It can be construed to mean no more than an examination of a judge's performance in terms of the rate of reversals or the efficiency with which a particular judge manages a docket. But the danger is that the language implies more than this by saying less. What of the judge who takes legitimate, if unpopular, positions on matters of legal interpretation? Is that judge to be labeled "unqualified" for that reason? While we would hope not, it is not unlikely that sitting judges may not support the legislation because of the vagueness of the bill's language on this point. In addition, judges on the courts affected by the legislation rarely hear cases individually; rather, appellate judges sit in panels of three and the justices of the supreme court act on a panel of seven. Thus, other than the prose which a particular judge or justice might select for an opinion, there may not be much for the commission to "review."

Then there is a danger of "inbreeding." There is no good reason for the same commission which recommended the appointment of a judge to be the body which evaluates his performance. As will be seen,\textsuperscript{178} it would be relatively simple to appoint a different commission to evaluate judicial performance. Thus, the expense and added bureaucratic burden attendant to the creation of a separate review body are justified when one considers the problems inherent in an alternative system in which the selectors are authorized to review their own decisions.

5. Local Options

It has been pointed out that S.J.R. 6 provides for a local option to institute a merit plan for lower courts.\textsuperscript{179} This is probably attributable to the differences in population density among the eighty-eight counties in Ohio, along with the resulting differences of opinion which are likely to exist regarding the impact such a plan would have on the judiciary of a particular area. This is understandable, but, as already shown,\textsuperscript{180} it is at the trial court level that reform is needed most. Although there is evidence that partisan politics do not play the role in rural areas that it does in the cities,\textsuperscript{181} there is no evidence that the

\textsuperscript{177} S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.
\textsuperscript{178} See text accompanying notes 216–21 infra.
\textsuperscript{179} S.J.R. 6, art. IV, § 6(A)(7); see Appendix at 4. See text accompanying note 132 supra.
\textsuperscript{180} See text accompanying notes 160–61 supra.
elective process is any more objective, though rural voters do have a reputation for greater independence. In addition, the absence of a large field of candidates in a small county judicial race will not necessarily generate significantly greater awareness of their ability or interest in the outcome of the election.\textsuperscript{182}

Nor does the local option provision in the bill create the likelihood that trial judges will ever be selected according to merit. As noted earlier,\textsuperscript{183} the powerful political interests in the cities are unwilling to surrender their dominance over the judiciary. It is these same political interests which will play a major role in the campaign to adopt merit selection on the local level. In rural areas, there may be hostility to merit selection because of the generally smaller field of candidates and because of differences in general political philosophy.\textsuperscript{184} The predictable result is that the Ohio Plan will become operative only at the appellate level of our judiciary.

It can be argued that the public is much more likely to accept a merit plan at the local level once the plan acquires a respectable track record at the appellate and supreme court levels. The problem with this analysis is that it is at those upper levels where the benefits of adopting a merit plan would be least discernible.\textsuperscript{185} To the extent that the judges and justices are visible as individuals, the nature of their work will make it very difficult to observe any sweeping changes in the quality of justice which is dispensed by them as the result of the merit plan.

The expected hostility toward merit selection at the trial level could be an intimation of statewide defeat of the constitutional amendment in its entirety. If the need for judicial reform is genuine, it will not take place as a result of this legislation because the local option provision will probably not be widely exercised. The submission to the voters of a comprehensive, statewide plan for merit selection in all state courts is not only the most effective means of improving the judiciary, but also

\textsuperscript{182} See How Much Do Voters Know or Care About Judicial Candidates? 38 Am. Jud. Soc'y 141 (1955). The article contains a summary of the results of a 1954 New York study which found that rural and urban voters were about equally uninformed about judicial candidates prior to elections, the courts to which judges were elected, and the names of the candidates for whom they had voted. The study was conducted within a ten day period after the 1954 judicial elections and those interviewed claimed to have voted on election day. Jackson suggests that the media now play a vital role in the election of our judges. D. Jackson, supra note 175, at 382. This fact may raise questions about the current validity of a study done almost twenty-five years ago. However, there are recent data which support the proposition that judicial elections and candidates do not enjoy high priority in the public view. See Note, supra note 175, at 293–94.

\textsuperscript{183} See text accompanying note 95 supra.

\textsuperscript{184} See R. Watson & R. Downing, supra note 181, at 254.

\textsuperscript{185} See text accompanying note 158 supra.
there are indications that such a plan would be favorably received, despite the inclusion of trial level judiciary. The growing number of states which have adopted merit selection on a statewide basis suggests that both urban and rural voters are more amenable to the idea than might be surmised at first glance.\textsuperscript{186} In addition, the distrust in government spawned by Watergate has likely also produced public disdain for the kinds of political machinery and machinations which have brought us where we are. Thus, there may be significant voter support for a rational plan for selecting persons whose public function is to operate in an arena and in a manner in which politics should have no place. If all persons who reside or do business in Ohio are subject to the same laws, then it follows that all are entitled to equally qualified judges to interpret and enforce those laws, without regard to where they live or work.

\textbf{IV. A PROPOSAL FOR LEGISLATIVE IMPLEMENTATION}

Having examined the provisions of S.J.R. 6 and areas of possible amendment, what follows is a proposal for implementing a merit plan in Ohio. It builds upon the amendments proposed earlier and is meant to provide a model for legislation which might be adopted by the General Assembly in the event of enactment and approval of S.J.R. 6 or, preferably, a model for amendment of the bill itself. It would be advantageous to amend S.J.R. 6 itself, because this would provide the electorate with a clear picture of what is contemplated by the legislation and how it would operate if approved.\textsuperscript{187}

By way of an overview, the proposal is based upon certain premises. First, it is best to have all judges selected pursuant to a merit plan. Second, it is not possible to insulate completely the matter of judicial selection from the political process. Third, the legislative and executive branches should have equal power in the nomination and selection process in order to minimize the influence of partisanship.\textsuperscript{188} Fourth, the participation of laymen is highly desirable in the selection of judges, so that there should be equality of lay and legal representation in the nominating process. Fifth, the nominating and evaluation processes should not be performed by the same group. Sixth, the recruit-

\textsuperscript{186} For example, the Arizona and Vermont merit plans which were adopted in 1974 reflect equally favorable responses from diverse groups in our national population. \textit{See Ariz. Const.} art. 6, \$\$ 12, 30, 36, 37; \textit{Vt. Const.} Ch. 1, \$ 3, Ch. 2, \$ 47, Ch. 3, \$ 71. The fact that no Northern industrial state has followed suit may be attributable more to political machinery than to a hostile public attitude.

\textsuperscript{187} The original Ohio Plan contained provisions which outlined the selection process and composition of the judicial council. \textit{See} note 55 \textit{supra}.

\textsuperscript{188} \textit{See} notes 109-10 \textit{supra} and accompanying text.
ment process should take place within an atmosphere of strict confidentiality; however, the appointment and confirmation procedures should be open to public view. Finally, there should be a professional, full time staff to implement the merit plan and the policies and procedures of the various nominating commissions.

A. The Nominating Commissions

Any merit plan is only as good as the method employed to select those who will serve on the body empowered to make recommendations to the appointing authority. In Ohio, as in several other states, that authority would be the Governor. Notwithstanding the need for senate confirmation, the Governor thus would hold great power in determining the quality of the judiciary because he selects the names which are to be sent to the senate. The existence of this power militates against granting to the Governor the additional power to name the persons who are to sit on the commissions themselves. This would confer upon the Governor almost plenary power to choose the judges. While the merit system is certainly preferable to popular election, it makes little sense to go to the extreme of allowing the Governor to choose all of the judges in the state. Therefore, a different, more diverse body should participate in the nominating process. It is here proposed that there be two commissions created to nominate persons to be appointed by the Governor subject to senate confirmation. All municipal, common pleas, and intermediate appellate judges should be appointed from nominations submitted by eleven district commissions. Supreme court justices should be appointed from nominations made by a separate supreme court commission. Finally, all judges should be evaluated for retention purposes by a commission on fitness and discipline.

1. The District Commissions

A judicial nominating commission should be created for each of the eleven appellate districts in the state. The makeup of the

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189. See text accompanying notes 96-97 supra.
190. As indicated in note 100 supra, the chief executive is the customary appointing authority for nomination committees. E.g., Mo. Const. art. 5, § 29.
191. See Winters, One-Man Judicial Selection, 45 Jud. 198, 199 (1962).
192. Those districts range in size from one to sixteen counties. Section 2501.01 of the Ohio Revised Code provides that the following counties shall constitute the state's eleven appellate districts:

First: Hamilton, Clermont, Butler, Warren, and Clinton;
Second: Preble, Darke, Shelby, Miami, Montgomery, Champaign, Clark, Greene, Fayette, and Madison;
Third: Mercer, VanWert, Paulding, Defiance, Henry, Putman, Allen, Auglaize, Han-
commissions should reflect the legitimate interests of the public in achieving a competent and independent judiciary. One method of accomplishing this objective is to provide that county officials elected by the public should participate in the selection of commission members. In addition, there should be input from the bar regarding the fitness and temperament of prospective nominees. Finally, the Governor should have some input into the selection process as the state's chief executive. Thus, the district commissions here proposed would be composed of appointees of the Governor, the president of the state bar association, and the commissioners of the counties within each appellate district. It is further proposed that the appointees of the Governor and the bar association should be admitted to the bar; the appointees of public officials should be laymen. Throughout their tenure, all appointees should reside within the appellate district which they represent. The proposed scheme contemplates an equal number of lawyers and nonlawyers on each of the eleven nominating commissions.

With the exception of the eighth and tenth appellate districts, which include only one county each, the remaining nine districts are as follows:

- **Fourth:** Brown, Adams, Highland, Pickaway, Ross, Pike, Scioto, Lawrence, Gallia, Jackson, Meigs, Vinton, Hocking, Athens, and Washington;
- **Fifth:** Morrow, Richland, Ashland, Knox, Licking, Fairfield, Perry, Morgan, Muskingum, Guernsey, Coshocton, Holmes, Stark, Tuscarawas, and Delaware;
- **Sixth:** Williams, Fulton, Wood, Lucas, Ottawa, Sandusky, Erie, and Huron;
- **Seventh:** Mahoning, Columbiana, Carroll, Jefferson, Harrison, Belmont, Noble, and Monroe;
- **Eighth:** Cuyahoga
- **Ninth:** Lorain, Medina, Wayne, and Summit;
- **Tenth:** Franklin;
- **Eleventh:** Lake, Ashtabula, Geauga, Trumbull, and Portage.

193. In several merit plan jurisdictions, the state bar either elects or appoints some member of the judicial nominating commissions. E.g., IND. CONST. art. VII, § 9; IND. CODE ANN. §§ 4-534-36 (Burns Supp. 1972) (elected bar commissioners); ALASKA CONST. art. IV, § 8; ALASKA STAT. § 22.30.010 (1976) (appointed bar commissioners).

194. Inasmuch as he is the officer of the state with the broadest constituency, the Governor occupies a position analogous to that of the President, who nominates candidates to the federal judiciary subject to the advice and consent of the U.S. Senate. U.S. CONST. art. II, § 2, cl. 2.

195. One writer has suggested that the more diversity built into the nominating process, the better it will be:

> The genius of the federal [nominating] system may be its pluralism. The Justice Department, the Senator, the ABA, special-interest groups, and the press are all permitted a voice. And therein lies what solution there is: maximize, don't minimize, the participants in the process. Let everyone be heard and do it as openly as possible.

D. JACKSON, supra note 175, at 388.

196. The eighth and tenth appellate districts are comprised of Cuyahoga and Franklin
each include from four to sixteen counties. In districts with an even number of counties, the elected county commissioners would select one lay nominating commission member from each county, beginning with the largest county according to population and proceeding to the smallest. In districts with an odd number of counties, the same procedure would be followed, except that the largest county would select two members in order to insure an even number of laymen. The seriatum selection of members according to the size of the county is important because of the restriction against more than half the nominating commissioners having the same political affiliation. The freedom to appoint members of a particular political party will thus diminish as the selections are made. That is, once one-half of the county appointees named have the same political affiliation, the remaining counties would be obligated to select independents or members of another political party.

Concurrent with the selection of members by the various county commissioners, the Governor would be empowered to select a number equal to one-half of the total number of commission members to be chosen at the county level. This will be an even number because of the number of counties in a district being even or because of the selection of two members by the largest county in a district with an odd number of counties. The members selected by the Governor would be comprised of an equal number of persons from both political parties or independents. The president of the state bar association would select a number equal to that selected by the Governor, with the same limitations.

As noted, the appointees of the Governor and the state bar association would be lawyers. In the nine districts here under consideration, the process outlined above would result in nominating commissions ranging in size from eight to thirty-two members. For reasons to be

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197. These districts are the second, third, sixth, seventh, and ninth appellate districts. *See* note 192 *supra*.

198. These districts are the first, fourth, fifth, and eleventh appellate districts. *See* note 192 *supra*.

199. *See* text accompanying note 109 *supra*. The legislation should provide that lay commission members must be residents of the county in which they were originally appointed during their terms of office.

200. *See* text accompanying notes 196–99 *supra*.

201. The ninth appellate district nominating commission would consist of a total of eight members; the first and eleventh districts, twelve members; the sixth and seventh districts, sixteen members; the second district, twenty members; and the third, fourth, and fifth districts, thirty-two members. *See* note 192 *supra* and accompanying text.
discussed, there should be a requirement that one of the lawyer members serve as chairman. Once the commission members are selected, they should draw lots for initial terms of one, two, or three years and, upon the expiration of their respective terms, the appointing authorities would replace them, with members serving full three year terms, with the county commissioners selecting first, then the Governor and then the state bar association. This would insure that the proper political balance is maintained.

With respect to the eighth and tenth appellate districts, consisting of one county each, the legislation should provide that the respective county commissioners would select eight representatives, with no more than half belonging to the same party. The Governor and the president of the state bar association would then select four appointees each, with the same political limitations. Thus, in these districts, the commissions would have sixteen members each.

The above approach recognizes that the political process cannot be entirely eliminated from judicial selection. Indeed, there is no need to do so if the influence of partisan politics is not allowed to operate in a manner which dominates the selection process to the exclusion of other significant factors. Control over partisan politics is achieved by including public officials who are responsible to the electorate in the nominating process without making them commission members, limiting the number of commission members from the same political party, and insuring that lay interests will be represented equally with those of the legal profession. Such a nominating commission would be well-suited to seek out the broadest range of potential judges from all

202. See text accompanying note 209 infra.
203. The choice of a three year term for commission members is based upon the belief that some frequency of turnover among commission members is desirable. Of course, the danger exists that insufficient continuity and experience could result from this approach, especially since judges serve terms of six years. An alternative would be to retain the three year term and limit commission service to two consecutive terms or to provide for one term of six years. Both alternatives would be consistent with the philosophy that ongoing bodies should be insulated from sudden changes in government by making terms of appointive office longer than those of the appointing authorities.
204. Again, the choice of sixteen members is based upon a balancing of the interest of broad representation against the reality that too large a nominating commission would be an inefficient decision-making body. The size and diversity of the populations of these counties and the number of judges and prospective nominees to be considered on a continuous basis might justify doubling the number of nominating commissioners. This is not essential, however. Ashman and Alfini recommended that commissions operate in small panels regarding particular vacancies, thus maximizing that use of members' time. A. ASHMAN & J. ALFINI, supra note 170, at 228.
205. See text accompanying note 171 supra.
segments of the community. In addition, the appointees of the public officials would, in all probability, be representative of the racial and ethnic makeup of the constituencies which elected them. Thus, commissions consisting almost entirely of white, male businessmen and corporate lawyers can be avoided with this system.206

2. The Supreme Court Nominating Commission

The commission created to select those to be nominated for the Ohio Supreme Court should be structured according to the same criteria used to compose the district commissions. That is, the commission members should represent a broad base of geographic, professional, lay, and political interests. Here, however, the importance of lay input is arguably less vital than at the district level. The specialized nature of the business of the supreme court militates in favor of additional professional scrutiny and review of potential candidates for appointment. Therefore, although lay representation is critical,207 the need for equality is less urgent.

The supreme court nominating commission would be comprised of twenty-two members appointed by the county commissioners of all eighty-eight counties,208 the Governor, the General Assembly, the Ohio Supreme Court, and the state bar association. They would be selected as follows. The chairmen of the eleven district commissions would become members of this commission by virtue of their office. These commission members would be lawyers.209 Once the district commission members have been named, the political affiliations of the chairmen can be ascertained. Then, eleven appointments would be made in the following order: the Governor would appoint two non-lawyers, one from each party unless the maximum number (eleven) of

206. Ashman and Alfni found that "the typical commissioner was 48 years of age or older, white male and either a lawyer, a judge or a businessman. . . . If the nonpartisan merit selection plan is to grow in both rural and urban areas, commissions will have to approximate more closely a representative cross-section of our society." A. ASHMAN & J. ALFINI, supra note 170, at 228.

207. Cf. Colson, Would a Lay Justice Be Just?, 13 IDAHO L. REV. 351 (1977) (1976 proposal by the Governor of Idaho to appoint a layman to the state supreme court favorably reviewed). The number of lawyers as well as laymen who regularly come into contact with the justices of the supreme court is very small. Lawyers have additional expertise here because there is a greater likelihood that their professional decisions and advice will depend upon being informed of the court's decisions. However, as noted earlier, the prospective appointees to the court are more likely to have some sort of judicial "track record," a fact which militates in favor of lay input.

208. See text accompanying notes 192-95 supra.

209. See text accompanying note 202 supra. This is the reason for requiring that all district commission chairmen be admitted to the bar.
commission members from any one party had been reached in the ranks of the district chairmen (this is unlikely because it would occur only if all district chairmen belong to the same political party). Next, the President pro tem of the Ohio Senate would select two nonlawyers under the same political restrictions imposed upon the Governor. Next, the Speaker of the Ohio House would appoint two nonlawyers, in conformity with the above restrictions. Next, the Chief Justice of the Ohio Supreme Court would select two persons admitted to the bar, subject to political restrictions. Finally, the President of the Ohio State Bar Association would select three lawyers, again subject to political restrictions. The resulting body would thus consist of twenty-two members, no more than eleven of whom would belong to the same political party and sixteen of whom would be lawyers. They would then draw lots for initial terms of one, two, or three years and their successors would be chosen as at the district level.\textsuperscript{210}

This commission would thus be representative of the entire state, appropriate political and professional interests, and would include important lay input in the selection process. On the whole, it might not be as representative of racial, ethnic, and other interests as the district commissions, but the number of political appointees would provide for some diversity. In addition, since the Governor has the responsibility of selecting a nominee from among those recommended by the commission, subject to senate confirmation, the prospect for a representative supreme court exists at least to the same extent as at present.\textsuperscript{211}

B. \textit{Commission on Fitness and Discipline}

As noted earlier,\textsuperscript{212} S.J.R. 6, in its present form, provides that the judicial nominating commission which nominated a judge for appoint-

\textsuperscript{210} The discussion in note 203 \textit{supra}, regarding the advisability of longer terms is equally applicable here. A potential problem is presented by the unequal terms of office of the district chairmen on their respective district commissions and the supreme court nominating commission when the commissions are initially organized. The solution is to provide that the district chairmen be elected at the district level and assigned to one of the longest terms (three to six years) before the other members draw lots. In addition, the legislation should provide that, at the supreme court level, half the district chairmen should serve the longest term; the other half should serve the next longest term. This would prevent inequality of terms at the two levels while insuring that all district chairmen do not leave the supreme court commission at the same time.

\textsuperscript{211} The supreme court is and has been made up of white males since its creation with the exception of two black men: Justice Lloyd O. Brown, who was appointed by Governor John J. Gilligan for a brief period but was defeated in the 1974 general election, and Justice Robert Duncan, who was appointed by Governor James A. Rhodes but did not run for re-election. See note 96 \textit{supra}.

\textsuperscript{212} See text accompanying notes 148–49 \textit{supra}.
merit shall also perform the function of evaluating that judge for the purpose of guiding the voters in the later retention election. There is no good reason for this unworkable proposal.\textsuperscript{213} It would be far more desirable to create a separate body charged with the responsibility of reviewing judicial performance and the power to take disciplinary action in appropriate cases. There is already legislation in effect in Ohio which authorizes the supreme court to appoint, on an ad hoc basis, a commission of five judges to adjudicate cases of alleged judicial incapacity or misconduct.\textsuperscript{214} This legislation should be amended to provide for periodic judicial evaluation as well.\textsuperscript{215}

This third and very important commission would consist of three divisions, one for the supreme court, one for the courts of appeals, and a third for common pleas and municipal courts. All of its members would be members of the bar. The reason for this is that judicial performance and misconduct are matters about which laymen are unlikely to be sufficiently informed to make meaningful and fair judgments.\textsuperscript{216} The fact that the electorate has the opportunity, in the retention election, to express its approval or disapproval of a particular judge provides sufficient lay input and removes the need for lay representation on this commission.

\textsuperscript{213} This is one of the components of the merit plan concept that is most criticized by those favoring direct election. \textit{See} note 79 \textit{supra} and accompanying text.

\textsuperscript{214} \textsc{Ohio Rev. Code Ann.} § 2701.11 (Page Supp. 1977). The commission is composed of judges appointed by the supreme court from any five appellate districts other than the district in which the respondent judge resides. Section 2701.12 enumerates the following grounds for retirement, removal, or suspension of a judge: 1) misconduct involving moral turpitude or a breach of judicial ethics; 2) conviction of a crime involving moral turpitude; 3) disbarment or suspension from the practice of law for misconduct before election or appointment; 4) permanent mental or physical disability preventing discharge of duty; and 5) mental or physical disability preventing discharge of duty for an indefinite time. \textsc{Ohio Rev. Code Ann.} § 2701.12 (Page Supp. 1977).


\textsuperscript{216} The assumption has two bases: first, lawyers, not laymen, appear before judges, read their opinions, and if it occurs, are mistreated by judges. Laymen are only rarely involved with judges on a continual basis. Second, to the extent that laymen are informed about the conduct of a judge, whether the information is positive or negative, it is likely to be in a "sensational" context, as where a particular judge granted shock probation to a defendant in a rape case, dismissed the charges against a police officer accused of brutality, or made some unkind remarks about a particular ethnic group in a speech at a picnic. None of these things, if proven, should be overlooked; however, neither should they be determinative of disciplinary action, nor the lack of it. The risk of improperly based censure is simply much greater with laymen than with lawyers. \textit{Cf. Calif. Const. art. VI, § 6} (providing for a Commission on Judicial Performance consisting of five judges, two lawyers, and two laymen).
1. **Supreme Court Division**

The supreme court division would consist of a panel of seven or nine members of the bar. They would be appointed by the Governor for six-year terms,\(^{217}\) which would be staggered, and appointments would be made without regard to political affiliation. It is less likely that partisan politics would influence decisions made at this level.\(^{218}\) Indeed, political affiliation is not a factor in any phase of the review and disciplinary process here envisioned.

The members of this division should be distinguished members of the Ohio bar of long standing and experience, such as retired justices or judges, experienced lawyers, and legal educators. Their function would be to review the performance of a justice seeking to succeed himself or herself in office and to make a recommendation to be placed on the ballot with the name of the candidate. In addition, this division would be authorized to adjudicate any charges brought against a justice and make findings of fact to the supreme court. The present legislation provides that a judge aggrieved by the findings of the five judge commission may appeal directly to the supreme court;\(^{219}\) this would continue to be the case under the proposed amendment.

2. **Appellate Division**

The appellate division would consist of the Chief Justice and two Associate Justices of the Ohio Supreme Court. They would serve during their respective terms as a reviewing and disciplinary authority for the thirty-eight appellate judges\(^{220}\) in the state and would operate in the same manner as the supreme court division. In order to prevent prejudice to an aggrieved judge who wishes to appeal the division's ruling to the supreme court, the legislation should provide that any justice who voted against that judge at the initial adjudication may not participate in the review of the findings being appealed.

\(^{217}\) See note 203 *supra*.

\(^{218}\) The nomination process is more susceptible to political abuse, because the decision-making process at that level is not necessarily tied to easily ascertainable criteria. The review process, on the other hand, is based on the record of the judge, and a politically inspired decision by this body would be more subject to public scrutiny. The "balancing" of political interests, which is employed at the nominating level, is unnecessary at the review level, because public scrutiny would ensure an apolitical decision-making process.


3. **Trial Division**

The trial division would be comprised of the presiding judges of the eleven appellate districts in the state. It would be their responsibility to review the records of the 181 municipal court judges and the 296 common pleas judges across the state. In addition, this division would have the same disciplinary authority regarding these judges as that exercised by the other two divisions. Because municipal judges are elected in odd numbered years and serve six-year terms, approximately one-third are elected every two years. Thus, approximately sixty of these judges around the state would be reviewed by the eleven panels of the commission on fitness and discipline in a given year. Similarly, common pleas judges are elected in even numbered years and serve six-year terms. Thus, about fifty such judges would be reviewed each year. This is a manageable number in each instance.

4. **Criteria for review**

The three divisions of the commission on qualifications and discipline outlined above would have two primary functions. First, they would sanction or remove judges for cause or incapacity during a judge's term. Second, they would review the performance of each judge seeking to be retained in office at the end of his or her term. This dual role would provide ongoing scrutiny of judicial conduct and would be an excellent check against any complacency which might accompany a judicial appointment. In essence, this sort of peer review should minimize any abuse of judicial office.

The criteria which the commission should employ to determine whether a judge should be retained in office is a more difficult matter. Any system or policy which would diminish judicial independence should be avoided. Still, several matters must be addressed in evaluating any judge. First, the commission should consider the quality of decisions rendered. The only practical way of doing this would be to examine the decisions which are reversed by a higher court because of an improper interpretation of the law. Second, a judge's efficiency ought to be considered. While the quantity of decisions rendered is not the only measure of a judge's competence, it is indicative of that judge's energy and dedication. To the extent that a judge's docket is

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221. *Id.* at 21, 76.
224. S.J.R. 6, art. IV, § 6(A)(8); *see* Appendix at 4. *See* text accompanying notes 148-52 supra.
clogged, the administration of justice is hindered. Third, the out-of-court conduct of a judge should be considered. The presence or absence of bad publicity, complaints regarding a judge's conduct, and alleged breaches of the canons of judicial ethics should be taken into account. The commission should not, however, become a roving investigatory body. Its function is not analogous to that of an investigating grand jury, and where it is not presented with unfavorable information, the commission would not be empowered to solicit such information about a judge. Finally, the commission ought to consider the results of polls which are customarily taken by local bar associations in connection with their endorsements. These results would be helpful in determining the views of the practicing bar.

The commission's deliberations should be conducted in the strictest secrecy and the judge seeking to be retained should be given the opportunity to appear personally in connection with his or her candidacy. Once a determination is made, the commission should inform the judge of the rating which will be given. This would allow a judge the option of not seeking retention in the face of an unfavorable rating by the commission. Finally, instead of the ratings proposed in S.J.R. 6,225 the following should appear on the ballot, because they would be more accurate: "Recommended for Retention by the Commission on Fitness and Discipline," "No Recommendation by the Commission on Fitness and Discipline," and "Not Recommended for Retention by the Commission on Fitness and Discipline."226

C. The Selection Process

It is essential to the feasibility of any merit plan that it provide an orderly, expeditious process for the nomination and final selection of judges. There should, therefore, be a timetable written into the legislation providing for vacancies to be filled within a minimum reasonable time after they arise.227 This is to be distinguished from retention

225. The proposed ratings are "well qualified," "qualified," and "not qualified." S.J.R. 6, art. IV, § 6(A)(8); see Appendix at 4.

226. The change is proposed on the ground that the commission's recommendation should not be considered final. In the event the commission votes against recommending retention, the judge affected should not be branded with the label "not qualified." The presence or absence of qualifications regarding judicial performance can be independently ascertained by the electorate. The proposed language change results in the commission's decision being made public without concurrently assassinating a judge's character.

227. The standard timetable contained in merit plan legislation provides for judicial vacancies to be filled within sixty days of their occurrence. See, e.g., ALASKA STAT. § 22.05.080 (1976) (45 days); IND. CODE ANN. § 4-7806 (Burns Supp. 1972) (60 days); IOWA CODE ANN. § 46.14 (West Supp. 1977) (60 days).
elections, which would be held at the time of the annual general
elections for various offices.

There is no good reason for a judicial vacancy to remain unfilled
for longer than six months. The following schedule would enable
the process to be completed before the end of that period in all but the
most unusual circumstances. First, the selection process would be
triggered by the receipt of notice by the Clerk of the Judiciary that a
vacancy exists in a particular court. Such notice would come from the
presiding judge of the court affected, from the supreme court (in the
case of a removal for incapacity or other cause) or from the appropriate
county board of election (in the case of an insufficient margin of
approval in a retention election). The legislation should require that
such notice be transmitted within seven days of the occurrence of a
vacancy.

Upon receipt of notice of a vacancy, the clerk would notify the
chairman of the appropriate judicial nominating commission. That
commission would then have ninety days to conduct the screening,
interviewing, and deliberating processes necessary to make the required
number of recommendations to the Governor. There should be a
requirement that the commission cause notice of the vacancy and the
latest date for submission of applications to be published in a newspa-
per of general circulation in the appellate district or, in the case of
vacancies on the supreme court, the state bar journal. In order to
prevent undue delay, the legislation should provide that the failure or
inability of the commission to make recommendations to the Governor
within the ninety day period would operate as an authorization for the
Governor to appoint a candidate of his or her choice for confirmation
by the senate. Upon the final selection of candidates for nomination
to the Governor, the commission chairman would submit written
notice of the commission’s nominees to the Governor, the clerk, the
President of the Senate, and the candidates who applied.

Within thirty days after receipt of the commission’s nominations,

228. This is a substantially longer period than is typically provided in other merit plan
jurisdictions. See note 227 supra. The shorter mandatory timetables provided in other
states create the risk that the nominating commission will be hurried in its deliberations.
Given the criticism of those opposing merit selection that nominating commissions are
not blessed with insight significantly greater than that of the electorate, it seems wise to
allow ample time for the nomination to be submitted, the appointment made, and
confirmation to be considered. In many cases, however, the appointment process could
be completed in less than six months.

229. See section D infra.

230. These "bypass" provisions are customary. They insure diligence on the part of
the responsible officials. See note 100 supra.
the Governor would be required to submit one candidate to the senate for confirmation. His failure or inability to act within the time prescribed would operate as an authorization for the President of the Senate to submit one of the candidates nominated by the commission to the senate for confirmation. The senate would be required to act upon any nomination made by the Governor within thirty legislative days after receipt. In the event of the senate's failure or inability to so act, the Governor's nomination would become final.231

In the event of a negative senate vote on the question of confirmation of the Governor's appointee, the Governor would have an additional fourteen days to submit another name from among those recommended by the nominating commission. Again, the failure or inability of the Governor to comply with this requirement would empower the senate to confirm another nominee named by the commission. Within thirty days after receipt of a second appointment from the Governor, the senate would be required to act or the appointment would become final. This process would be repeated as often as necessary to confirm a nominee to fill the vacancy. In the event that none of the commission's nominees are confirmed, the clerk would notify the commission chairman that the vacancy continued to exist. Upon receipt of such notice, the selection process would be repeated as outlined above.

D. Personnel

The admittedly complex procedure of selecting commission members and the mechanics of judicial selection here proposed require that some administrative support be available to implement the proposed legislation and to monitor continued conformance to the statutory mandates here suggested. This could be accomplished by the creation by the legislature of the position of Clerk of the Judiciary. The clerk would be selected by majority vote of the Governor, the President of the Senate, and the Chief Justice of the Supreme Court. To minimize politization, the term of office should be staggered with that of the Governor; this suggests that a term of six years would be advisable. The clerk and the clerk's staff salaries, as well as necessary operating expenses, would be included in the budget of the supreme court. An alternative method of funding would be to assess the counties for the operating expenses of the clerk's office on a per capita basis. The total amount required to staff the clerk's office and to compensate commis-

231. Implementation of this provision would require amending the language in S.J.R. 6 which requires the advice and consent of the senate in all appointments. One way to accomplish this would be to insert language requiring the senate's advice and consent unless otherwise provided by law.
sion members for their service and actual expenses should not be excessive.

E. Publicity

All matters involved in the screening of candidates and the selection process should be kept in the strictest confidence by the commissions. In order to insure the confidentiality of the selection process, the nominating commissions' proceedings would have to be exempt from the provisions of the sunshine law. The prospect of public discussion of a lawyer's qualifications and fitness for judicial office would doubtless deter many suitable persons from making themselves available for judgeships because of the potentially negative impact upon their law practices or professional associations. Thus, the legislation should require commission members to affirm their commitment to nondisclosure of matters coming before them in their official capacity. Breach of that commitment would certainly be a ground for the removal of a member for cause.

Once the commission has made its recommendations to the Governor, however, the public's right to know comes into play. This does

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232. It is probable that the overwhelming majority of commissioners would serve without pay. The Indiana merit plan provides that commissioners receive only reimbursement for expenses incident to the performance of their duties. Ind. Code Ann. § 4-7814 (Burns Supp. 1972).

233. See ABA Model By-Laws for State and Local Bar Associations Respecting Appointment and Election of Judges § 3 (1973). Section 3 deals with confidentiality and provides in part as follows:

(b) Except as herein otherwise specifically provided, the discussions at the committee meetings pertaining to the qualifications of persons to be considered by the committee shall be completely confidential; and no member of the committee shall disclose to anyone not a member of the committee any action taken by the committee or any statement made at a committee meeting pertaining to the qualifications of any person whose name has been submitted to, or has been considered by, the committee.

234. Ohio Rev. Code Ann. § 121.22 (Page 1978). Subsection (A) of the statute provides:

(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings, unless the subject matter is specifically excepted by law.

Arguably, the deliberations of the commissions could be considered to be within the exception because of the language in subsection (G):

The members of a public body may hold an executive session only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

(1) . . . to consider the appointment, employment, dismissal, discipline, promotion, demotion or compensation of a public employee or official, or the investigation of charges or complaints against a public employee [or] official. . . .

235. The ABA Model By-Laws specifically provide for removal for breach of confidence. ABA Model By-Laws, supra note 233, at § 3(c).
not mean that the names of all candidates should be publicized; only names which are actually submitted to the Governor would be made public. The major reason for requiring the Governor to submit a nomination to the senate for confirmation is to use that mechanism to make public the name of the nominee in order that there be public scrutiny of a prospective appointee before, as well as after, the selection process.\textsuperscript{236} In the event facts regarding the fitness of a nominee have not been considered by a nominating commission, the public would have the opportunity to express its sentiments to the senate prior to a vote on the question of confirmation.\textsuperscript{237} This would seem particularly important in Ohio, which has no provision for the recall of incumbent judges.\textsuperscript{238}

In addition, a prospective appointee cannot expect to be appointed in a vacuum of silence. It is a high honor to be nominated by a commission and appointed by the Governor for a judgeship and, even in the event of a negative vote in the senate, the standing of such a lawyer would not likely be diminished without good reason. In the event that the senate is not in session, the Governor's announcement of an appointment would not be final for thirty days;\textsuperscript{239} thus, there would still be time for public reaction to an appointee's fitness and, in the event that disclosures are made which raise serious questions about the appointment, the Governor would be able to withdraw it.

V. CONCLUSION

The partisan political process is an important and valuable part of American government. However, it has become clear that the judicial branch of government performs a function that ought to be removed from political dominance to the greatest extent possible. If that is true of judicial work, it is no less true of judicial selection. We expect our judges to disregard political considerations in the interpretation and enforcement of our laws, but our present system of electing judges makes that objective difficult to achieve and, more important, substi-

\textsuperscript{236} See text accompanying note 174 \textit{supra}.
\textsuperscript{237} It would be advantageous for the Senate Judiciary Committee to hold formal hearings on the Governor's appointment, as is done at the federal level. The appointee should appear and an opportunity should be afforded to interested or aggrieved groups to comment on his or her qualifications. The process should be as open as possible to negate the claim that merit selection is a "secret" or "invisible" process. See Golomb, \textit{Selection of the Judiciary: For Election}, in \textit{JUDICIAL SELECTION AND TENURE} 74, 76 (G. Winters ed. 1973); Barber, \textit{Ohio Judicial Elections—Nonpartisan Premises With Partisan Results}, 32 \textit{Ohio St. L.J.} 762, 767, 788 (1971). \textit{See also note 195 supra}.
\textsuperscript{238} See note 164 \textit{supra} and accompanying text.
\textsuperscript{239} See text accompanying notes 230-31 \textit{supra}.
tutes political criteria for professional qualifications. The result is that our judiciary tends to be influenced—some would say dominated—by forces which are irrelevant if not inimical to the judicial function.

The General Assembly and the Ohio electorate have the opportunity to remedy this situation through the enactment and approval of S.J.R. 6. In its present form, however, the bill will not appreciably improve the Ohio judiciary and may be politically defective for that reason. Although adoption of a merit plan in Ohio will probably not be easy—change is never greeted with open arms—the electorate is much more likely to support an orderly and efficient method of judicial selection, which does not readily lend itself to abuse, than the legislation now pending in the senate. This article has attempted to suggest a means of accomplishing that objective. Ohio was among the first states to consider a merit plan. Having failed to adopt one, perhaps we can benefit from the years of experience in other states to implement a selection process which takes advantage of their successes and avoids their failures.
Appendix

112th GENERAL ASSEMBLY,
REGULAR SESSION,
1977-1978

S.J.R. No.6

MESSRS. HALL-CELEBREZZE-MILLESON-ROBERTO-COX-BOWEN

JOINT RESOLUTION

Proposing to amend section 6 and section 13 of Article IV of the Constitution of the State of Ohio to provide an appointive-elective system for the selection of certain judges.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state in the manner prescribed by law at a special election to be held on the first Tuesday after the first Monday in May, 1977, a proposal to amend section 6 and section 13 of Article IV of the Constitution of Ohio to read as follows:

ARTICLE IV

Sec. 6. (A)(1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years, THE JUDGES OF THE COURTS OF APPEALS, AND THE JUDGES OF THE COURTS OF COMMON PLEAS SHALL SERVE SIX YEAR TERMS, WHICH SHALL BE STAGGERED AND BEGIN AND END ON THE DAYS FIXED BY LAW. THE TERMS OF OFFICE OF JUDGES OF COURTS ESTABLISHED BY LAW SHALL BE FIXED BY LAW.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six—years GOVERNOR SHALL, WITH THE ADVICE AND CONSENT OF THE SENATE, APPOINT AND FILL VACANCIES IN THE OFFICES OF THE CHIEF JUSTICE OF THE SUPREME
JUDGES OF THE COURTS OF APPEALS, AND THE JUDGES OF
ANY OTHER COURT SUPERIOR TO THE COURTS OF
COMMON PLEASES THAT IS ESTABLISHED BY LAW, UNDER
AN APPOINTIVE-ELECTIVE SYSTEM BY APPOINTING, AND
SUBMITTING TO THE SENATE FOR CONFIRMATION, A PER-
SON FROM A LIST OF THREE OR MORE QUALIFIED PERSONS
ADMITTED TO THE PRACTICE OF LAW IN THIS STATE
WHOSE NAMES HAVE BEEN SUBMITTED TO THE GOVER-
NOR BY A JUDICIAL NOMINATING COMMISSION.

(3) THE GENERAL ASSEMBLY SHALL FIX BY LAW THE
NUMBER AND ORGANIZATION OF JUDICIAL NOMINATING
COMMISSIONS, AND THE NUMBER, METHOD OF SELEC-
TION, QUALIFICATIONS, COMPENSATION, EXPENSES AND
TERMS OF OFFICE OF THE MEMBERS OF EACH COMMI-
SION. THE MEMBERS OF A COMMISSION SHALL SERVE
STAGGERED TERMS. AT LEAST ONE-HALF OF THE MEM-
BERS OF A COMMISSION SHALL BE ADMITTED TO THE
PRACTICE OF LAW IN THIS STATE. NO MORE THAN ONE-
HALF OF THE MEMBERS OF A COMMISSION SHALL BE
FROM THE SAME POLITICAL PARTY. A HOLDER OF PUBLIC
OFFICE MAY SERVE ON A JUDICIAL NOMINATING COMMI-
SION.

(4) NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO
THE GENERAL ELECTION NEXT PRECEDING THE EXPIRA-
[Page 3]
TION OF HIS TERM OF OFFICE, THE CHIEF JUSTICE, A JUS-
TICE OF THE SUPREME COURT, A JUDGE OF A COURT OF
APPEALS, OR A JUDGE OF ANY OTHER COURT SUPERIOR TO
THE COURTS OF COMMON PLEASES THAT HAS BEEN ESTAB-
LISHED BY LAW MAY FILE A DECLARATION OF CANDIDA-
CY TO SUCCEED HIMSELF. THE QUESTION OF HIS
CONTINUANCE IN OFFICE FOR A FULL TERM SHALL BE
SUBMITTED, IN THE MANNER FIXED BY LAW, TO THE
ELECTORS AT THE GENERAL ELECTION. IF FIFTY-FIVE PER
CENT OF THE ELECTORS VOTING ON THE QUESTION VOTE
"YES," HE SHALL BE CONTINUED IN THE OFFICE FOR THE
TERM COMMENCING THE DAY AFTER HIS TERM EXPIRES.
IF FIFTY-FIVE PER CENT OF THE ELECTORS DO NOT VOTE
"YES," THERE SHALL BE A VACANCY IN THE OFFICE UPON
THE EXPIRATION OF THE TERM. THE GOVERNOR SHALL
FILL THE VACANCY IN THE MANNER PROVIDED [sic] (A)(2) OF THIS SECTION.

(3) (5) The judges of the courts of common pleas and the divisions thereof, UNLESS THE ELECTORS APPROVE AN APPOINTIVE-ELECTIVE SYSTEM PURSUANT TO DIVISION (A)(7) OF THIS SECTION, shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(6) THE JUDGES OF COURTS OF COMMON PLEAS AND OF COURTS ESTABLISHED BY LAW THAT ARE INFERIOR TO THE COURTS OF APPEALS SHALL, UNLESS THE ELECTORS APPROVE AN APPOINTIVE-ELECTIVE SYSTEM PURSUANT TO DIVISION (A)(7) OF THIS SECTION, BE ELECTED IN THE MANNER PROVIDED BY LAW.

(7)(a) NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS ARTICLE, JUDGES OF ANY COURT OF COMMON PLEAS OR OF ANY COURT ESTABLISHED BY LAW THAT IS INFERIOR TO THE COURTS OF APPEALS, MAY BE APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM, IF A MAJORITY OF THE ELECTORS WITHIN THE TERRITORIAL JURISDICTION OF THE COURT VOTING ON THE QUESTION VOTE AFFIRMATIVELY FOR THE APPOINTIVE-ELECTIVE SYSTEM. THE METHOD OF SUBMISSION OF THE QUESTION SHALL BE PROVIDED BY LAW.

(b) THE PROVISIONS OF DIVISIONS (A)(2), (3), AND (4) OF THIS SECTION GOVERNING AN APPOINTIVE-ELECTIVE SYSTEM FOR COURTS SUPERIOR TO THE COURTS OF COMMON PLEAS SHALL APPLY TO THE JUDGES OF ANY COURT ESTABLISHED BY LAW MADE SUBJECT TO THE SYSTEM BY THE ELECTORS, EXCEPT THAT THE LIST SUBMITTED BY THE JUDICIAL NOMINATING COMMISSION SHALL CONTAIN NOT FEWER THAN TWO NAMES, AND THE DATE OF COMMENCEMENT AND EXPIRATION OF THE TERM OF EACH JUDGE SHALL BE PROVIDED BY LAW.
(8) THE JUDICIAL NOMINATING COMMISSION RESPONSIBLE FOR SUBMISSION OF NOMINATIONS FOR THE OFFICE OF THE JUDGE OF A COURT SHALL REVIEW THE RECORD OF A JUDGE TO DETERMINE HIS QUALIFICATIONS TO BE RETAINED AS JUDGE OF THE COURT, AND RATE HIM AS WELL QUALIFIED, QUALIFIED, OR NOT QUALIFIED FOR RETENTION IN OFFICE. THE RATING OF THE JUDGE SHALL APPEAR ON THE BALLOT UPON WHICH THE QUESTION OF THE JUDGE’S BEING RETAINED IN OFFICE IS SUBMITTED TO THE ELECTORS. THE METHOD OF REVIEW, INFORMING THE JUDGE OF HIS RATING PRIOR TO HIS FILING OF A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF, AND SUBMISSION OF THE RATING ON THE BALLOT SHALL BE PROVIDED BY LAW.

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges justices of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntary retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.
SECTION 13. (A) In case the office of any judge, NOT SUBJECT TO AN APPOINTIVE-ELECTIVE SYSTEM PURSUANT TO SECTION 6 OF ARTICLE IV OF THE OHIO CONSTITUTION, shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.


(2) A SUCCESSOR JUDGE IS ELIGIBLE TO FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF AS PROVIDED UNDER SECTION 6 OF ARTICLE IV OF THE OHIO CONSTITUTION.

(3) THE APPOINTMENT SHALL BE MADE FROM A LIST OF PERSONS SUBMITTED BY A JUDICIAL NOMINATING COMMISSION IN THE MANNER REQUIRED BY SECTION 6 OF ARTICLE IV OF THE OHIO CONSTITUTION AND LAWS ENACTED THEREUNDER.

(4) THE CHIEF JUSTICE OR ACTING CHIEF JUSTICE OF THE SUPREME COURT SHALL ASSIGN JUDGES TO SERVE THE COURT IN WHICH THE VACANCY OCCURS, AS PROVIDED UNDER SECTIONS 2 AND 5 OF ARTICLE IV OF THE
OHIO CONSTITUTION, UNTIL A SUCCESSOR APPOINTED BY THE GOVERNOR AND CONFIRMED BY THE SENATE ASSUMES OFFICE.

SCHEDULE

The provisions of former Section 6 and Section 13 of Article IV of the Constitution of Ohio and of law existing on the effective date of this amendment shall continue to apply, until January 1, 1980, to the election of, and appointments to fill vacancies in the offices of, the chief justice or justices of the supreme court, judges of the courts of appeals, and judges of courts superior to the courts of common pleas established by law. This amendment does not affect the terms of offices to which such chief justice or justices of the supreme court, judges of the courts of appeals, or judges of courts established by law have been elected or appointed prior to January 1, 1980, and they may remain in office, unless removed for cause, until the expiration of their respective terms of office and may file declarations of candidacy to succeed themselves in office, in the manner provided in Section 6 of Article IV of the Ohio Constitution, not less than seventy-five days prior to the general election next preceding the expiration of their term of office, without further appointment by the governor. However, on and after the general election held on the first Tuesday after the first Monday in November of 1982, the ballot upon which the issue of their retention in office appears shall include their rating by the judicial nominating commission established for the office.

No appointment shall be made, under the provisions of this amendment, to fill a vacancy in the office of the chief justice of the supreme court or of any justice of the supreme court, judge of the court of appeals, or judge of a court superior to the courts of common pleas established by law until after January 1, 1980. Assignment of judges to serve courts in which such vacancies occur shall be made as provided in division (B)(4) of Section 13 of Article IV of the Ohio Constitution as adopted by this amendment.

Legislation implementing the provisions of this amendment shall be enacted by July 1, 1980.

EFFECTIVE DATE

If adopted by a majority of the electors voting on this amendment [sic] shall take effect January 1, 1979, and existing Section 6 and Section 13 of Article IV of the Constitution of Ohio shall be repealed from such effective date.