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## Judicial Merit-Retention Elections in Pennsylvania

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# Judicial Merit-Retention Elections in Pennsylvania

*Darren M. Breslin, Esquire\**

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## I. INTRODUCTION

Over the past several years, elected officials, civic organizations, academics and influential citizens have revitalized calls for Pennsylvanians to change the way state judges are selected. These individuals and groups support an appointive system called “merit selection” to replace Pennsylvania’s 160-year-old electoral system for judicial selection.

Under the current system, all judges of the Pennsylvania Unified Judicial System are selected through partisan elections.<sup>1</sup> Common pleas and appellate court judges are elected to ten-year terms,<sup>2</sup> and may serve as regularly commissioned judges until age seventy.<sup>3</sup> At the end of each term, common pleas and appellate

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1. PA. CONST. art. V, § 13(a); *see also* PA. CONST. art. V, § 13(b) (providing that vacancies may be filled by an interim gubernatorial appointment with the advice and consent of the Senate).

2. *Id.* at § 15(a).

3. *Id.* at § 16(b).

court judges may run for reelection, or they may seek another term by appearing on a non-partisan ballot in a “yes” or “no” retention election.<sup>4</sup> If a majority of the electorate votes to retain the jurist, he or she will be commissioned to serve another full term (subject to mandatory retirement). Judges elected to Philadelphia’s municipal court, traffic court, and magisterial district court serve six-year terms, but the latter are not eligible for retention.<sup>5</sup>

Pennsylvania Governor Edward G. Rendell, the Pennsylvania Bar Association, and Pennsylvanians for Modern Courts (PMC), among others, are calling for a constitutional amendment, or even a constitutional convention, to change how appellate court judges are initially selected. These advocates favor a system where a commission would screen and recommend a number of candidates for judicial office to the governor.<sup>6</sup> The governor would then nominate an individual from this list. The nominee would need senate confirmation before serving as a judge. Under PMC’s proposal, after some period of time, that judge would stand for a non-partisan retention election before the voters.<sup>7</sup> In June 2010, in light of the Luzerne County judicial corruption scandal, Governor Rendell suggested expanding the merit selection system to county common pleas jurists as well, if desired by the county electorate.<sup>8</sup>

Pennsylvanians are not alone in debating the best judicial selection method. Citizens, politicians, and advocacy groups in other states are grappling with the same question. In Missouri, for example, a state well known for its adoption in 1940 of a “model” judicial merit-selection (appointive) system, a movement is underway to abandon judicial appointments and return to an elective process for judges “in urban areas and in higher courts.”<sup>9</sup>

Numerous articles and position papers have been written extolling the virtues of one judicial selection method over another.<sup>10</sup>

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4. *Id.* at § 15(b).

5. *Id.*

6. See Press Conference, Pennsylvanians for Modern Courts, Pennsylvania Ready for Merit Selection (June 9, 2010), <http://www.pmconline.org/node/331>.

7. Pennsylvanians for Modern Courts, Merit Selection, <http://www.pmconline.org/choosingjudges/meritselection> (last visited July 6, 2010).

8. Robert Swift, *Split Seen on County Merit Selection Option*, SCRANTON TIMES TRIB., June 10, 2010, available at <http://thetimes-tribune.com/news/split-seen-on-county-merit-selection-option-1.838306>.

9. See, e.g., Jo Mannies, *Roy Blunt Sides with Effort to Change Missouri’s Judicial-Selection System*, ST. LOUIS BEACON, June 9, 2010, available at <http://www.stlbeacon.org/content/view/full/102965/314/>.

10. Compare Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077 (2007), Symposium, *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353 (2002), and Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The*

The purpose of this article is not to weigh in on the current discussion, but rather to first examine how Pennsylvania arrived at the current system of judicial selection, and then focus on a key aspect of both the current and proposed judicial selection alternatives: nonpartisan, noncompetitive merit-retention elections.<sup>11</sup> While this is not the first or most comprehensive article to chronicle Pennsylvania's judicial selection history,<sup>12</sup> a contemporary review of the historical roots of the state's current selection method, and an in depth examination of how and why the Commonwealth devised the current merit-retention system for judicial reelections may be beneficial in the current debate over judicial selection alternatives.

## II. HISTORY OF JUDICIAL SELECTION METHODS IN PENNSYLVANIA

Since the founding of the United States, Pennsylvanians have utilized various methods for selecting jurists. Under the 1776 Pennsylvania Constitution, judges were appointed by the Executive Council (the 1776 Constitution did not provide for the office of governor) for seven-year terms.<sup>13</sup> Judges were eligible for reappointment at the end of each term.<sup>14</sup> This method of judicial selection essentially mirrored judicial selection during Pennsylvania's colonial period.<sup>15</sup>

Under the 1790 Constitution, judges were appointed by the governor.<sup>16</sup> As with judges appointed to serve in the newly established federal judiciary, Pennsylvania judges served during good behavior—so-called “life tenure.”<sup>17</sup>

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*Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1 (1993), with Hon. Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN. ST. L. REV. 1 (2004).

11. Throughout this article words “retention” and “merit-retention” are used interchangeably. “Merit-retention” was used by delegates to Pennsylvania's 1967-68 Constitutional Convention to suggest judges would be retained or removed from office by the voters on their records, or merit, and not on the basis of their political parties. *See, e.g.*, 1 COMMONWEALTH OF PA., DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-1968, at 1042-43 (1969).

12. For an excellent article chronicling the history of judicial selection in Pennsylvania, see THE COMMITTEE OF SEVENTY, JUDICIAL SELECTION GOVERNANCE STUDY (1983), available at [http://www.seventy.org/Downloads/Policy\\_&\\_Reform/Governance\\_Studies/1983\\_-\\_Judicial\\_Selection\\_Governance\\_Study.pdf](http://www.seventy.org/Downloads/Policy_&_Reform/Governance_Studies/1983_-_Judicial_Selection_Governance_Study.pdf) [hereinafter COMMITTEE OF 70].

13. PA. CONST. OF 1776 ch. II, §§ 20, 23.

14. PA. CONST. OF 1776 ch. II, § 23.

15. *See, e.g.*, *An Act for Establishing Courts of Judicature in This Province* § 3 (May 22, 1722), in A DIGEST OF THE LAWS OF PENNSYLVANIA 310 (John Purdon ed., 1818) (noting that judges were appointed by the provincial governor or lieutenant governor).

16. PA. CONST. OF 1790 art. II, § 8.

17. PA. CONST. OF 1790 art. V, § 2; U.S. CONST. art. III, § 1.

In the 1830s, reformers in Pennsylvania became dissatisfied with what they deemed "excessive patronage" by the governor.<sup>18</sup> In 1838, service during good behavior was removed. Judicial appointments were still made by the governor, although now with the consent of the senate, and the terms of office were limited.<sup>19</sup> Supreme Court justices—called judges at that time—served fifteen-year terms and common pleas court judges served ten-year terms.<sup>20</sup> While some Democratic-party efforts to make the office of judge an elected position failed,<sup>21</sup> for the first time in the Commonwealth's history, members of the "minor judiciary," then called "justices of the peace," were elected in local wards, boroughs, and townships to five-year terms.<sup>22</sup> It has been suggested that this change was intended to "enlarge the powers of the electorate at the expense of the executive."<sup>23</sup>

In 1850, whether attributable to "Jacksonian Democracy"<sup>24</sup> or a desire "to increase judicial independence and stature,"<sup>25</sup> Pennsylvanians abandoned the appointment method of judicial selection and instituted popular elections.<sup>26</sup> Supreme Court judges were elected to fifteen-year terms, while common pleas court judges were elected to ten-year terms. Some authors have suggested that this change in judicial selection methods was an attempt to free the judiciary from "the corrosive effects of politics" and to enable judges to "restrain legislative power."<sup>27</sup> Other authors have suggested that the shift to the election of judges in the nineteenth century was not "a thoughtful response to concerns over the independence or integrity of the judiciary . . . [but rather] a response to the populist fervor that inundated the nation at the time, affecting

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18. CHARLES M. SNYDER, *THE JACKSONIAN HERITAGE: PENNSYLVANIA POLITICS 1833-1848*, at 96 (1958).

19. PA. CONST. of 1838 art. V, § 2.

20. *Id.*

21. SNYDER, *supra* note 18, at 104.

22. PA. CONST. of 1838, art. V, § 7.

23. SNYDER, *supra* note 18, at 105.

24. THE COMMITTEE OF 70, *supra* note 12, at 11-15. "Jacksonian Democracy" "was characterized by a commitment to democracy, which included the extension of the franchise . . . , the breakdown of class distinctions, opposition to monopoly and special privilege, social legislation to improve the lot of debtors, and the defense of state sovereignty." SHELDON GOLDMAN, *CONSTITUTIONAL LAW: CASES AND ESSAYS* 27 (2d ed. 1991).

25. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1399-1400 (2003).

26. PA. CONST. of 1838, Art. V, § 2 (1850).

27. Schotland, *supra* note 25, at 1400 (citing Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 HISTORIAN 337, 338-39 (1983)).

all of its institutions.”<sup>28</sup> Still others have suggested that the country’s embrace of Jacksonian Democracy, and, in particular, the adoption of elected versus appointed judges, was really attributable to “the triumph of ‘emotion’ over ‘reason.’”<sup>29</sup> Whatever the true reason, the year 1850 ushered in an era of a fully elected judiciary in Pennsylvania, one that has now endured for 160 years.

By the 1870s the notion of an elected judiciary began to fall out of favor for some in Pennsylvania. Advocates of change argued that judicial selection should not be tied to partisan politics.<sup>30</sup> During the 1872-73 constitutional convention, a majority of the judiciary committee recommended a return to appointing judges, while opponents recommended continuing the electoral system.<sup>31</sup> Proponents of the elective system argued that the quality of judges had improved since the advent of judicial elections and that if the citizens were fit to select their governor, they were fit to select their judges.<sup>32</sup> Opponents argued that the elective system forced judges to be politicians, subject to political dealings,<sup>33</sup> and that the voters were not competent to select good judges.<sup>34</sup>

Ultimately the only change in judicial selection resulting from the 1874 Constitution was that the terms of office of Supreme Court judges were increased to twenty-one years, but without the possibility for reelection, while the terms of common pleas court judges remained at ten years.<sup>35</sup>

Shortly after judicial elections became the law in Pennsylvania, efforts to reduce partisan political influences on the judiciary began.<sup>36</sup> Bar associations across the country advocated taking judges out of politics.<sup>37</sup> The concept of nonpartisan judicial elections was first suggested in the 1870s, as a means of “forc[ing]

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28. Montgomery & Conner, *supra* note 10, at 5 (quoting HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 38 (1992)).

29. *The Case for Judicial Appointments*, *supra* note 10, at 359 (quoting Caleb Nelson, *A Re-Evaluation of Scholarly Explanation for the Rise of Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 191 (1993)).

30. THE COMMITTEE OF 70, *supra* note 12, at 15.

31. *Id.* (citing 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1872-73, PENNSYLVANIA 412 (1873)).

32. *Id.* at 16 (citing 3 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 706, 747 (1873)).

33. *Id.* at 16 (citing 4 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 54-55 (1873)).

34. *Id.* at 16 (citing 3 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 32, at 743).

35. PA. CONST. of 1874 art. V, §§ 2, 15.

36. THE COMMITTEE OF 70, *supra* note 12, at 15.

37. *Id.*

voters to select judges based on merit rather than party affiliation," and to "take the judges out of politics."<sup>38</sup> Nonpartisan judicial elections were offered as a compromise between gubernatorial appointment and partisan elections.<sup>39</sup> In 1913, Governor Tenor signed legislation requiring judicial candidates for courts of record to be elected through nonpartisan ballots.<sup>40</sup> However this law was repealed in 1921<sup>41</sup> and partisan elections were reinstated.<sup>42</sup> The failure of this initiative has been attributed to the reality that despite nonpartisan ballots "political leaders continued to control the slating of many candidates while the ballots became clogged with numerous unknown judicial hopefuls."<sup>43</sup>

The concept of nonpartisan ballots for judicial elections resurfaced in the 1940s and 1950s, mainly in connection with an appointive method for judicial selection. The 1959 Report of the Commission on Constitutional Revision (Woodside Commission Report) supported the so-called "Pennsylvania Plan," which called for nonpartisan retention elections for appellate court jurists who would initially be appointed to a brief term by the governor.<sup>44</sup> The purpose of the recommendation was, in part, to remove judges from partisan politics.<sup>45</sup> Nonpartisan retention elections, after a brief appointive term by the governor or chief justice, were also recommended by the Governor's Commission on Constitutional Revision in 1964<sup>46</sup> and by the Pennsylvania Bar Association in 1966.<sup>47</sup>

The Woodside Commission examined the various methods of judicial selection used across the country and concluded that the elective system was "not adequate to determine the ability of a judge."<sup>48</sup> The majority of commission members supported appoint-

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38. *Id.* (internal quotations omitted).

39. THE COMMITTEE OF 70, *supra* note 12, at 18.

40. Act of July 24, 1913, No. 457, 1913 Pa. Laws 1001 (repealed 1921).

41. Act of May 10, 1921, No. 199, 1921 Pa. Laws 426.

42. Act of May 10, 1921, No. 198, 1921 Pa. Laws 423.

43. Montgomery & Conner, *supra* note 10, at 9.

44. COMMISSION ON CONSTITUTIONAL REVISION, REPORT WITH RESPECT TO THE JUDICIARY art. V, § 25 (1959) [hereinafter WOODSIDE COMMISSION REPORT].

45. See PREPARATORY COMMITTEE FOR THE CONSTITUTIONAL CONVENTION, THE JUDICIARY: REFERENCE MANUAL NO. 5, 379 (1968) [hereinafter REFERENCE MANUAL NO. 5].

46. GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION, REPORT, WITH RECOMMENDATIONS OF RESOLUTIONS TO BE INTRODUCED INTO THE GENERAL ASSEMBLY § 7 (1964); REFERENCE MANUAL NO. 5, *supra* note 45, at 417-19.

47. PENNSYLVANIA BAR ASSOCIATION, PROPOSED JUDICIARY ARTICLE § 7 (1966); REFERENCE MANUAL NO. 5, *supra* note 45, at 383-85, 389-90 (alternate proposal).

48. WOODSIDE COMMISSION REPORT, *supra* note 44; REFERENCE MANUAL NO. 5, *supra* note 45, at 379.

ing judges to the bench for a short term, followed by a retention system.<sup>49</sup> The commission members believed

that politicians, rather than the people, select the nominee for judicial office under [the elective] system and that this selection is determined not primarily on the basis of judicial ability but rather on the basis of extrajudicial considerations, such as party affiliation, membership in a particular racial or religious group, and patronage considerations.<sup>50</sup>

Nationally, the American Bar Association's 1962 Model State Judicial Article similarly suggested executive appointments to fill judicial vacancies followed by retention elections.<sup>51</sup> In 1967, the President's Commission on Law Enforcement and Administration of Justice endorsed the principle of retention elections "as the best way to protect judges from 'undue political influence and to increase their independence.'"<sup>52</sup>

Despite numerous calls for change in the method of judicial selection, the issue was not formally taken up in Pennsylvania until the 1967-68 constitutional convention.

### III. 1967-68 PENNSYLVANIA CONSTITUTIONAL CONVENTION

Prior to the 1967-68 Pennsylvania Constitutional Convention, a preparatory committee was created "to compile alternative proposals for constitutional changes to be considered by the convention."<sup>53</sup> In a 1967 Statement to the Preparatory Committee by the League of Women Voters of Pennsylvania, nonpartisan retention elections after a brief appointive term would "help to keep the courts out of politics and politics out of the courts."<sup>54</sup> Regarding a proposed selection process combining partisan elections for judges,

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49. Judge Woodside however was in the minority and favored an elected judiciary. See WOODSIDE COMMISSION REPORT, *supra* note 44.

50. *Id.*; REFERENCE MANUAL NO. 5, *supra* note 45, at 379.

51. AMERICAN BAR ASSOCIATION, MODEL STATE JUDICIAL ARTICLE (1962); REFERENCE MANUAL NO. 5, *supra* note 45, at 394-98.

52. THE COMMITTEE OF 70, *supra* note 12, at 19 (quoting SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION IN THE UNITED STATES 1-2 (American Judicature Society 1980) (discussing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967)).

53. REFERENCE MANUAL NO. 5, *supra* note 45, at v.

54. League of Women Voters of Pennsylvania, Statement to the Pennsylvania Constitutional Convention Preparatory Committee, Task Force Hearing on the Judiciary Article (July 1967).



followed by nonpartisan retention elections, the Preparatory Committee wrote:

This system combines the direct election by the people with a nonpartisan, noncompetitive reelection, but it eliminates the rigors of a campaign for the incumbent judge, retains his skill and experience and permits the electorate to pass on his qualifications and fitness for office as demonstrated by his prior term of office.<sup>55</sup>

As noted above, the so-called "Pennsylvania Plan" proposed judicial appointments, followed by nonpartisan retention elections. On the retention election aspect of this plan, the Preparatory Committee wrote:

The proponents of the Pennsylvania Plan feel that the provision for an election to decide whether a judge is to be retained gives the electorate sufficient democratic control over the judiciary. The election contemplated does not follow the usual type of political campaign, since the judge who seeks to be retained for a regular term runs on his own record. He does not have to spend the time, physical and mental energy, nor the money required by a typical partisan, competitive campaign. His only investment in effort and money to be retained is in the work he has put into his judicial duties to gain a satisfactory record and in the cost of a postage stamp used to notify the election officials that he desires to be retained for another term.<sup>56</sup>

The Preparatory Committee also heard from opponents of a retention election system for judges. The committee wrote:

[O]pponents of this system maintain that it is difficult to remove an incompetent judge under this system. . . . Since there is no opposition in the reelection, the duty of campaigning against the incumbent judge falls upon lawyers, who are put in the delicate position of opposing a judge before whom the lawyers may be required to appear, at the time of the campaign or in the future. Under this situation, there will be no real contest and unless there are two contestants, there is no doubt about the outcome of the race. . . . Former Judge Wood-

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55. REFERENCE MANUAL NO. 5, *supra* note 45, at 116.

56. *Id.* at 132.

side, speaking in opposition to a merit plan for selection of Judges, observed about the possibility of unseating a judge running for reelection on a noncompetitive ballot "Where officials are 'elected' on a 'Yes' or 'No' vote, approval is nearly unanimous. 'You cannot lick somebody with nobody,' is a tried and accepted political slogan, even in America."<sup>57</sup>

During the convention numerous proposals were debated concerning judicial selection.<sup>58</sup> Most of these debates surrounded the method for initial judicial selection (appointment vs. election). Delegate (and former governor) William Scranton said the question of judicial selection "was the most contentious and the most contested of all the portions of [the judiciary] article within the committee."<sup>59</sup> On the selection of judges, Delegate Stout wrote: "we found this issue to be the 'hottest,' most controversial issue of this Convention."<sup>60</sup>

Delegates were bitterly divided, not only on the best method for initial judicial selection, but also on the question of nonpartisan retention elections. Some delegates bristled at the concept of merit-retention. Delegate Keller suggested retention elections would functionally ensure lifetime appointments, calling the concept the "till death do us part" proposal.<sup>61</sup> In urging the defeat of the merit-retention proposal, Delegate Fohl argued, "The very same people who yesterday and in previous days were telling us the people are not knowledgeable enough to vote for the judges [in the first instance] are now telling us that they are knowledgeable enough to vote 'yes' or 'no' a short time later [in a retention election]."<sup>62</sup> Delegate Goldman, who would later support merit-retention, questioned how voters would know whether a judge is good or bad when they have nothing to compare with him.<sup>63</sup>

Other delegates believed merit-retention elections were necessary to lessen the influence of partisan politics on sitting judges.<sup>64</sup>

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57. *Id.* at 116 (citing the Report of the Commission on Constitutional Revision, 1959, Minority Statement, 215).

58. *See e.g.*, 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-68, at 94-99, 122-27, 148-52, 161, 172-84, 207-08, 225-33, 288-95, 309-13, 315, 322-23, 444-49 (1969). *See also* REFERENCE MANUAL NO. 5, *supra* note 45, at 101-116; THE COMMITTEE OF 70, *supra* note 12, at 20.

59. Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. 1, pg. 448.

60. Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1235.

61. *Id.* at 1043.

62. *Id.* at 1082.

63. *Id.*

64. *See e.g.*, 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-68, *supra* note 58, at 94-99 (Proposal No. 1000), 122-27 (Proposal No. 1011), 147-52 (Pro-

Delegate Burkholder stated that "yes-no" retention elections were the way to reduce political influences on judges in office.<sup>65</sup> Near the end of the convention, Delegate Goldman said nonpartisan retention elections "keep [judges] out of politics, running solely and exclusively on their own background, on their own ability as they have proven it in their preceding term."<sup>66</sup>

On February 26, 1968, in the closing days of the convention and after days of impasse, an amendment was introduced that would lead to the current Constitution's Article V. The amendment called for partisan elections, followed by nonpartisan "merit retention" elections for all common pleas and appellate court judges. It also called for the voters at the 1969 primary election to determine if the Commonwealth's appellate court judges should be selected by the governor from a list of names submitted by a Judicial Nominating Commission.<sup>67</sup> This compromise position eventually led to the current Article V, Sections 13 and 15.

On April 23, 1968, Pennsylvanians adopted the current Constitution. Supreme Court justices, appellate and common pleas court judges are elected to ten-year terms.<sup>68</sup> Philadelphia municipal and traffic court judges and magisterial district court judges are elected to six-year terms.<sup>69</sup> All of these jurists, except magisterial district court judges, may seek reelection to office by running in nonpartisan retention elections.<sup>70</sup>

The 1969 ballot question on judicial appointments for appellate court judges failed by a vote of 643,960 to 624,453.<sup>71</sup>

#### IV. MERIT-RETENTION ELECTIONS IN THE CURRENT JUDICIAL SELECTION DEBATE

While the debate continues to this day over the best method for the initial selection of Pennsylvania judges, recommendations to change judicial selection over the past forty years have repeatedly

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posol No. 1031), 172-78 (Proposal No. 1054), 207-08 (Proposal No. 1087) and 290-95 (Proposal No. 1174).

65. 2 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-68, at 1081 (1969).

66. *Id.* at 1242.

67. *Id.* at 1241-42.

68. PA. CONST. art. V, § 15(a).

69. *Id.*

70. *Id.* § 15(b).

71. ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 558 (1985).

advocated continuing the use of merit-retention elections as a way of limiting partisan political influences on judicial selection.<sup>72</sup>

For example, in 1981, the Committee to Study Pennsylvania's Unified Judicial System, chaired by former Justice Thomas W. Pomeroy, Jr. (Pomeroy Report) recommended that all appellate court judges in the state should be appointed by the governor for an initial term of two years, and then stand for election on a non-partisan ballot. The committee further recommended retaining the nonpartisan "merit-retention" system established in the 1968 Constitution.<sup>73</sup>

In 1988 Governor Casey's Judicial Reform Commission (Beck Commission Report) recommended that appellate court judges serve an initial four-year term through gubernatorial appointment, and then be required to stand for election in a non-partisan retention election if they wish to continue in office.<sup>74</sup>

In the wake of the Beck Commission Report a statewide non-profit, nonpartisan organization called Pennsylvanians for Modern Courts (PMC) was established with the goal of enhancing public confidence in the judiciary. A principal mission of this organization has been to promote an appointment system of judicial selection. Like the 1969 referendum, as well as the Pomeroy and Beck Commission Reports, PMC's proposal calls for the gubernatorial appointment of judges from a list of candidates forwarded by a nominating commission, followed by nonpartisan, uncontested retention elections.<sup>75</sup> Likewise, the League of Women Voters of Pennsylvania supports retention elections for trial and appellate judges.<sup>76</sup>

In 2007, the Pennsylvania Commission on Judicial Independence<sup>77</sup> contacted former delegates to the 1967-68 constitutional

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72. Ironically, at least one author has suggested the change from an appointive judicial selection method to partisan elections was itself an attempt to free the judiciary from "the corrosive effects of politics." Schotland, *supra* note 25, at 1400 (quoting Hall, *supra* note 27, at 337).

73. THE COMMITTEE TO STUDY PENNSYLVANIA'S UNIFIED JUDICIAL SYSTEM, THOMAS W. POMEROY, JR., CHAIRMAN 81, 89-92 (1981).

74. GOVERNOR'S JUDICIAL REFORM COMMISSION, PHYLLIS W. BECK, CHAIRPERSON 155-56 (1988). Interestingly the question of judicial selection was the only issue that generated a significant dissenting report. *Id.* at 202-38.

75. Pennsylvanians for Modern Courts, What is Merit Selection?, <http://www.pmconline.org/nodc/27> (last visited June 30, 2010).

76. League of Women Voters of Pennsylvania, Judiciary, <http://palwv.org/issues/judiciary.html> (last visited Aug. 12, 2010).

77. The Pennsylvania Commission on Judicial Independence was officially empanelled by the Pennsylvania Supreme Court in 2005. Unified Judicial System of Pennsylvania, Judicial Independence Commission,

convention, and asked about the purpose behind merit-retention elections. Five former delegates provided the following statement:

The delegates to the 1968 Constitutional Convention wanted to ensure that Pennsylvania judges, after serving an initial term in office, would be reelected in a non-political manner based on the merits of their performance in office.

The Constitution born of that convention provided, for the first time in Pennsylvania history, that judges were to be reelected not in partisan political contests but by a new method called *retention*. When seeking reelection, each judge would have the opportunity to stand before voters on his or her record in a neutral, non-confrontational referendum. Voters would approve or disapprove each judge with a “yes” or “no” vote.

This reelection method was designed to keep judges out of the political fray while at the same time holding them accountable to the voters based on their overall performance in office.

Under the retention system, the public is able to evaluate its judges while the judges are able to maintain their independence which is essential to their role in our democratic system of government.

In making retention part of the Constitution, the delegates to the Constitutional Convention hoped and expected that voters would evaluate judges not on any single issue or decision, but rather on their full records and with the understanding that the sole duty of all judges is to uphold the law, uninfluenced by any form of outside pressure.<sup>78</sup>

Current and former elected officials in Pennsylvania have repeatedly called for a change in how the state initially selects judges, but proposals consistently endorse the concept of merit-retention elections for additional terms in office. In June 2010

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<http://www.aopc.org/T/BoardsCommittees/CourtRelatedPanels/IndependenceCommission.htm> (last visited Aug. 12, 2010). Its principal goals are to “foster[] a better understanding of the role of the courts in a democracy and [to] counter[] unfair attacks on the judiciary.” *Id.*

78. This statement was signed in April 2007 by former delegates Holbrook M. Bunting, Jr., Esquire, William F. Clinger, Jr., Esquire, Hon. Robert E. J. Curran, Hon. John W. Keller, Joseph M. More, Esquire, and by Marvin Comsiky, Esquire, who served as General Counsel to the Convention. Statement of Delegates to the 1968 Constitutional Convention: Why We Re-Elect Judges by Retention (2007), available at <http://www.pavotesmart.com/StatementofDelegatesToThe1968ConstitutionalConvention-final.pdf>.

current Governor Rendell was joined by three former governors—Hon. Richard Thornburgh, Hon. Thomas Ridge and Hon. Mark Schweiker—in calling for the appointment of appellate court judges, followed by a nonpartisan election after serving four years, and a retention election every ten years thereafter.<sup>79</sup> Similarly legislation has been introduced numerous times in the Pennsylvania general assembly since the 1970s, most recently in the 2009-2010 legislative session, calling for a constitutional amendment establishing an appointment process for judicial selection, followed by retention elections.<sup>80</sup>

Efforts to implement an appointment process for judicial selection in Pennsylvania have existed in one form or another virtually since the Commonwealth switched to judicial elections in 1850. But nearly every effort to move away from judicial elections since 1969 has included merit retention elections at some point after an initial appointive term. Arguments can still be made that a retention election system is ideal as it allows a judge to run on his or her “record,” giving the voters an opportunity to pass on the judges “qualifications and fitness for office as demonstrated by his prior term.”<sup>81</sup> Conversely, some may still argue that nonpartisan “yes” or “no” retention elections have a limited value since judges are rarely defeated,<sup>82</sup> and as the preparatory committee to the 1967-68 constitutional convention wrote: “Under [the retention election] system there will be no real contest, and unless there are two contestants, there is no doubt about the outcome of the race.”<sup>83</sup>

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79. Angela, Coulombis, *Rendell Presses for Merit-Based Judge Selections*, PHILA. INQUIRER, June 10, 2010, [http://www.philly.com/philly/news/breaking/20100609\\_Rendell\\_presses\\_for\\_merit-based\\_judge\\_selections.html](http://www.philly.com/philly/news/breaking/20100609_Rendell_presses_for_merit-based_judge_selections.html).

80. See e.g., S.B. 860, 2009-10 Leg., Reg. Sess. (Pa. 2009); H.B. 1621, 2009-10 Leg., Reg. Sess. (Pa. 2009).

81. REFERENCE MANUAL NO. 5, *supra* note 45, at 116.

82. Rarely are judges in Pennsylvania defeated in retention elections. The most notable defeat came in 2005, when Justice Russell Nigro was narrowly defeated in his bid for retention by less than 30,000 votes. During that same year, Justice Sandra Schultz Newman was retained with 54.1% of the votes. See Pa. Dep't of State, Elections Information, <http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=12&ElectionID=19> (last visited Aug. 12, 2010). In 2007, a concerted effort, led primarily by mid-state political activists, to remove judges running for retention in Pennsylvania failed. See e.g., *Election Aftermath: Retentions Didn't Change Need for Reform*, THE MORNING CALL, November 12, 2007, [http://articles.mcall.com/2007-11-12/news/3803948\\_1\\_judges-debate-and-amendments-lawmakers](http://articles.mcall.com/2007-11-12/news/3803948_1_judges-debate-and-amendments-lawmakers). Only one judge from the court of common pleas in Bradford County was not retained; however, it is uncertain that his defeat was attributable to a statewide “vote no” effort. See Cheryl R. Clarke, *Mott Says That His Bench Record Should Be Deciding Factor*, WILLAIMSPORT SUN GAZETTE, November 4, 2007, <http://www.sungazette.com/page/content.detail/id/500543.html?nav=5014>.

83. REFERENCE MANUAL NO. 5, *supra* note 45, at 116.

## V. ENHANCING THE UTILITY OF MERIT-RETENTION ELECTIONS

Leaving positions for or against a nonpartisan, uncontested retention election system for incumbent judges aside, arguably the value and utility of Pennsylvania's retention election system is enhanced when the citizens are informed. This was clearly a concern to some of the delegates to the 1967-68 convention.<sup>84</sup> Historically, efforts to provide relevant information to voters with regard to judges running for retention have come from one or two sources: the media or the organized bar associations. In the year 2000, the American Bar Association Standing Committee on Judicial Independence issued a report on state judicial selection standards. The committee recommended the following criteria for judicial selection and retention:

Standard A.1: Selection Criteria. Judicial selection criteria should include, but not necessarily be limited to:

(i) Experience. A candidate for judicial office should be a member of the Bar of the highest court of a state for at least 10 years and have been engaged in the practice or teaching of law, public interest law, or service in the judicial system.

(ii) Integrity. The candidate should be of high moral character and enjoy a general reputation in the community for honesty, industry and diligence.

(iii) Professional Competence. Professional competence includes intellectual capacity, professional and personal judgment, writing and analytical ability, knowledge of the law and breadth of professional experience, including courtroom and trial experience. Candidates for appellate judgeships should further demonstrate scholarly writing and academic talent, and the ability to write to develop a coherent body of law.

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84. See e.g., Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1081-82 (Delegate Goldman argued "[i]t seems ridiculous in this day and age to continue having [judges] elected by the people when they do not really know who they are . . . if people do not even know the man's name, how will they know whether he has been good or bad?").

(iv) Judicial Temperament. Judicial temperament includes a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion.

(v) Service to the Law and Contribution to the Effective Administration of Justice. Service to the law and contribution to the effective administration of justice includes professionalism and a commitment to improving the availability of providing justice to all those within the jurisdiction.

Standard A.2: Retention Criteria. In addition to the criteria set forth in Standard A.1, in evaluating the judicial performance of a judge standing for retention election, the following should be considered:

- preparation, attentiveness and control over judicial proceedings;
- judicial management skills;
- courtesy to litigants, counsel and court personnel;
- public disciplinary sanctions; and
- quality of judicial opinions.

These selection and retention criteria were approved by the American Bar Association House of Delegates in July 2000.<sup>85</sup>

Some organizations and civic groups have suggested utilizing an organized method for gathering this information on judges seeking another term through a retention election, and making that information available to the public through an evaluation system or through voter guides.<sup>86</sup> The League of Women Voters of Pennsyl-

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85. A.B.A. STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON STATE JUDICIAL SELECTION STANDARDS 7 (2000), <http://new.abanet.org/committees/judind/PublicDocuments/reformat.pdf>. Similarly, the Pennsylvania Bar Association has published "traits" for voters to consider when initially voting for a judge. See C. Dale McClain, Ten Traits to Consider When Voting for Judges, <http://www.pavotesmart.com/TenTraitstoConsiderWhenVotingforJudgesOp-ed.pdf>.

86. The Beck Commission recommended that the Judicial Nominating Commission (charged initially with nominating potential jurists to the governor) would also reevaluate each judge or justice seeking a full or subsequent term through retention, and state its conclusions publicly. Governor's Judicial Reform Commission, *supra* note 69, at 38. See



vania has published a guide suggesting “how to judge the judges” and listing sources of information on judicial candidates.<sup>87</sup> During election years, the League of Women Voters publishes a voters’ guide, including information on judicial retention election candidates.<sup>88</sup> Likewise, the Pennsylvania Bar Association has established a website where a significant amount of information on statewide candidates for retention may be found.<sup>89</sup> These information sources are valuable, especially to voters who otherwise may have no knowledge of a judge’s identity, let alone his or her record.

The Pennsylvania Commission on Judicial Independence has suggested that the media and all county bar associations in Pennsylvania should likewise make similar relevant information available to the county electorate voting in retention elections for common pleas court judges.<sup>90</sup> Arguably the value and utility of the information provided by the bar associations and the civic organizations would be further enhanced if additional elements from the American Bar Association’s suggested retention criteria were included.<sup>91</sup>

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also Mark Neville, *Whether We Elect Judges or Merit Select Them, Voters Need to Be Educated*, PATRIOT-NEWS, November 12, 2009, [http://www.pennlive.com/editorials/index.ssf/2009/11/whether\\_we\\_elect\\_judges\\_or\\_mer.html](http://www.pennlive.com/editorials/index.ssf/2009/11/whether_we_elect_judges_or_mer.html).

87. See League of Women Voters of Pennsylvania, *How to Judge the Judges: Judicial Election Information for Voters*, <http://palwv.org/lwv/pubs/judgethejudges.pdf> (last visited Aug. 12, 2010).

88. See League of Women Voters of Pennsylvania, *Voters’ Guide*, <http://palwv.org/voting/vote.html>.

89. See PAVoteSmart, *Judicial Election Information*, <http://www.pavotesmart.org/> (last visited Aug. 12, 2010).

90. In Philadelphia County this would include information on judges elected to the Philadelphia municipal court and the Philadelphia traffic court.

91. The Pennsylvania Bar Association (PBA), through its Judicial Evaluation Commission asks judicial retention candidates to voluntarily complete a questionnaire and provide representative writing samples. These are reviewed by an investigative panel, which may also conduct interviews with other individuals. The panel then meets with the retention candidate and submits a report to the commission. The commission reviews the information provided and issues a rating of either “recommended” or “not recommended” for retention. Candidates who do not participate in the evaluation process are given a rating of “not recommended for failure to participate in the evaluation process.” Ratings are made public via news releases and the PBA Web site. See Pennsylvania Bar Association, *Judicial Evaluation Commissions Evaluation Procedures*, <http://www.pavotesmart.org/aboutJEC.pdf> (last visited Aug. 12, 2010).

The League of Women Voters of Pennsylvania provides similar information on its website regarding the retention election system and retention candidates. All judicial retention candidates are asked to list their education, occupation and qualifications for this office, and to answer a question. For example, in 2009 candidates were asked to give their opinion on the judicial disciplinary system. See League of Women Voters of Pennsylvania, *Nonpartisan Voters Guide: Municipal Election*, November 3, 2009,

## VI. CONCLUSION

It is unknown if Pennsylvanians will decide to change the way they select judges. While the effort to move to an appointive system of judicial selection has persisted for over 40 years, no initiative or legislation has come closer than the 1969 referendum, which failed by less than 20,000 votes. Nevertheless, the movement appears reenergized through the efforts of advocacy groups and elected representatives. Regardless of the method ultimately selected for the initial appointment of jurists, however, it appears likely that Pennsylvanians will continue to have a direct vote on which jurists are permitted to remain in office after their initial term, through the state's 40 year old merit-retention election system.

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<http://palwv.org/voting/2009/VGFall2009.pdf> (last visited Aug. 12, 2010). In 2007, candidates were asked to explain what the phrase "judicial independence" means to them. *See* League of Women Voters of Pennsylvania, 2007 Campaign Voters Guide, <http://palwv.org/members/2007/Fall%202007%20Voters%20Guide.pdf> (last visited Aug. 12, 2010). As with the PBA evaluations, participation is voluntary.

