



PENNSYLVANIANS
FOR MODERN COURTS

Testimony of Pennsylvanians for Modern Courts
Before the Article V Subcommittee of the Pennsylvania Bar Association
Constitutional Review Commission

Presented by Lynn A. Marks, Executive Director

Wilkes-Barre

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I. Introduction

Pennsylvanians for Modern Courts (PMC)¹ thanks the Pennsylvania Bar Association's Constitutional Review Commission and Article V Subcommittee for holding this hearing and for the opportunity to present this testimony.

PMC has not taken a position on whether Pennsylvania should hold a constitutional convention. Our work for reform has focused on amending the constitution through the legislative and referendum process. Although there are constitutional changes that we seek, we are not certain whether it is preferable to pursue those reforms through a constitutional convention or through the legislative/referendum process. We have concerns about the potential scope of a constitutional convention, and worry that although reform is needed, an open constitutional convention places at risk some of the most important and valued provisions of the Pennsylvania Constitution.

However, PMC firmly believes that if Pennsylvania is to explore holding a constitutional convention, Article V – the Judiciary Article – must be among the articles open to review and possible amendment. First, Article V concerns one of the three primary branches of our government; if Pennsylvania is to consider possible amendments to the structure and operation of Pennsylvania's government, it cannot exempt one branch from such review.

Second, to exempt Article V would foster the public perception that the Pennsylvania Bar Association is focused not on serving the public, but on serving its members – namely, lawyers and judges. This is a serious issue. If the PBA is engaging in this examination of the Constitution as a service to the public in general (as well as to members and the clients they represent), it must undertake a meaningful review, including those provisions that most directly affect the PBA's members.

Third, the Judiciary Article is in need of amendment in at least three major areas:

- Funding of the Unified Judicial System
- The process for selecting appellate court judges
- The judicial discipline system

Any constitutional convention should include these as important areas to be reviewed and considered.

¹ **Pennsylvanians for Modern Courts** is a statewide nonprofit, nonpartisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving the jury system, court administration and court financing; increasing fairness in the courts; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses.

II. Funding of the Unified Judicial System

The Constitution provides for Pennsylvania's Unified Judicial System:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.²

There is only a brief reference in Article V to how the Unified Judicial System is to be funded: "Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law."³ As a result, funding for the Unified Judicial System is governed by a combination of this language, state statutes, and case law.

Funding for the Unified Judicial System traditionally has been shared by the state and the counties.⁴ As required by the Constitution, the state pays salaries for all jurists. In addition, the state has borne the cost of the salaries of some administrative office employees and senior county-level staff, and has provided grants to assist with other court costs.⁵ Counties provide the bulk of county-level staff salaries.⁶

For years, this division of fiscal responsibility has created tensions between the state and the counties. Despite long-term and ongoing litigation, and specifically designed Court-mandated plans for transitioning to a fully state-funded Unified Judicial System, the tensions remain and have worsened. The recent economic situation has exacerbated problems for court funding, as state and local budgets cannot meet rising court costs.

Pennsylvania is currently facing a budget crisis that has developed and worsened over recent years. As Pennsylvania Supreme Court Chief Justice Ronald Castille recently explained in his testimony to the legislature in support of the budget request of the Unified Judicial System:

We as judicial leaders greatly respect the challenges in lean times for you, as legislators, and for the Governor. The Judiciary is mindful of the need to achieve meaningful savings. . . . But we

² Pa. Const. art. V, § 1.

³ Pa. Const. art. V, § 16(a).

⁴ National Center for State Courts, "Pennsylvania" <http://www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map/pennsylvania.aspx>.

⁵ *Id.*

⁶ *Id.*

cannot ignore the fact that the state budget process repeatedly under-funds the judicial budget.⁷

In Fiscal Year 2010-2011, the judiciary received \$276 million in state funds, suffering a shortfall of \$38 million. Some, but not all, of that shortfall was made up with funds generated by a temporary filing fee; the deficit totaled \$12 million. The Governor's proposed 2011-2012 budget included the same \$276 million appropriation for the Unified Judicial System, which would leave a deficit of \$71.3 million. It is anticipated that the filing fees would reduce the deficit to \$47.2 million.⁸

Chief Justice Castille, in his presentation to the legislature, emphasized the need for a solution to this problem:

Pennsylvania's Judiciary did not create these serial, structural deficits.

Pennsylvania's Judiciary cannot save its way out of these deficits.

Neither, in fairness, did the current Executive or Legislative Branches create the Judiciary's six past deficits, but this is the year when a new process can begin to put funding for the court system back on sound footing and avoid placing Pennsylvania's justice system at risk.⁹

Across the nation, the shrinking of court budgets is having a visible adverse affect on the delivery of justice.¹⁰ A 2009 report by the American Bar Association (ABA) announced that adequate court funding is necessary to properly maintain functioning courts and judicial independence, but that the court system is particularly susceptible to underfunding.¹¹ Courts receive only a small portion of state budgets to begin with, but the percentage has decreased in recent years.¹² The ABA has declared the status of court funding "one of the most critical issues facing the legal profession," and created the Task Force on the Preservation of the Justice System to "develop recommendations and strategies" in response to the crisis.¹³

⁷ The 2011-2012 Budget Request of Pennsylvania's Unified Judicial System, presented to the House and Senate Appropriations Committees by Chief Justice Ronald D. Castille and Justice Debra Todd on Behalf of the Supreme Court of Pennsylvania, March 28, 2011.

⁸ Documents submitted in support of the 2011-2012 Budget Request of Pennsylvania's Unified Judicial System.

⁹ The 2011-2012 Budget Request of Pennsylvania's Unified Judicial System, presented to the House and Senate Appropriations Committees by Chief Justice Ronald D. Castille and Justice Debra Todd on Behalf of the Supreme Court of Pennsylvania, March 28, 2011.

¹⁰ Peter Hardin, "Facing Budget Cuts, State Courts Struggle," Gavel Grab, (Feb. 10, 2011), <http://www.gavelgrab.org/?p=17840>.

¹¹ The American Bar Association, "Roadmap to Funding the Justice System: How are the Courts Funded?" (May 2009) at 4-5.

¹² *Id.*

¹³ Task Force on the Preservation of the Justice System "About Us"

http://www.americanbar.org/groups/justice_center/task_force_on_the_preservation_of_the_justice_system/about_us.html.

Forty-six states are experiencing budget shortfalls, and these difficulties are seriously affecting the courts.¹⁴ Funding cutbacks are dangerous for a number of reasons. The percentage of court budgets going to personnel expenses is overwhelming, resulting in a “disproportionately negative impact on services” when court budgets are reduced.¹⁵ Furthermore, there is a trend that when a program is cut due to cost concerns, full funding is rarely restored even when states begin to recover financially.¹⁶

The Pennsylvania court system has been working to decrease the financial burden on the courts. One focus is the increased emphasis on creating and using “problem-solving courts.” The number of these courts has increased by forty percent in the last two years. One study suggests that “for every \$1 invested in a problem-solving court. . . \$4.74 can be saved in costs to the criminal justice system, (e.g., corrections), and community.”¹⁷

Another innovation is the initiative with local governments to install video conferencing systems,¹⁸ that could be used between courts, prisons, jails, regional booking centers, and some police stations.¹⁹ Video conferencing improves court security and “eliminat[es] local court and law enforcement transportation costs.”²⁰ It may also prove useful in reducing the number of judicial seats.²¹ Pennsylvania also has increased court collections through its statewide automation efforts.²²

Chief Justice Castille has stated that despite efforts, the judicial branch has not benefited directly from attempts to save and raise money and continues to face a dangerous financial situation.²³

Recommendation

PMC believes that there must be a final resolution to the question of how the Unified Judicial System is to be funded. A constitutional solution is preferable to one imposed by the courts or won through litigation. There should be clear language in the Constitution directing how the judiciary budget is to be funded. Underfunding the judiciary, making the justices and judges go “hat in hand” to the legislature fighting for every dime, should no longer be an option for Pennsylvania. Any constitutional convention should explore how to ensure that our courts are fully funded every year so that the judiciary’s budget cannot be reduced to unacceptable levels.

¹⁴ ABA Now, “Legal Heavyweights Decry Shrinking State Court Budgets” (Feb. 10, 2011), <http://www.abanow.org/2011/02/legal-heavyweights-decry-shrinking-state-court-budgets/>.

¹⁵ The American Bar Association, “Roadmap to Funding the Justice System: How are the Courts Funded?” at 5.

¹⁶ *Id.* at 6.

¹⁷ Documents submitted in support of the 2011-2012 Budget Request of Pennsylvania’s Unified Judicial System.

¹⁸ 2010 State of the Commonwealth’s Courts, at 3.

¹⁹ *Id.*

²⁰ National Center for State Courts, “Pennsylvania.”

²¹ “2010 State of the Commonwealth Courts” at 3.

²² Documents submitted in support of the 2011-2012 Budget Request of Pennsylvania’s Unified Judicial System.

²³ Ronald D. Castille, “2010 State of the Commonwealth Courts” at 2.

III. Selection of Appellate Court Judges

A. The Way We Select Judges Undermines Public Confidence in Our Courts

The system we use for selecting judges – electing them in partisan elections in which they must raise funds and campaign – has undermined public confidence in the courts and the judiciary.²⁴ Studies demonstrate that the electoral process, in which campaign funds are primarily contributed by lawyers, law firms and entities that frequently litigate in the state courts, leads the public to believe that “justice is for sale.”

This belief is wholly antithetical to the ideals on which our system of justice was founded. The courts are supposed to be bastions of independence, to which all can come to be judged fairly and without regard to popular opinion, political expediency, personal bias, gender, race, ethnicity, or social or economic status. But when judges preside over cases involving lawyers or parties that contributed financially to their campaigns – helping them reach their current positions – the other litigants and the broader public cannot help but be concerned that a judge’s impartiality might be affected.

PMC, and its affiliated lobbying organization PMCAction, lead a Coalition focused on bringing Merit Selection to the appellate courts of Pennsylvania. The current electoral system – with its emphasis on fundraising and campaign prowess – is broken. Merit Selection is the solution that is best designed to get the most qualified, fair, and impartial judges on the appellate bench, and to get those judges out of the fundraising business.

Pennsylvania is one of only six states that elects *all* of its judges in contested *partisan* elections. The other states are Texas, Illinois, West Virginia, Alabama, and Louisiana. These elections have become increasingly divisive and expensive, and it is particularly difficult for voters to get sufficient relevant information about judicial candidates. In short, judicial elections have become more like elections for other public officials.

This is problematic because judges are different from other public officials. Unlike legislators and executives who represent particular constituencies and are elected based on their positions on controversial issues, judges are not supposed to be responsive to their communities, popular will, or political pressure. Instead, judges owe their fidelity to the law alone and must impartially resolve disputes based on the law and evidence. Campaign support should have no influence on decisions in the courtroom.

Public trust in the courts is imperative; without it, the court system cannot conduct its vital work. As elections become more partisan, expensive, and contentious, public faith in our courts is damaged. If the public *perceives* justice to be “for sale” to the highest contributor or to be predetermined for those who share opinions similar to those espoused by the judge on the campaign trail, the ideal of impartial justice is undermined.

In 1987, Governor Bob Casey commissioned the Pennsylvania Judicial Reform Commission, a respected panel of civic leaders, public officials, legal professionals and members of the

²⁴ <http://judgesonmerit.org/wp-content/uploads/2010/06/2010-Merit-Selection-Poll1.pdf>

judiciary, and chaired by then-Superior Court Judge Phyllis W. Beck. In January of 1998, the Commission issued a report finding that confidence in Pennsylvania's judiciary was appallingly low, in large part due to the system of electing judges and the fundraising that went along with it. Among the Beck Commission's recommendations was implementing an appointive method of selecting appellate judges.

Sadly, in the more than twenty years since the Beck Commission issued its report, public confidence in the courts has only deteriorated. Polls in Pennsylvania and elsewhere reveal that voters are increasingly dissatisfied with the elective process. This general dissatisfaction stems in part from the role fundraising plays in judicial elections.

Perhaps most tellingly, judges themselves express concern about the need to raise funds from parties and lawyers who appear before them. And even worse, national polling shows that nearly half of state court judges believe campaign cash influences judicial decisions.

In June 2010, a statewide poll was conducted by PMC, PMCAction, Justice at Stake, the American Judicature Society and the Committee for Economic Development to assess Pennsylvanians' attitudes about the courts, judicial elections, and judicial selection reform.²⁵ The poll revealed a widespread perception among voters that the system of electing appellate judges needs to be reformed:

- 62 percent favor merit selection of appellate judges over elections;
- 73 percent said that the most qualified candidates do not win judicial elections;
- 76 percent believed campaign contributions influence judicial decision-making; and
- 93 percent agreed that the voters should have the opportunity to choose whether the state should change the way it selects appellate court judges.

These results echoed earlier statewide and national polls.²⁶ These numbers are staggering and confirm what has long been known: money and judicial selection should not mix. Clearly, the pressure individuals and groups feel to donate, combined with the concern that their adversaries in court may have donated to the judge's campaign, contribute to a widespread perception that "justice is for sale."

B. What is Merit Selection?

Merit Selection is a system for selecting judges that combines elements of the elective and appointive systems and adds a critical feature: an independent citizens nominating commission that evaluates candidates for appellate judge and recommends them for possible nomination.

²⁵ *Id.*

²⁶ A February 2009 USA TODAY/Gallup Poll found that "89% of those surveyed believe the influence of campaign contributions on judges' rulings is a problem, and 52% deem it a "major" problem. In addition, a 1988 poll commissioned by a Special Commission of the Pennsylvania Supreme Court revealed that almost 90% of Pennsylvanians surveyed believed that decisions made by judges are, at least sometimes, influenced by campaign contributions. (Lake Sosin Snell Perry & Associates and Deardourff/The Media Company poll).

Merit Selection is designed to get the most qualified, fair and impartial judges onto the appellate courts. Merit Selection emphasizes qualifications, skills, experience, temperament and reputation for ethical behavior. By eliminating the expensive electoral campaign process, Merit Selection gets appellate court judges out of the fundraising business.

C. How Does Merit Selection Work

A viable Merit Selection system should have four parts: (1) a diverse citizens nominating commission that evaluates and recommends candidates for nomination to judicial office; (2) an executive officer (i.e., the governor) empowered to nominate recommended, and only recommended, candidates to the appellate bench; (3) a legislative confirmation process; and (4) a role for the public in evaluating the judges following an initial term in office.

1. The Nominating Commission

Ideally, a nominating commission should be a nonpartisan group of racially and ethnically diverse men and women from across the Commonwealth. The nominating commission should include lawyers from different regions and practice areas and nonlawyers.

Elected officials, political party leaders and officers, and lobbyists should be prohibited from serving on the nominating commission. Because the courts touch all of our lives, it is important to ensure that some members of the nominating commission are average Pennsylvanians – people who might end up in court as litigants, witnesses or jurors.

Under recent proposals, the authority to appoint Commissioner members would be shared by the Governor, the legislative leadership of both parties and the public, as represented by categories of nongovernmental organizations, corresponding to various segments of the population.

Sharing the appointment power between the Governor and the legislature continues the longstanding constitutional role that these entities share in the judicial selection process, particularly in filling interim vacancies. Providing for a group of “public members” enables the public to have critical input in the process.

The concept of “public members” of the Commission gives a voice to many organizations that represent and reflect different segments of the population, and includes on the Commission individuals who have not been appointed by elected officials. It allows for greater public participation without designating a seat on the commission for any particular union, business entity, or civic group.

2. How Would the Nominating Commission Conduct its Work?

The nominating commission would be charged with evaluating candidates for appellate court vacancies. The commission would perform thorough investigations of candidates to develop a list of the most highly qualified. The information developed through this process would be relevant to the question of whether a candidate has the qualifications, skill, experience, temperament and reputation for fairness and ethical behavior required to serve on the appellate bench. This is the information that voters have long complained they are unable to attain and that is rarely, if ever, the focus of electoral campaign advertisements, robocalls and soundbytes.

The commission would be empowered to examine a candidate's background and to interview colleagues, courtroom adversaries, judges and others familiar with the candidate's work and experience. People with knowledge of the candidate's commitment to the community and reputation for fair and ethical behavior also would be interviewed.

The nominating commission's evaluation process should provide for public input. This could be through an announcement of who has applied for a judicial vacancy and the solicitation of written comments about the applicants. In addition, public hearings could be held where candidates would be questioned about their qualifications. Although the commission would be able to maintain the confidentiality of some of the information collected, including financial information and background interviews and investigations, this would allow for greater public understanding of and participation in the process. Commission deliberations and voting would still be confidential.

A list of the five most highly qualified candidates would be forwarded to the Governor. This list would be made public.

3. Nomination by the Governor

The Governor would be bound to nominate an appellate judge from the list of candidates recommended by the nominating commission. The Governor would not be free to appoint whomever he or she wishes to serve. The public would be confident that all of the candidates recommended by the commission would be well qualified. Because the list will have been made public, Pennsylvanians would have the opportunity to make their views on the recommended candidates known to the Governor.

4. Senate Confirmation

The Governor's nominee would be subject to Senate confirmation. Senate confirmation would include hearings and the opportunity for public comment. Pennsylvanians would have the opportunity to inform their Senators of their views about the nominee for appellate judge.

5. Retention Elections

After an initial four-year term, appellate judges would stand before the public in a yes/no nonpartisan retention election. This is six years earlier than elected judges currently stand for retention. The public therefore would have an early opportunity to evaluate the judge's performance on the bench.

If a judge wins retention, he or she would serve a full ten year term, and would then be eligible to stand for retention every ten years until mandatory retirement at age 70.

Many Merit Selection states use formal judicial evaluation commissions to evaluate and assess judges standing for retention. These evaluations often involve written questionnaires, as well as interviews with the judges, their colleagues on the bench, lawyers, and court staff. The results are published, and are very valuable to voters making decisions about retention. The process also provides valuable feedback to the judges.

D. The Problems Inherent in Electing Appellate Court Judges

Elections simply are not designed to get the most qualified, fair, and impartial judges on the bench. This is because elections do not emphasize qualifications and skill, but rather reward campaign prowess and fundraising ability.

In addition, random factors, like ballot position, name recognition and county of origin, play too great a role in electoral success. The public has long complained about the lack of access to relevant information, and the difficulty of making decisions about appellate court candidates. Finally, judicial elections have produced an appellate bench that does not reflect the diversity of Pennsylvania. These problems will be discussed in turn below.

1. Judges Should Not Be in the Fundraising Business

Most judges will tell you, honestly, that campaign contributions do not affect how they rule on cases that come before them. Unfortunately, as the costs of campaigns and the fundraising that accompanies them break new records, the public finds that increasingly difficult to believe.

During the 2009 election for a seat on the Pennsylvania Supreme Court, two candidates raised nearly 4.67 million dollars, mostly from lawyers, law firms, unions, corporations and other entities that frequently litigate in the state appellate courts. That set a new record in Pennsylvania for a single seat race. Even the candidates themselves complained that it is no wonder that the public thinks “justice is for sale.”

These figures are in line with increasingly expensive judicial elections across the nation. But the numbers raised by judicial candidates don’t give the whole picture because they do not include fundraising and campaign expenditures by third parties, including political parties. Nationally, since 2008, non-candidate groups have begun to outspend the actual candidates.

As former U.S. Supreme Court Justice Sandra Day O’Connor explained in *Parade Magazine*:

When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial. If I could do one thing to solve this problem, it would be to convince the states that select judges through partisan elections—that is, when a Democrat and Republican run against one another—to switch to Merit Selection instead. This method decreases the importance of money and politics in the process while still allowing voter input on retaining each judge.²⁷

The fundraising problem and the perceptions it creates are intensified because in Pennsylvania (and many other states), judges don’t have to recuse in cases where the litigants or lawyers gave money to help them get elected. That means that a judge can make the decision in a case that involves a lawyer or party who gave money, even a lot of money, to his or her election campaign. This is a key cause of the increasingly widespread public belief that campaign

²⁷ Sandra Day O’Connor, “How To Save Our Courts,” *Parade Magazine*, (Feb. 24, 2008), http://www.parade.com/articles/editions/2008/edition_02-24-2008/Courts_O_Connor.

contributions affect decisions made in the courtroom. Even if this perception is erroneous, great damage is done by the very fact that the public believes it could be true.

In June 2009, the U.S. Supreme Court in *Caperton v. Massey* recognized that in some cases, a judge's refusal to recuse from a case involving a campaign supporter rises to the level of a due process violation. Crucial to the Court's analysis was the concept of "the probability of bias." Actual bias was not the issue; it was enough that the circumstances of the campaign support for the judge by the CEO of a party to the litigation raised "a serious risk of actual bias."

The Supreme Court noted that *Caperton* was an exceptional case, and that not every case involving a judge presiding over a campaign donor would violate the Due Process Clause. However, to a party sitting in court, it's not the size of the donation by the opposing party or opposing counsel that matters, it's the very fact of the donation.

This is not a hypothetical situation. Every day, judges in Pennsylvania preside over cases involving lawyers, law firms and litigants that contributed to their election campaigns. In the wake of *Caperton*, more judges may face recusal petitions based on involvement of campaign donors in their cases, but nothing absolutely requires that judges recuse in such cases.

Unfortunately, the money spent on judicial elections is only likely to increase in the future. In January of 2010, the U.S. Supreme Court invalidated a portion of The Bipartisan Campaign Reform Act of 2002 (2 U.S.C. § 441b), which restricted corporate and union spending of general treasury funds on campaign advertising.²⁸ With the restrictions lifted, spending by outside groups on campaign advertising has begun to increase. Just recently, an election for a single seat on the Wisconsin Supreme Court prompted a record \$3.6 million in special interest spending on television advertising alone.²⁹

2. The Lack of Required Qualifications to Run for a Seat on the Appellate Courts

Currently, the only requirements to run for election to the appellate bench are residency in the Commonwealth for at least one year, licensure as a lawyer in the Commonwealth, and being at least twenty-one years of age.³⁰ A candidate is not required to have actually practiced law at all, let alone for any minimum number of years. There is no requirement that a lawyer have tried any cases in the court to which he or she is seeking election.

Although we have many good judges on the appellate courts, they are there *despite* the electoral system, not because of it. Pennsylvania needs a judicial selection system designed to place the most highly qualified, skilled and experienced candidates on the appellate courts. Elections simply are not designed to do this; they emphasize connections, campaign prowess, fundraising ability, and luck.

Part of the appeal of a Merit Selection system is the promise of establishing meaningful requirements and minimum qualifications for candidates seeking judicial office. These

²⁸ *Citizens United, Appellant v. Federal Election Commission*, 130 S. Ct. 876 (U.S. 2010)

²⁹ Erik Opsal, "One Week Later: What Happened in Wisconsin?" Brennan Center For Justice, (Apr. 13, 2011), http://www.brennancenter.org/blog/archives/one_week_later_what_happened_in_wisconsin/.

³⁰ Pa. Const. art. V, §12(a); 42 Pa.C.S.A. 3101.

requirements would be written into the Constitution and would include being engaged in the practice of law for a minimum number of years. “Being engaged in the practice of law” would be defined broadly, so that legal academics, legislators, policy developers and others with relevant experience could be considered.

In addition, other elements would be considered in an effort to bring to the bench people who would operate fairly, without bias or partiality and with the highest respect for the ethical constraints of the position. Candidates’ reputations for honesty, integrity, and fairness would be considered, as would candidates’ commitment to and involvement in their communities and the legal community. Finally, the process would recognize the importance of having a judiciary made up of men and women from diverse geographical, racial and ethnic backgrounds.

3. The Lack of Access to Relevant Information

Traditionally, judicial races have been relatively low turnout elections. They occur in odd-numbered years, when there are very few high profile races on the ballot. Even when judicial elections do accompany a populous county’s mayoral or city/county executive race, there is often a significant drop-off of voters who vote for the “up-ticket” races and decline to vote in the judicial races.

What explains this? Disenchanted voters who want to cast educated, meaningful ballots but who have been frustrated in efforts to learn relevant information about the candidates often skip the judicial section of the ballot. Voters understand that appellate judges occupy critically important positions in our government, but they are concerned that they do not have the necessary information to make an informed vote.

Instead, voters usually hear soundbytes and see quick ad spots that tout a candidate’s “tough on crime” credentials, or that play up a candidate’s name. In addition, in 2009, Pennsylvanians were treated to an unprecedented negative advertising campaign by the Supreme Court candidates. Both campaigns went negative, with ads that didn’t really tell voters anything about why either was qualified for the Supreme Court. The ads led to dual accusations of ethical violations. As former U.S. Supreme Court Justice Sandra Day O’Connor recently said, “Campaign ads about judicial races are like french fries for people who are hungry for information - they are not good nutrition.”

Merit Selection would set up a system in which Pennsylvanians can learn about the candidates applying for judicial vacancies and can share with the nominating commission, the Governor and the Senate any relevant information they have about these candidates. In addition, once a judge has gone through this process of evaluation by the commission, nomination by the Governor and confirmation by the Senate, significant information about his or her qualifications, skill, experience, background and reputation will have been made public. This all will be important to Pennsylvanians, who will be asked to decide in a retention election after the judge’s initial term whether that judge should be retained.

4. Random Factors Influence Election Outcomes

Too often, the best predictors of the winners of judicial elections are how much a candidate spends on the campaign, political party affiliation, the geographic area in which a candidate lives

and whether there is a non-judicial race that increases turnout, ballot position, and name recognition. These factors are not related to a candidate's qualifications. The influence of these factors is great because even the voters who do participate in these low turnout elections have very little relevant information on which to base their decisions.

Decisions as important as who sits on the appellate courts should not be left to chance and random factors. Merit Selection removes the randomness from the process and sets up a system under which qualifications determine who reaches the appellate bench.

5. The Lack of Diversity on Pennsylvania's Appellate Courts

Pennsylvania is a diverse state, politically, ethnically, racially and geographically. Our appellate courts, however, do not reflect this diversity. Instead, most candidates who win election to the appellate courts come from the big population centers – the Philadelphia and Pittsburgh areas.

The appellate courts are lacking in racial and ethnic diversity, and although women recently have been successful in reaching the Superior and Commonwealth Courts, only three women ever have been elected to the Supreme Court (although more women have been appointed to fill interim vacancies). Only one person of color has ever been elected to a full term on the Supreme Court. Currently, there are no people of color serving on the Pennsylvania Supreme Court. There is one judge of color on the Superior Court, and one judge of color on the Commonwealth Court.

Under Merit Selection, the nominating commission evaluates ALL applicants for judicial vacancies. No one is excluded from the process due to lack of financial resources or political connections. The proposed Constitutional language emphasizes the value of having diverse courts and a diverse nominating commission. It requires that "The commission shall consider that each of the appellate courts should include both men and women who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of this Commonwealth." Similar language guides those appointing nominating commission members.

The value of a diverse judiciary is that Pennsylvanians believe they will be treated fairly by appellate courts that reflect the diversity of the Commonwealth. When governmental institutions reflect the populations they serve, the public has greater confidence that those institutions serve the people. This is very important in maintaining strong courts. The courts derive their power and legitimacy from public trust. Perception is very important when it comes to the court system.

Merit Selection has a better track record than elections in bringing diverse judiciaries to the bench. Research by the American Judicature Society shows that racial minorities have greater success reaching appellate benches through Merit Selection. Of 340 judges on the highest state courts in the nation, 35 are minorities; 5 were elected, while 30 reached the bench through some form of appointive system, including Merit Selection. Women, too, have greater success in reaching appellate courts in Merit Selection states. Of 340 judges on the nation's highest state courts, 103 are women; 31 were elected, and 72 reached the bench through some form of appointive system, including Merit Selection.

6. Why Merit Selection for the Appellate Courts Only?

The problems with elections are more pronounced at the appellate level. Appellate court elections require candidates to campaign statewide and buy television advertising time in multiple media markets. As a result, these campaigns are much more expensive. Moreover, special interests groups get more involved in and spend more on appellate court elections. In elections for most county courts, voters have a greater likelihood of knowing candidates and greater opportunity to meet and learn about those candidates. Finally, the lack of diversity is much more apparent on the appellate courts.

7. Merit Selection is Different from the Process for Appointing Interim Appellate Judges in Pennsylvania and from the Federal System for Appointing Judges

Under the current system for filling interim appellate court vacancies, the Governor appoints and the Senate must confirm a nominee by a two-thirds vote. Traditionally, to win confirmation, the nominee must pledge not to seek a full term in the upcoming election. Thus, interim appointments serve for two years or less.

Under the federal system, the president may appoint a nominee of his or her choosing. That nominee is then subject to Senate confirmation, and will serve for life or good behavior.

In a Merit Selection system, the Governor would be required to make a nomination from the commission's list of highly qualified candidates. No such requirement exists in either the interim appointment process or the federal system. Although Pennsylvania has a bipartisan nominating commission to advise our United States Senators on possible federal court appointments, its recommendations are not binding on the president, and since the nominating commission is not constitutionally-mandated, it could cease to exist. In addition, the nominating commissions are quite different: in the federal system the U.S. Senators appoint all the Commission members.

Critically, Merit Selection also provides that following a brief term on the bench, a judge would stand before the public in a nonpartisan, yes/no retention election. Neither the interim appointment process nor the federal system provides for any sort of retention election.

Neither the federal system nor the interim appointment process should be viewed as examples of how Merit Selection would work.

IV. The Judicial Discipline System

Public trust and confidence in our courts is weakened when judges face criminal charges, as they recently have in Luzerne County, or are disciplined because of unethical or improper behavior on the bench or the campaign trail.

What helps maintain public confidence in the face of such problems is the knowledge that there are clear ethical rules and guidelines governing judicial behavior, that judges and the public are aware of these rules, that the rules are enforced, and violations of the rules are punished.

It is PMC's hope that all judges abide by the rules governing judicial conduct, act impartially, adhere to governing ethics rules, and obey the law. At times, unfortunately, some judges fall short. Therefore, a strong method for disciplining judges who act improperly is critical to maintaining public confidence in the integrity of the judiciary and the entire judicial process.

A strong, independent judicial discipline system should have two functions: protect the public by ensuring that unethical and illegal conduct by judges is halted and punished, and protect judges from unfounded allegations by disappointed litigants.

PMC believes that certain changes are needed to improve the judicial discipline system. Some of these changes can be accomplished by procedural changes at the Judicial Conduct Board and the Court of Judicial Discipline. Others can be achieved by rule changes by the Supreme Court. We focus our testimony on amendments to the Pennsylvania Constitution that would improve the judicial discipline system.

A. The Current Judicial Discipline System

In 1993, the Pennsylvania Constitution was amended to reform the Judicial Discipline System that had been in existence since 1968. The current system is two-tiered. The Judicial Conduct Board ("Board") investigates and prosecutes allegations of judicial misconduct, and the Court of Judicial Discipline ("Court") adjudicates charges of judicial misconduct.

The Board is composed of 12 members: three judges, three lawyers and six non-lawyers. Half of the members are chosen by the Governor (1 Common Pleas Court judge, 2 lawyers, and 3 nonlawyers). The other half is chosen by the Pennsylvania Supreme Court (1 judge of either the Superior or Commonwealth Court, 1 magisterial district judge, 1 lawyer and 3 nonlawyers).³¹

The Court of Judicial Discipline is composed of 8 members: 4 appointed by the Governor (1 judge of the Common Pleas, Superior or Commonwealth Courts; 1 non-lawyer; and 2 non-judge members of the bar) and 4 appointed by the Supreme Court (2 judges of the Common Pleas, Superior or Commonwealth Courts; 1 magisterial district judge and 1 non-lawyer).³²

The Pennsylvania Supreme Court hears appeals of Court of Judicial Discipline rulings, except appeals involving members of the Supreme Court. In such cases, a Special Tribunal is convened to hear the appeal to avoid members of the Supreme Court hearing an appeal involving one of their colleagues.

This system replaced the Judicial Inquiry and Review Board, which had investigated allegations of misconduct and recommended sanctions to the Supreme Court (including in cases involving allegations against members of the Supreme Court).

³¹ Pa. Const. art. V, § 18(a)(1) & (2).

³² Pa. Const. art. V, § 18(b).

B. The Judicial Discipline System Must Be Sufficiently Funded to Fulfill its Obligation to Protect the Public from Judicial Misconduct

According to Board statistics, in 2010, 649 complaints were filed with the Board and 596 were disposed of. During that year, the Board filed formal charges with the Court of Judicial Discipline against three judges.³³

In 2010, 566 complaints were dismissed after a preliminary inquiry. Seven more were dismissed after a full investigation. In 17 other cases, discipline short of formal charges were issued, including ten letters of caution (a letter of caution is a "private warning of conduct that could lead to judicial misconduct if not corrected"); and seven letters of counsel (a letter of counsel is a private letter issued when there is "sufficient evidence of judicial misconduct" but it appears, based on the evidence, to be an isolated incident).³⁴

In recent years, the Judicial Conduct Board has operated with only a Chief Counsel, an Assistant Counsel and three investigators to cover complaints from a judicial system comprised of 1,025 justices, judges, and magisterial district judges (collectively referred to herein as "judges") who handle more than three million cases per year that affect, at various times, every resident of Pennsylvania. This is clearly insufficient.

The Judicial Discipline System, like the entire Unified Judicial System, suffers from inadequate funding. The Pennsylvania Constitution provides that: "The budget request of the [Board of Judicial Conduct] shall be made by the board as a separate item in the request submitted by the Supreme Court on behalf of the Judicial Branch to the General Assembly."³⁵ Similar language governs the budget request of the Court of Judicial Discipline.³⁶

Including the Judicial Discipline budget as part of the broader Judiciary budget means that as the Judiciary budget is reduced, so too might the Judicial Discipline budget be. In many other states³⁷, the Judicial Discipline System makes a direct budgetary request to the Legislature. The budget is not part of the general judiciary budget.

Recommendation

Pennsylvania should amend the Constitution to provide for such a separate budgetary request. This would enable the Judicial Discipline System to directly request funds and to testify before the Legislature to explain the request and answer questions about operations, rather than having its budget rolled up in the general Judiciary budget.

³³ Proposed Budget of the Unified Judicial System 2011-2012, at 164.

³⁴ Proposed Budget of the Unified Judicial System 2011-2012, at 164.

³⁵ Pa. Const. art. V, § 18(a)(6).

³⁶ Pa. Const. art. V, § 18(b)(4).

³⁷ States that have a separate budgeting process for the judicial discipline system include: Alabama, Alaska, Arizona, California, Louisiana, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, North Dakota.

C. Changes Required to Ensure the Independence of the Judicial Conduct Board and the Court of Judicial Discipline

The 1993 Constitutional Amendment that created the current Judicial Discipline System was carefully designed the system to separate the investigative and prosecutorial functions from the dispositional function. The goal was to have two independent, trusted bodies. Over time, however, we have heard people complain that the Board and the Courts appear to be interconnected agencies rather than independent bodies.

1. Term Limits Should be Imposed on Members of the Judicial Conduct Board and Court of Judicial Discipline

The Constitution sets no limits on how many terms an individual may serve on either the Board or the Court. The only restriction is that a member of either body must wait a year following the conclusion of his or her term before being reappointed to that body.³⁸

Over time, members have served multiple terms on the Board and Court. Moreover, there has been significant overlap in the memberships of these bodies, as individuals move from service on the Board to the Court and vice versa.

We appreciate that institutional memory and a fuller understanding of the work of either body may well be informed by continued service and by having members who have served on each body. However, without some term limits, the frequent rotation of the members of the Board and Court weakens – at least in appearance – the independence of the bodies and the purpose of having a two-tiered discipline system.

Recommendation

We recommend that there be a maximum number of years that one can serve on either body, as well as a total number of years one may serve when time on both bodies is combined.

2. Mandatory Breaks in Service Should Be Imposed on Members of the Board and Court of Judicial Discipline

Recommendation

PMC recommends that restrictions be imposed on an individual's ability to serve on the Board and then, following that service, on the Court (or vice versa). For the independence of both bodies and to foster public confidence in the system, we recommend that a break in service of at least two years be required during which a former member of the Board should not be permitted to be appointed to the Court and vice versa. This will also minimize the necessity for a member of the Court to recuse from cases in which he or she may have made decisions as a member of the Board.

³⁸ Pa. Const. art. V, §§ 18(a)(3) & (b)(2).

D. The Confidentiality Provisions Governing the Judicial Discipline System

The Constitution provides that “All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality.”³⁹ This language was intended to ensure that litigants and lawyers are not afraid to file complaints against judges they believe have engaged in misconduct and to protect judges when erroneous, unfounded, or malicious complaints are filed. These are very important elements of a well-functioning discipline system.

The Luzerne County scandal and its aftermath, however, demonstrated that the confidentiality rule can be used as a shield to avoid scrutiny of Board action or inaction. During the Interbranch Commission on Juvenile Justice (“ICJJ”) hearings, the Board refused to provide information about a complaint and its handling to the ICJJ, based on its interpretation of the confidentiality provisions.

The two bodies litigated the issue before the Supreme Court.⁴⁰ The Supreme Court held that the Board was required to submit some of the requested materials, although under seal, in accordance with its own Rule of Procedure 18(C), which provides: “Information related to violations of criminal laws may be disclosed to the appropriate government agency.” The Supreme Court found the ICJJ was such an entity.

The Board appeared to be seeking to protect the privacy of its members and staff, rather than that of a complainant or a targeted judge.

In addition, Board Rule of Procedure 18(C) permits the Board to refer matters to the appropriate external law enforcement authorities when a complaint raises issues within the jurisdiction of such authorities. However, there is no guidance about how such determinations are to be made, or about how confidentiality concerns come into play.

Recommendations

External investigation of a judge should be permitted to proceed unimpeded by the Constitution’s confidentiality provisions. The Constitution should be amended to require the Board to inform the appropriate legal authorities when a complaint raises allegations of criminal misconduct.

At the same time, external investigations of judges should not impede the ability of the Board to protect the public from judicial misconduct. PMC therefore recommends that the Constitution (and as necessary existing statutes) be amended to require state and federal prosecutors to fully inform the Board of information they uncover in the course of an investigation relating to the actions of a judge in the exercise of his/her official duties.

Federal and state grand jury secrecy rules should be amended to provide that the Board can and will be informed of an investigation into judicial misconduct in office. Without such communication, the Board may be unaware of the allegations and unable to avail itself of the temporary suspension process to protect the public.

³⁹ Pa. Const. art V, § 18(a) (8).

⁴⁰ See *In re: Interbranch Commission on Juvenile Justice*, 988 A.2d 1269 (Pa. 2010).

To avoid future conflicts such as the one between the Board and the ICJJ, we recommend that the Constitution be amended to provide that the Board must respond to subpoenas by law enforcement agencies, Inspectors General, and specially convened bodies authorized to investigate the Board (such as the ICJJ).

V. Conclusion

PMC thanks the Pennsylvania Bar Association, the Constitutional Review Commission and the Article V Subcommittee for the opportunity to present this testimony. We hope it will help to inform the work of the Subcommittee and the full Constitutional Review Commission.