Common Cause Pennsylvania

Working for Open, Accountable and Responsive Government

**TESTIMONY BY COMMON CAUSE/PENNSYLVANIA
ON THE NEED FOR MAJOR REFORMS
IN THE PENNSYLVANIA JUDICIARY**

**Presented to the House Subcommittee on the Courts
July 14, 1994
Harrisburg, PA**

Chairman Dermody, Chairman Clark and distinguished members of the House Subcommittee on the Courts, I thank you for this opportunity to share some of the views of Common Cause/Pennsylvania on the need to reform this state's judicial system. My name is Susan Mitchell. I serve as the Chair of the Judicial Reform Project Team for Common Cause/PA, a public interest advocacy organization representing 13,000 Pennsylvanians that for twenty years, as of yesterday, has been active in promoting openness, accountability and responsiveness in government institutions.

Few issues have captured our organization's interest as much as improving the courts of Pennsylvania. On previous occasions we have testified before various bodies on court-related issues. And, certainly, there are several avenues to pursue in making the judiciary more effective and more responsive to the demands of democracy. To gain a clear understanding of what lies at the heart of our current judicial crisis we can reflect on the warning of Lyman Patterson who stated in The Profession of Law:

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> "The fundamental problem is this: a judge exercises more power with less accountability than any other official in our society. A recognition of the judge's lack of accountability does not constitute an indictment of either judges or the legal system, but it does mean that effective and competent judges are essential to the administration of justice in our society."

Common Cause has supported a dual approach to judicial reform in Pennsylvania -- preventative and corrective. Earlier in this session the corrective aspect was addressed when the General Assembly approved, and the voters ratified, a constitutional amendment which was designed to discipline errant judges. But, we still have a seriously flawed method for selecting judges. It seems we have gotten the cart before the horse. A system that helps us to select the best individuals to serve as judges obviously would diminish the need for discipline and removal.

Therefore, the most essential and most significant improvement which can be enacted is the proposal to replace an elected appellate judiciary with one whose members are appointed on the basis of merit.

The arguments supporting merit selection are compelling. It is the only system that seeks candidates solely on the qualities for being an ideal judge -- intelligence, experience, integrity, effectiveness, and temperament. It also is probably the best system for broadening representation on the court. An effort to create diversity recognizes that, while formal education in the law may not vary much from school to school, the life experiences by which that learning is filtered and reflected may vary greatly.

Merit Selection supports the mission of the judiciary and enhances its credibility, because weighing appeals calls for great depth of understanding, and great skill in reasoning and debate. When properly constructed, it should assure the highest standards of ethics -- a court which is shielded from the influence of money, power and political cronyism.

There seems to be only one compelling argument against merit selection. Some observers and legislators insist that an elected judiciary empowers the people. That sounds reasonable. It sounds sincere. You can almost smell the apple pie and hear the brass band in the background.

Elections are appropriate for selecting legislators and executives whose jobs are to mold and execute public policy. Through debate, compromise and salesmanship, they balance the needs of a diverse and ever-shifting public. But the combat skills necessary to help one survive elective politics do not appear to translate well to attracting and promoting the best judges. Their role requires them to be reflective and analytical, capable of making decisions based on constitutionality and fairness, and not on popular opinion. The nature of their role in the democratic process requires that they be somewhat removed from the public's passions of the moment. The obvious example comes from the civil rights movement. If federal judges would have had to face the electorate in the South during the 1950s and 1960s, would they have had the courage to do what was right?

A further problem is that voters only have choices among a very narrow field of candidates. These candidates are most often chosen and nurtured by political

organizations. Their preferred qualities most often include party loyalty, a track record of being a "team player", and those imprecise attributes which make a person capable of winning an election. They are groomed by spin doctors and ad agencies, and funded by sources which should make any reasonable person squeamish. Democratic elections generally produce the best form of representative government, but election of judges, obviously, is not designed to advance the people with the best judicial qualifications.

Imagine an exit poll during a judicial election. "Excuse me sir. Would you tell us what influenced your choices in this election?"

"Certainly. I voted for Catherine Grace. She recently published an excellent article on Trends in Environmental Law. Also, she's quite a Constitutional scholar--it's clear that her perspective on Article 1 Section 28 could create a dynamic shift in civil rights cases...."

Of course, I'm kidding about that scenario. Our pollster would get this, instead: "I voted for the guy on the top of the list--I think his name starts with L. I'm fairly sure he's the one with the TV ads where he's driving a tractor. He says he's tough on crime. That's good enough for me."

That candidate--now Judge What's-his-name/starts-with-L-I-think--was not chosen because of his love of justice, or his hard work in becoming a knowledgeable, compassionate jurist. He had the top ballot position. His fundraisers and media consultants found and funded the right hooks, and gave him name recognition. Lets not forget the 1987 Philadelphia judicial elections in which three judges, who had been suspended for many months for allegedly accepting inappropriate gifts in the Roofers

Union scandal, were reelected. They apparently were reelected because their names sounded familiar -- never mind that it was because of the notoriety they achieved through scandal.

Furthermore the public appears to be quite uneasy with, or at least uninterested in, electing judges. In the 1993 general election, which featured a hotly contested, high profile, race for the state Supreme Court, only 35% of Pennsylvania's registered voters participated. Compared with the 83% turnout for the 1992 election in which the President and all state representatives were chosen, it appears that voters do not feel prepared to fulfill their role in judicial selection.

Obviously, we cannot and will not accept a judiciary based on form rather than substance. Respect for governance, and respect for the law, falls when citizens lose their confidence in those who create, enforce and interpret the law.

There is some debate over what components and what approaches would provide the best system of merit selection. Some of our perspectives are as follows:

1. The nominating process should be as open as possible. If we are, indeed, anxious to include "citizen empowerment" in judicial selection, we must include knowledgeable lay persons on the selection panel, and we should require demographic balance on the nominations commission. The commission structure must overcome the power of politics. Our hope, under any system, is that there is assurance that appellate judgeships are not, in any way, patronage positions.

2. The nominating panel's criteria for choosing judicial nominees should be well established and well known to the public. The criteria should include demographic balance as one significant factor in selection.

3. A reasonable period for public comment on nominees before confirmation is appropriate. An open process should also include frequent reports to the public on nominees and their qualifications, the status of vacancies and pending vacancies, and the general deliberations of the commission.

4. Confirmation by a simple majority of the Senate is preferable to a super-majority requirement. We believe that the appropriate time to screen out any candidate whose credentials are less than superb, is during the nominating commission's review process.

5. There must be realistic, built-in safety valves to prevent prolonged vacancies on the bench in cases where the Governor and the Senate are at odds over a particular nominee or group of nominees.

Merit selection in other states, has given us ample evidence that this is an appropriate and effective reform. Common Cause, therefore, has asked the Governor to call the General Assembly back for a special session this month to deal with this long overdue constitutional amendment.

We recognize, of course, that even with strong arguments favoring merit selection, and public frustration with the current court, there is no assurance that this measure will pass in the immediate future. For this reason, we would like to briefly comment on other reform proposals.

Please understand, it is the position of Common Cause that other reforms are not substitutes for Merit Selection, but are complimentary to that change. Merit Selection remains the ultimate goal.

Common Cause has long supported campaign finance reforms, such as those now before the House in HB-2873. By restricting the amount of money individuals and PACs can give to judicial candidates, by limiting the amount of money a judicial candidate can spend on a campaign, and by providing partial public financing to encourage a broader field of candidates, we can enhance the fairness and quality of judicial elections. Furthermore, public financing of judicial campaigns would remove at least some of the

uneasiness and suspicion that blight the current system -- a system which sees lawyers and their high-powered clients making large contributions to judges' political campaigns, and then showing up in the courtrooms of those same judges. Very public disclosure of private campaign funding sources might greatly increase the public's confidence in blind justice.

This particular reform can be more easily accomplished, because it requires only the modification of the state Election Code. It is an essential action to take while merit selection is still pending.

Administrative improvements within the court system also has been a topic of recent commentary, particularly in light of recommendations by the Grand Jury convened to hear the issues involving Justice Larsen. Reform efforts ought to include ongoing discussions of court administration by experts convened to discuss and recommend reform within a context of wide participation and public review. A good starting point would be for this subcommittee to conduct a thorough analysis of the various studies which already have been commissioned -- the Beck Commission Report, the Pomeroy Commission Report, the Senate's "The Image of Justice" Report, the Committee of 70 Report, and the Larsen Grand Jury Report -- especially since they often reach similar conclusions.

There is concern over a lack of documentation and written procedures for some critical Supreme Court activities. It is our understanding that some changes in this area are already underway -- particularly with regard to the system for determining which appeals to hear, for allocatur petitions, and the potential for abuses that can come with

large unvouchered expense accounts. We strongly urge that the Larsen Grand Jury recommendations be given serious consideration, and we hope that momentum is not lost before the task is completed.

Common Cause/PA urges this panel to move forward as boldly as possible on the issues of Judicial Reform. Our strongest recommendation is that the legislature act decisively on Merit selection, and present a carefully-crafted proposal to the voters in 1995. The legislature also should take decisive action on campaign finance reforms which will improve judicial elections until we achieve a responsible system for merit selection. Improvements in the courts' administrative processes and accounting activities would increase the effectiveness of the courts as well as improve public perceptions of the judicial branch's integrity.

The quality of justice is greatly influenced by the quality of Justices. We have recently witnessed some painful, faith-destroying disclosures about our courts. We have had absolute, irrefutable proof that our current system does not inspire confidence. We have evidence beyond a reasonable doubt that major reforms are long overdue.

This is a time for legislative courage, for legislative responsibility, for taking a stand in support of the best interests of the public. We hope that efforts toward real judicial reform will move ahead with swiftness and sincerity.