The Proposed Changes in the Selection and Tenure of Judges in Ohio

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The insecurity of judicial tenure under the Stuarts was one of the principal evils culminating in the Revolution of 1688. As a result, through the Act of Settlement, which was adopted twelve years later, security of tenure through executive appointment for life or during good behavior became firmly established in the mother country, and was brought by the Colonists to American shores. Interference by the crown with that security of tenure was emphasized in the Declaration of Independence as one of the causes of the separation. To avoid repetition of this evil the framers of the Federal Constitution expressly provided therein that federal judges: "shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." (Federal Constitution, Art. 3, Sec. 1.)

Originally the colonial and state judiciaries were likewise selected through executive or legislative appointment to serve during good behavior.

During the first half of the nineteenth century there developed a rising tide of public sentiment against the appointive life-tenure judiciary. The trend began among the newly-formed states west of the Atlantic seaboard. In their more or less pioneer environment, and through the application of Jeffersonian principles of popular election during the Jacksonian era, these states departed from the appointive system and adopted the popular elective system with short terms which has since been in vogue. The general hostility to the then existing

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appointive system has been attributed to the popular disfavor which developed toward some strong life-tenure judges who tenaciously adhered to English rules and precedents notwithstanding the temporary unpopularity of English laws following the Revolution.

Opposition to the courts was increased by a public feeling that their attitude was unfriendly toward the debtor class. This feeling was accentuated following the establishment in *Marbury* v. *Madison* of the doctrine of judicial review of the constitutionality of legislation. (1 Cranch, 137 [1803].) It may be noted here that attempts to check the exercise of judicial power have usually taken the form of assaults upon the security of judicial tenure.

At present, the elective method is operative in thirty-six states. Judges are appointed by the governor with confirmation by the senate or council in five states, Massachusetts, Maine, New Hampshire, Delaware, and New Jersey; and appointed by the legislature in five states, Connecticut, Rhode Island, South Carolina, Vermont and Virginia. In Florida the judges of the Supreme Court are elected but those of the principal trial court are appointed by the governor. In California, under the recent constitutional amendment of 1934, the Supreme and appellate court judges are appointed by the governor, with confirmation by a small council. Trial court judges are elected.

The special committee on Judicial Selection and Tenure made the following significant report at the sixtieth annual convention of the American Bar Association. (Kansas City, Mo., Sept., 1937):

> "Of the 36 states in which five years ago election of judges prevailed and was accepted as inevitable, the bar of 17 states, nearly 50 per cent of all of them, acting alone or in conjunction with lay agencies, have taken affirmative steps looking to the adoption of appropriate substitutes for direct election of judges. In at least 3 other states the bar is preparing to propose similar reform."

Outside the United States judges are selected by appoint-

ment rather than popular election in all countries except Switzerland.

Coming now to Ohio we find that the government established pursuant to the Ordinance of 1787 created for the Northwest Territory as principal public officials, a governor, a secretary, and three judges, "any two of whom to form a court, who shall have a common-law jurisdiction." (Sec. 4). These appointments were to be made by Congress. After the ratification of the Federal Constitution, and the passage of the Act of August 7, 1789 (Journal of Congress IX, 109), continuing the Ordinance in effect, these appointments were, of course, made by the President. Under the Constitution of 1802, judges were appointed by a joint ballot of both houses of the general assembly. (Art. VI, Sec. 8). The Constitution of 1851 removed all appointive power from the legislature and declared that the judges should be elected by vote of the people. Therefore, since the effective date of the Constitution of 1851, we have had popular election of judges in Ohio.

There have been two changes particularly affecting judges since 1851—the direct primary and the non-partisan ballot. From 1851 to 1912 judges were nominated by political party conventions. In 1912 a constitutional amendment was adopted providing for the direct primary as the method of nomination. The non-partisan ballot was established by Legislative Act in 1911. The consequence of the last two changes produced an anomalous situation. By the adoption of the primary system the judge was required to declare his political party allegiance and as a partisan go forth to seek the nomination. If nominated, he immediately became a non-partisan for the general election because his name appeared on the non-partisan ballot. (Independent candidates may be nominated by petition. Judges of municipal courts and justices of the peace are nominated by petition). This is the system we have in Ohio today.

The first significant step toward a change in the present method of selecting judges in Ohio was the Cincinnati Confer-

ence held October 20, 1934, under the auspices of the Ohio State Bar Association, the Cincinnati Bar Association, and the Law School of the University of Cincinnati. All proceedings of this Conference were reported in the University of Cincinnati Law Review, Volume VIII, No. 4 (November, 1934). There were approximately 200 leading members of the Bar present from all parts of the state.

At the conclusion of the Conference, questionnaires were filled out by those present and Professor C. Fred Luberger of the College of Law, University of Cincinnati, summarized the conclusions of the Conference, as reflected by the statements of the speakers and the questionnaires, as follows:

"By way of summary, it may be stated that, upon the more important, fundamental aspects of the problem, the conclusions of the conference were as follows:

1. The courts of Ohio do not measure up to the high standard to which they should. There is, consequently, general dissatisfaction with the personnel and the work of the judiciary.

2. In all the courts of the state, in both urban and rural sections, the present method of selecting judges by popular election has resulted in a judiciary which is, and permits itself to be, subjected to political and personal influences, and which is, in too great degree, characterized by want of legal ability and by the lack of industry, and, in lesser degree, by arrogance, intolerance, timidity, and indifferent moral character.

3. While some improvement in the personnel of the bench would probably result from the adoption of more exacting qualifications for office, and while the bar might be made a somewhat more effective influence than it now is, more drastic measures are imperative. Only by a fundamental change in the method of selection of judges can there be secured to the state a judiciary of the quality and calibre which the people deserve and ought to desire.

4. It would probably be unwise to confer the sole power of choosing judges upon a single officer, commission, board, or other body. But, if that were to be done, the authority and responsibility should be vested in the governor, who is elected by the people and directly accountable to them. Confirmation by the senate of the governor's appointments should not be required. Rather should the governor consult with an advisory board, qualified by knowledge, experience, and high purpose, before making his appointments.

5. The best plan or system for the selection of judges is one wherein the responsibility is divided between two agencies, at least one of which is directly responsible to the people of the state, and each of which will act as a check upon the other. The first would be charged with the duty of selecting, or nominating, a minimum number of qualified lawyers for each judicial office to be filled. The second would make the final selection of the judges from the list of nominees submitted by the first. The nominating function could best be performed by a commission, the composition of which should be carefully safeguarded by exacting qualifications for membership, and which should be large enough to be representative of the interests served and small enough to be responsive to the demand of painstaking efficiency. The appointive function should be entrusted to the governor, whose accountability to the electorate of the state is direct and immediate. No matter how steeped in party politics he might be, his appointments could be expected to be of the highest type, for nothing less will be acceptable to the people or to the bar, and so will become traditional.

6. If the foregoing method of selection by appointment were established, the judiciary would be taken out of politics. Lawyers possessing the ability, the scholarship, and the high character so essential upon the bench, but who now decline to seek judicial office because of their abhorrence of politics, would be attracted more generally to careers upon the bench and the opportunity for distinguished public service thereby given.

7. The compensation paid to judges should be, but is not, commensurate with the rewards of private practice. Judicial salaries should be increased, particularly when and if a change in the method of selection is made and leaders of the bar are thereby made receptive to judicial office. Pensions, too, should be established, payable upon physical disability or upon reaching retirement age, but not until a better method of judicial selection is obtained.

8. It is not advisable to extend the present terms of judicial office in Ohio to longer periods so long as popular election of judges is retained. When a new method is established which substantially mitigates the evils of the present system, then the tenure of the judiciary can with safety, and should, be considerably extended. Tenure for life or during good behavior would probably be advisable; but if not that, certainly terms of not less than twelve or fifteen years in the superior courts, and of eight or ten years in the inferior courts, ought to be favored."

Meanwhile the Committee on Judicial Administration and Legal Reform of the Ohio State Bar Association had been

studying a proposed plan of judicial selection. It had under consideration five plans of selection; the Cincinnati Conference plan, which provided for appointment of judges by the governor from a list of persons nominated by a commission elected by the voters; the Cleveland plan, providing for nomination by the judicial council, appointment by the governor, and confirmation by the senate; the Federal plan, which was similar to the present method of selecting federal judges; the California plan, which required the appointed judge to "run against his record" for continuance in office after serving a definite period; the Wilkin plan, which provided that the governor appoint the judges with the advice and consent of a judicial commission composed of ten members selected by the senate.

On May 9, 1935, the Ohio State Bar Association and the Cincinnati Bar Association joined in conducting a poll of the State Association's members to determine sentiment for a change in the method of selection. To the question, "Should judges of the Supreme Court in Ohio be appointed?" the vote was "Yes" 1,355, "No" 268. To the question, "Should judges of the courts of appeals be appointed?" the vote was "Yes" 1,286, "No" 299. Voting on the five proposed plans of selection, the Cleveland plan, providing for nomination by the Judicial Council, appointment by the governor and confirmation by the senate, led the field. The Cincinnati Conference plan, providing for appointment of judges by the governor from a list of persons nominated by a commission elected by the voters, ranked second in the poll. In this connection it should be observed that the views of the lawyers in the smaller cities and villages showed practically the same percentage vote for and against the questions submitted as the lawyers in the large cities.

Another question submitted to the Bar was, "Should judges of these courts hold office for a term of; 6 years, 12 years, or good behavior?" The vote was: for six years, 562; for 12 years, 294; for good behavior, 703.

To the question, "Should a judge be required to 'run against his ecord' in order to continue in office more than six years?" the vote was, "Yes" 767, "No" 737. (See Ohio BAR, Vol. VIII No. 11 [June 10, 1935,] for tabulation poll.)

A similar questionnaire to a list of newspapers of Ohio showed 68 per cent favoring appointment of appellate judges and 70 per cent favoring appointment of supreme court judges. (Ohio BAR, Vol. VIII No. 12 [June 17, 1935.])

A subcommittee of the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association reported at the annual meeting of the Association in July, 1935, that in view of the sentiment expressed in the recently conducted poll of the members of the Bar and the press, "sentiment in favor of appointed judges of the reviewing courts is crystallizing. We conclude that, for the present, at least, our advocacy should be confined to the appointment of judges to the courts of appeals and Supreme Court."

Whereupon, the Convention referred the proposal back to the subcommittee for further study and the drafting of a proposed amendment. (Ohio BAR, Vol. VIII No. 15, P. 189.) (The subcommittee was composed of George R. Murray, Dayton, subsequently president of the Ohio State Bar Association; Robert N. Wilkin, New Philadelphia, former judge of the Supreme Court of Ohio, and Henry G. Binns, Columbus.)

At the following mid-winter meeting of the Ohio State Bar Association, held in Toledo, January, 1936, the subcommittee again reported and submitted a draft of the proposed amendment. The report said:

> "It is our earnest desire that this important proposal be given the fullest possible discussion, destructive as well as constructive criticism being invited. We will ask that the proposal be referred back to our committee for referendum vote and report to the 1936 annual meeting."

(Ohio BAR, Vol. VIII No. 42, P. 549)

The proposed amendment was submitted to the Ohio State Bar Association at the next annual convention, which was held

in Columbus in July, 1936, and was approved. (Ohio BAR, Vol. IX, No. 17, P. 223.)

At the following mid-winter meeting of the Ohio State Bar Association, held in Dayton, January, 1937, Robert N. Wilkin, New Philadelphia, who had replaced George R. Murray, Dayton, as chairman of the subcommittee, reported that:

> "Since the Summer Meeting of 1936, we have considered ways and means of carrying its mandate into effect. Numerous conferences have been held by the chairman and members of the subcommittee with bar association officers over the state, and certain conclusions have been reached. The first is that the necessary constitutional amendment providing for the appointment of judges should be presented to the people in November, 1937; that meantime, funds to cover the expenses of an intensive campaign are to be solicited; that a committee comprised of representatives of various groups, including labor and the Grange, be appointed and that publicity be sought in all quarters. This program is within the authority granted by the Association, and, therefore, no formal action is now necessary." (Ohio BAR, Vol. IX, No. 39, P. 505)

Shortly thereafter, Joseph C. Hostetler, Cleveland, was persuaded to accept the chairmanship of a state-wide campaign committee to sponsor the amendment. He selected as members of the State Committee prominent men and women representing various fields of activity. Campaign chairmen were selected in practically all the counties of the state.

The immediate tasks before the campaign committee were to place in circulation initiative petitions to obtain 300,000 signatures so that the proposed amendment could be placed on the ballot. Meanwhile, an educational program was developed through the support of various lay organizations and the newspapers of the state. The reaction of the newspapers as reflected by their editorials was particularly noteworthy.

The Ohio Committee on Judicial Selection has been conducting its educational and petition circulating campaign since March, 1937. According to Joseph C. Hostetler, state chairman, the present objective of the committee is to submit the

proposed amendment to a vote of the people at the November, 1938, election.

The proposed amendment provides for the appointment of the seven judges of the Ohio Supreme Court and the 27 judges of the nine courts of appeals in the state. There are approximately 300 common pleas, probate, and municipal judges in the state who would continue to be elected as at present. The amendment provides, however, that by a majority vote the electors of a county may bring their common pleas and probate judges under the appointive provisions of the amendment and the voters of a municipality may do likewise with respect to their municipal judges. Any county or municipality having adopted the appointive system may rescind its action but the question of rescinding shall not be submitted to the electors more than once in six years.

The requirement of the amendment, that judges of the supreme and appellate courts be appointed while the common pleas, probate, and municipal judges continue to be elected until such time as by local option those judges also become appointive, is entitled to an explanation. It is readily apparent that in the predominantly rural counties the people have an opportunity to be, and are, much more familiar with the qualifications of the judges than in the larger centers of population. It may be concluded, therefore, that with respect to the county and municipal judges the knowledge possessed by the voters as to the qualifications of those judges will, very largely, depend upon the population of the county. If it is a rural county, a larger percentage of the voters are personally acquainted with the judge and without doubt the prestige of his office and person places the voters in a position to make a satisfactory selection. By the same reasoning, the county and municipal judges in the thickly populated counties and cities are comparatively unknown to the voters and the possibilities of making a satisfactory selection become more remote.

Because this is an accepted fact, the amendment permits

those counties desiring to do so to adopt the appointive system. This leaves the door open for each county and city to determine which system is better for its local courts.

With respect to the supreme and appellate court judges, the situation is similar in all counties. The voters in one county have as little knowledge of the qualifications of the higher court judges as the voters in any other county. Judges of the supreme court are elected by the voters of all the counties. Voters of the counties in an appellate district select the court of appeals judges. There are an average of approximately ten counties in each appellate district. Being farther removed from direct contact with the people less is known by the average voter regarding the qualifications of the higher court judges. The result is that the voters will either refuse to express a choice for the judges or many will vote blindly thereby placing a premium on a candidate with a vote-getting name. According to the election statistics compiled by the Secretary of State, there were over one million people in Ohio who voted for other candidates at the 1936 election but expressed no choice among the candidates for the Supreme Court of Ohio and there were 48,000 in Franklin County who failed to vote for any of the court of appeals judges in this district. For these reasons, the appointive system is mandatory as to the supreme and appellate courts; optional as to the county and municipal courts.

The amendment makes no changes in the number or compensation of the judges.

There are four steps in the selection of the judges affected by the amendment. They are: (1) *Nomination;* (2) *Appointment;* (3) *Confirmation;* (4) *Ratification.* These four steps are consecutive and will be hereafter described.

(1) *Nomination.*

The nominations are made by a judicial council. This council is to be composed of eight members. The chief justice of the Supreme Court is president of the council. Other members are: a court of appeals judge selected by the appellate judges in

the state; a common pleas judge selected by the common pleas judges in the state; a probate judge selected by the probate judges in the state, and a municipal judge selected by the municipal judges in the state. This makes five judges.

Then there are three practicing attorneys appointed by the governor. Their terms are staggered so that one will be leaving and one coming on the council every year. The chief justice is president and a member of the council so long as he holds the office of chief justice. The other seven members of the council serve terms of three years limited to two consecutive terms. The amendment provides that the judges of the courts of appeals, common pleas, probate, and municipal courts shall meet during the January following the adoption of the amendment at which time each group will select its representative on the judicial council.

No compensation is provided for the members of the judicial council.

In 1925, there was passed an act establishing a judicial council, consisting of the chief justice and certain representatives of each order of judges, together with three members of the bar, whose function is to study and report upon the workings of the judicial system of the state. (110 Ohio Laws 364). In his Historical Introduction to Volume 1, Ohio Jurisprudence, Clarence D. Laylin of the Columbus Bar, and former Professor of Law in the College of Law at the Ohio State University, says with respect to the judicial council:

> "Lack of legislative appropriations has rendered this machinery thus far ineffective. But, should the demand for reform become more insistent, the judicial council, itself the one unified judicial agency at the command of the state, bids fair to perform a signal service in that direction." (1 Ohio Juris., cv [1928])

Under the provisions of the proposed constitutional amendment, when a judicial office to be filled by appointment becomes or is about to become vacant, the governor shall certify that fact to the judicial council. Within thirty days after such certi-

fication is received, the judicial council submits to the governor the names and qualifications of not less than three or more than five persons, qualified electors of the judicial district of the court in which such vacancy is to be filled, whom the judicial council deems qualified to hold such office.

The members of the Bar were in general agreement that there ought to be an officially designated agency to make the nominations. Unlimited power of selection by the governor opens the door to the possibility of appointing judges as a reward for political support.

The question of personnel of the judicial council was the subject of great study on the part of the committee. The council could be composed of those representatives best qualified by experience, ability, and interest to prepare a suitable list of nominations, or, it could be composed of representatives of various groups and interests in the state selected because of the interest which they represented rather than because of familiarity with the qualifications of a judge. To extend the membership of the judicial council to representatives of so-called "interests" raises some serious economic, religious and racial questions. If it was determined that the farmers should have a representative on the judicial council, who would select him? Must he be identified with the Grange or Farm Bureau? If labor must have a representative, who would appoint him? Must he be identified with the A. F. of L. or the C.I.O.? This illustrates the difficulties if the judicial council is to be composed of representatives of minority groups. The problem is to determine which groups are to be represented on the council and who selects the representative. In view of all these conditions, the conclusion that the judicial council should be composed of five judges and three lawyers selected in the manner already described appears to offer the best assurance that the nominees will be selected primarily on the basis of ability and experience.

(2) *Appointment*

It has already been stated that the judicial council submits

to the governor the names and qualifications of not less than three or more than five persons for each vacancy to be filled by appointment. From this list the governor must make the appointment.

There was general agreement that the appointment, under the conditions described in the amendment, should be made by the governor who is directly responsible to the people.

(3) *Confirmation*

The governor's appointment must be confirmed by the senate. An exception is made in the case of a judge holding office by election at the time of the adoption of the amendment. If at the expiration of his elective term he is appointed to succeed himself, senate confirmation is not required. As to appointments which are made when the senate is not in session, the question of confirmation will be determined either in its next regular session, or in special session which the governor is authorized to call for the purpose of confirming judicial appointments. If the senate denies confirmation or fails to confirm any judicial appointment within sixty days, the governor makes another appointment from the names submitted by the judicial council, and submits the name to the senate; and so on until the vacancy is filled.

The members of the senate are elected by the people and directly responsible to them. The requirement of senate confirmation permits the legislative branch of the government to exercise a check on the selection.

(4) *Ratification*

The word "ratification" is here used to emphasize the fact that the people themselves determine, directly, whether a judge shall continue in office after having served a definite period. This particular feature came from the California constitutional amendment adopted in 1934.

Under the proposed Ohio amendment, at the first general election occurring after the judge has served six years follow-

ing his appointment, and at the general election occurring every sixth year thereafter so long as such judge remains in office, his name shall be placed on the ballot in the judicial district of the court for which he was appointed with the number of years of his service stated and with the question, "Shall Judge .... (giving his name) be retained in office?" If a majority of those voting on this question vote in the negative, the judge will be retired from office at the end of thirty days, and the office will be declared vacant; otherwise, the judge shall continue in office.

This procedure is what is called "running against the record." It is distinguished from the present elective system because the judge does not run against a competing candidate for continuance in office. It has often been stated that the knowledge that a competing candidate is in the field stimulates campaigning and causes judges to consume much of their time, energy, and financial resources to assure their continuance in office. It is contended that this provision in the amendment will, to a large extent, eliminate campaigning and political alliances which have, under the present system, appeared indispensable to the judge seeking reelection.

In reviewing the four steps in the selection of judges under this amendment, it will be observed that an effort has been made to accomplish two major objectives. The first is to preserve the best features of both the elective and appointive systems and eliminate the worst features of both. The second is to establish a system of judicial selection thoroughly in accord with our democratic principles of government.

Reverting to the first objective we note that the amendment eliminates the two major criticisms of the usual appointive system which are: (1) Unlimited power of selection by the chief executive. The amendment requires the governor to make his selection from a list of nominees submitted by the judicial council. (2) Tenure for life, which is a burden if the judge becomes incompetent, dictatorial, or unfit for office. The

amendment requires the judge to run against his record every six years.

The better features of the usual appointive system which are presented by the amendment include: (1) Greater independence; (2) Selection based principally upon experience, ability, and character thereby attracting the best qualified; (3) Security of tenure based upon merit.

The criticisms of the usual elective system which the amendment eliminates are: (1) Campaigning for office; (2) Insecurity; (3) Political interference; (4) Insufficient knowledge of candidates' qualifications to permit voters to make intelligent choice; (4) The showman or ballyhoo type of candidate, who has the advantage regardless of qualifications for judicial office.

The better features of the usual elective system are retained by the amendment through the provision that the judge must run against his record every six years for continuance in office. Rather than decide between two or more candidates, none of whom may be competent, the people decide whether the judge who has served six years is satisfactory. This, after all, seems to be the important question for the people to determine.

The second objective, to establish a system of selection in accord with our democratic principles of government, was also given careful consideration. That the amendment accomplishes this is apparent from an analysis of it. The nominations are made by the judicial council of which five of the eight members are judges. In other words, the judiciary is predominant in making the nominations. The appointment is made by the governor, the head of the executive branch of the government, selected by direct vote of the people. Confirmation is required by the senate, a branch of the legislature, the members of which are selected by direct vote of the people. Finally, the people, by direct vote, determine whether the judge's services have been satisfactory. Here then, under the amendment, we have the three co-ordinate branches of the government—judicial, executive, legislative—each having a definite responsibility in

the selection of the judges. Their action and the record of the judge is then weighed by the people whose decision may retire the judge from office.

Those features of the amendment which apply generally have already been described. According to its schedule, the amendment becomes effective immediately upon adoption. It is specifically provided that judges of the Supreme Court and courts of appeals now in office shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die, or resign.

To fill a vacancy caused by the expiration of the term of any judge holding office by election at the time of the adoption of the amendment, the certification by the judicial council and the appointment by the governor shall be completed at least seventy days before the general election next preceding the expiration of such elective term. If such judge is appointed to succeed himself, confirmation by the senate is not required; but if he is not appointed to succeed himself, he may, within sixty days of such election, file with the Secretary of State his application to have his name and that of the person appointed to succeed him, submitted at the general election to the voters of the judicial district of the court in which such vacancy is to be filled. The Secretary of State then causes the two names to be placed upon the ballot, and the person receiving the greater number of votes is commissioned as judge the same as though appointed under the amendment, and senate confirmation is not required.

The purpose of this feature of the amendment is to protect those judges elected to office prior to the adoption of the amendment, but whose terms expire after the amendment becomes effective. As to them, the appointment must be made seventy days prior to the general election next preceding the expiration of their terms, so that, if the judge is not appointed to succeed himself, he may run against the person appointed to succeed him. Whoever receives the greater number of votes assumes the office under the same conditions as if he were appointed.

Another feature of the amendment is the provision that the incumbent of a judicial office shall continue in office until his successor has been appointed or elected. This provision eliminates the so-called "short term" which occurs under the present system where an appointed judge fills a vacancy only until the next general election at which time a judge is elected to complete the unexpired term. Whenever a vacancy occurs in any common pleas, probate, or municipal court, the governor fills the vacancy by appointment, as at present, but, under the amendment the appointee serves for the remaining period of the unexpired term, rather than until the next general election as at present.

The amendment also enjoins the legislature to enact laws providing for the retirement, because of age or disability, and for compensation during retirement, of the judges.

This concludes an analysis of the provisions of the amendment.

Attention is now directed to a consideration of the arguments presented by those who look with disfavor upon the amendment. Opponents of the proposal fall within three classes. One class is composed of those who oppose the proposal for reasons of expediency. They may hope to gain more, personally, from the elective system either as a non-candidate through the exercise of political influence, or, as a candidate because they excel at political campaigning. To this group only one answer may be given, that being that the welfare of the people of the state as a whole, through the improvement of the judiciary far transcends in importance the personal advancement of any one individual.

A second class of opposition comes from those who are in sympathy with the purpose and general intent of the proposal but disagree with certain details of the amendment. The only answer to this group is that no plan of judicial selection could be devised which would meet the approval of everyone in every detail. It has already been related, however, that during a

period of approximately five years a committee of the Ohio State Bar Association labored diligently to ascertain all views on the subject. Five different plans of selection were studied during that period and from these were combed those features which met with the general approval of the greater number of the members of the Bar. Those who oppose the amendment because of disagreement with minor details must seek comfort in the realization that unanimity of opinion as to details is seldom achieved in enterprises involving human beings. The finished product represents necessary minor compromises. But the plan in general is the measure of its value. If it constitutes an improvement over the present system, is it not worthy of trial?

A third class of opposition comes from those who conscientiously oppose the principle of the proposed amendment. Since they are honest in their belief, their views must be respected and their arguments against the proposal must be answered by logic. What are the principal arguments advanced against the amendment?

It has been contended that there is no more reason for the appointment of judges than, say, the governor or members of the legislature. This statement fails to consider the difference in the nature and duties of the offices. Voters express their choice for executive and legislative officials on the basis of policies and issues. Those officials initiate, enact, and enforce the laws in accordance with the expressed wish of the people. During the campaign for election, their views on issues are ascertained and made available to the people through public addresses, the press, the radio, and every other means of publicity. But the judge is different. He is not selected on the basis of issues. His views on issues dare not be predetermined. His "issues" are his character and ability which do not make the headlines. He is the umpire not the player. Because of the nature of his office, the people generally know less of his character and ability than of the candidates for executive or

legislative offices. Furthermore, the duties of the judge require a person particularly fitted for that office. He must be a student of the law. He must possess a judicial temperament. He must be independent. He must be impartial. He must command respect and confidence. His work is highly specialized and he must possess the necessary experience and ability if he is to perform the duties of his office satisfactorily. On this point Robert N. Wilkin, former judge of the Supreme Court of Ohio, has said:

> "A popularity contest is no more adequate to determine the competency of a judge than the competency of a surgeon, a teacher, or a mechanic. If the best judges are to exercise the judicial function, they must be obtained by a process of selection—not election."

It has been contended that the proposed amendment violates the principles of democracy by removing from the people the right to select all their judges by popular vote. It has already been pointed out that the amendment affects only the 34 judges of the supreme and appellate courts, whereas more than 300 county and municipal judges will continue to be elected as at present. It has been stated herein that the nature of the judicial office is such that the people are not in a position to know the qualifications of the candidates and as a result either fail to vote for the judges or vote blindly thereby making the selection largely a matter of chance. Furthermore, it has been related that the amendment requires the judge to run against his record for continuance in office at which time the people, by direct vote, determine whether, in their judgment, his work has been satisfactory. On this point, an editorial appearing in the Springfield, Ohio News, July 29, 1937, is pertinent. It reads:

> "The question before the house for many months has concerned the infallibility of the courts, meaning the judge. What shall we say of the judicial finality of the dictum which Judge Struble of Cincinnati has laid down in his speech opposing the Ohio amendment for a partly appointive bench. Said he:

> 'Strike down the elective system of government and you strike down representative government . . . If the people are not capable of electing judges, they are not capable of electing other officials.'

Would the learned Cincinnati judge admit that we have representative government in the federal government of the United States? There is the representative house and there is the representative senate. Also the people elect the president.

Yet it has never been seriously proposed to elect the chief justice of the United States, or the associate justices, or the scores of judges of the district courts and the courts of appeals. It has been agreed that the people were not in position to make these choices. Representatives of the people, to-wit, the president and the senate, select the judges. It has been supposed hitherto that this was representative government and all right.

How then, could Judge Struble say a thing so contrary to obvious fact? The mystery can be explained on no theory save that a judge, even an elected judge of the court of common pleas, may be less than omniscient and infallible.

There is much nonsense talked, as anyone can see by looking around him, concerning the supposed necessity of electing everybody who is to do public work, if the people are to rule. Judge Struble might as well have said that if the people are not capable of electing their school teachers or their mail carriers they are not capable of electing other officials. Yet the people do not elect, do not want to elect, could not elect, their school teachers, their mail carriers, their policemen, and the men who build their roads. The mere physical impossibility of it is obvious to the common sense. The very principle of the representative government whose fate Judge Struble fears is the election of a few persons to represent the people in choosing the rest. We elect a congressman, two senators, a president; out of them comes the whole federal service, the personnel of which the people would know themselves crazy if they tried to pick. We elect a governor and a legislature. Out of them come the state roads, the administration of workmen's compensation, the operation of the state's schools. There is nothing more sacred about the election of a judge than about the election by popular vote of a president of a state university or the superintendent of your schools."

It has been contended that judges selected in the manner provided in the amendment are less likely to be liberal in their interpretation of the laws and less responsive to the will of the

people. This contention was answered more than twenty years ago when a special commission under the sponsorship of the National Economic League made a thorough survey of judicial decisions in American courts.

The commission consisted of such eminent men as Charles W. Eliot, Morefield Storey, Roscoe Pound, and Louis D. Brandeis, associate Justice of the United States Supreme Court. I shall quote from the report of the commission:

> "The constructive work in American law was done by appointed judges, while most of the technicality of procedure, mechanical jurisprudence and narrow adherence to 18th century absolute ideas, of which the public now complains, is the work of elected judges. The illiberal decisions of the last quarter of the 19th century to which objection is made today, were almost wholly the work of elected judges with short tenure. Moreover, where today we have appointed judges these courts in conservative communities have been liberal in questions of constitutional law, where the elective judges, holding for short terms, have been strict and reactionary."

Whether the people are ready for this change in the method of selecting judges can be determined only by them through the power of the ballot. The burden of presenting the case rests with the Bar of Ohio; the decision with the people. At the Cincinnati Conference of 1934 the late Newton D. Baker said:

> "Will the people, having gotten this power to elect judges, be reluctant to give it up? Frankly, I think that underestimates the intelligence of the people. It may not be easy to persuade people into the belief, but I believe if the bar of Ohio went to the people and pointed out what a judge is, what the qualifications are that a judge ought to have, what kind of a life he ought to live, what kind of duties he has to perform, how essentially technical and special they are, how all of those qualifications and qualities have to do with things that are not worn on the sleeve for daws to peck at, but are the products of burning the midnight oil and of the refinement of conscience by duty highly, solemnly, bravely, and lonely done . . . —I believe if that were done, it could be accomplished."