



Pennsylvanians for Modern Courts

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STATEMENT OF EDMUND B. SPAETH, JR.
IN SUPPORT OF MERIT SELECTION OF
PENNSYLVANIA APPELLATE JUDGES

In offering this statement in support of amending the Pennsylvania Constitution to provide that justices of the Pennsylvania Supreme Court and judges of the Pennsylvania Superior and Commonwealth Courts should be selected and appointed on the basis of merit instead of being chosen by partisan political elections, I shall refer principally to my own experience.

I was a judge of the Superior Court from 1973 to 1986; to become that, I had to run in three state-wide partisan elections. I was appointed to a vacancy on the Superior Court in January 1973. In May 1973 I ran in the primary election, seeking nomination as the Democratic candidate (or Republican, for cross-filing was then permitted) in the November 1973 general election; however, I was defeated. When another vacancy occurred on the Superior Court, in December 1973, I was appointed to that vacancy. In May 1975 I again ran in the primary election; this time I was nominated as the Democratic candidate, and in the November general election I was elected to a ten year term on the court. When my term expired, in January 1986, I declined to run for retention on the court.

When I declined to run for retention, I was President Judge of the Superior Court and 65 years old. Thus, if retained,

I would have been able to serve five more years on the court. I very much enjoyed service on the court and regarded service as a high professional privilege; I should have liked to have continued to serve on the court. I was nevertheless unwilling to run for election -- even on a retention basis -- because in my view the election of judges, in particular of appellate judges, is fundamentally unsound because it is inconsistent with the creation of an impartial and qualified judiciary. In the balance of this statement, I shall summarize my reasons for this conclusion.

First: The election of appellate judges -- that is, the justices of the Supreme Court and the judges of the Superior and Commonwealth Courts -- does not in any sense reflect a deliberate decision by the electorate; it is rather a process that has been accurately characterized as a "politically bossed system that masquerades as an instrument of popular will."

When I ran for the Superior Court, I often asked my audience whether any one knew who I was or anything about the Superior Court. Except for an occasional lawyer or personal friend, no one did. I was then able to explain the responsibilities of the Superior Court, and so at least inform the audience of the importance of the election, but there was very little I could do to tell them about why they should vote for me. I could not, of course, promise to decide cases in a way that might have pleased a particular audience -- that I would be for, or against, labor, for, or against, plaintiffs in accident cases, and so on. I particularly remember a conversation I had with a member

of one of the groups I spoke to. After she had heard me explain that I could not make any such promises because it would amount to prejudging cases I knew nothing about; that a judge's responsibility was to decide each case on its particular facts and on the basis of the law, not on the basis of the judge's own predilections; and that in doing that the judge must be careful to listen to all of the witnesses and to consider the arguments of both lawyers as impartially as possible -- after listening to all this, she said, "But how does that help me decide whether to vote for you? Isn't that what every judge is supposed to do?"

In the end, I was elected by a substantial margin. But that didn't indicate in the least that finally, after three campaigns, the voters were in a position to decide whether I would be a good judge. If, right after my election, the voters had been asked who I was, most of them would not have had the least idea. The Democratic party ran an effective campaign in having its party workers get my name on sample ballots (in the 1973 primary, which I lost, the party ran almost no campaign, assuming that no problem would arise; after I lost it was learned that many voters had voted for my Republican opponent under the mistaken impression that he was a Democrat). Most important, there was a vigorous mayoralty race in Philadelphia, which the Democratic candidate won by a large margin. I was on his sample ballots and so came out of Philadelphia with too much of a lead for my Republican opponent to overcome. My election no more reflected the popular will than my

opponent's defeat did. We both were either the victim or the beneficiary of political chance.

People do not vote for an appellate judicial candidate as they do for other state-wide candidates. They have some basis for choice in voting for Governor or United States Senator; such candidates may, and do, take positions (for expanded medical coverage, for family leave, for lower taxes, whatever). But appellate judicial candidates cannot -- or should not -- take positions on how they will decide cases, and they are picked by voters on the basis of factors irrelevant to their qualifications: the candidate's ballot position; whether the candidate's name has a familiar ring; in what county the candidate lives; whether the local party worker (who knows nothing about the candidate's qualifications either) recommends a vote for or against the candidate.

In short, the argument that electing appellate judges is an exercise of popular will has no merit; it ignores the evidence and is contradicted by the experience of those who have run for election to an appellate court.

Second: The election of appellate judges inevitably and necessarily involves the judicial candidates in a process that compromises their independence, if not in fact at least in appearance.

When I ran for election to the Superior Court, almost all of the audiences I appeared before were Democratic audiences -- Democratic County Committee dinners and picnics, for example;

almost all of my opponent's audiences were Republican. That's wrong. There are real, and legitimate, differences in political philosophy between the Democratic and Republican parties. But there's no such thing -- or shouldn't be -- as Democratic or Republican law. To count noses, and say that an appellate court is "Democratic" (or "Republican") because a majority of its judges were elected as Democrats (or as Republicans) is to say that the court is irresponsible -- that it decides its cases on the basis of a partisan political philosophy rather than on the basis of an impartial application of the law to the particular facts of the case. It therefore made me, as it has made many other judicial candidates, intensely uncomfortable to appear before and seek the support of politically partisan audiences. It was inevitable that at least many in the audience, especially the non-lawyers, would infer from my appearance that I would decide the cases that came before me "their way" -- as a Democrat. I could not escape the feeling that by appearing before them, I was impliedly promising to do just that -- no matter how clearly I tried to say otherwise. And yet, there was no escape. If I was to be elected, I had to campaign, and that meant appearing before politically partisan audiences.

There was also no escape from another fact inconsistent with at least the appearance of judicial independence. No one can run a campaign without spending money. Unless one is wealthy, that means asking others to give you money. And if one is a judicial candidate, that means asking lawyers -- not yourself but some one

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been able to put aside, to transcend, the compromises of the politically partisan process through which they had to go to reach the bench. Not all judges can do that. And the public knows it.

Surely the time has come for us to do better. Pennsylvania is only one of eight states that selects all its judges by partisan political election. Is every one out of step but Johnny?

I don't propose in this statement to describe merit selection. Others in their statements will do that. But the experience of other states shows that merit selection is a far better way than partisan election to get a competent, independent judiciary of unquestioned integrity.

And contrary to its critics, merit selection is not undemocratic. In the first place, the people's elected representatives play a central role in the merit selection process. The Nominating Committee's members are appointed by the Governor and the leaders of the Senate and House of Representatives, and to become a judge a nominee of the committee must be appointed by the Governor and confirmed by the Senate. And in the second place, merit selection produces a more representative judiciary than partisan elections do. In Pennsylvania the appellate bench is mostly white, male, and from the two largest metropolitan areas. In merit selection states the bench has a much fairer representation of women and minority groups and is much more geographically diverse. This result is not surprising. To be nominated the judge must be a lawyer of demonstrated ability and

integrity. Thus, every qualified lawyer has a chance -- not only lawyers with political connections who are willing and able to raise a lot of money for their campaigns.

Nothing, absolutely nothing, is more important to the welfare of our citizens than an independent, incorruptible, and learned judiciary. Let us therefore do all we can to achieve such a judiciary. Without it, there cannot be that general respect for the law on which our society depends.

Thank you for the opportunity to present this statement.

Edmund B. Spaeth, Jr.

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This pamphlet was prepared by
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MERIT SELECTION — The Supreme Choice for Pennsylvania

What Pennsylvanians
need to know
about
choosing
judges



PENNSYLVANIANS FOR MODERN COURTS

Merit selection better than guessing game
Reform finally gets off the bench
Merit judicial selection bill deserves legislative support.

Grand Jury Seeks Court Reform

Investigation of Pennsylvania justice's accusations leads to call for his removal

Courting Chaos!
Enough hand-wringing! Let's fight for good judge!

A test of merit for evil to triumph on judicial reform, honest citizens need merely do nothing

What's in a name? In race for Supreme Court, plenty are out. So voters must rely on the arbitrary.

How to Buy A Judge
Some lessons in developing a proper judicial temperament.



Voters playing 'lottery' in Supreme Court race
Without off-limits, arbitrary factors

THE LOWDOWN ON THE HIGH COURT
Some lessons in developing a proper judicial temperament.

Secrecy shrouds

Good Courts Matter To All Pennsylvanians

Judicial decisions affect all aspects of our lives, from the taxes we pay to where our children attend school to how our rights and freedoms are protected. Whether you are the accuser or the accused, a witness or a crime victim, your fate should be entrusted to judges of the utmost independence, integrity and professional competence.

Some judges in Pennsylvania fit this description. But far too many don't — and here's why.

All judges are elected: the hundreds who serve on local trial courts and the 31 sitting on the statewide or appellate courts — Supreme, Superior and Commonwealth. Typically, winning an election depends on political savvy, party connections, luck, the ability to raise money and, these days, negative advertising. The one thing it **doesn't** depend on is qualifications.

Doesn't this concern you?

An overwhelming majority of voters in the May 1993 primary — 82% — signalled their dissatisfaction with the judicial system by approving a dramatic reform of the state's method for disciplining judges accused of misconduct.

Later that year, frustration with the appellate courts reached a fever pitch when a state grand jury issued a scathing report indicting one Supreme Court Justice and criticizing practices of the entire high Court.

Now we must keep up the momentum by enacting another and even more far reaching reform, this one to change the way we select appellate judges.

MERIT SELECTION FOR PENNSYLVANIA'S APPELLATE COURTS

WE DESERVE THE BEST

What's Wrong With Electing Appellate Judges?

The scandals on the Pennsylvania Supreme Court confirm what has long been wrong with electing appellate court judges:

● **JUST ANOTHER POLITICIAN?**

Elections require judicial candidates to compete for political party endorsements and raise huge amounts of money for campaign war chests. We then demand that they be independent and non-partisan once on the bench. Is it any wonder that many judges continue to act like politicians?

● **MONEY TALKS—ARE JUDGES LISTENING?**

Statewide judicial campaigns are increasingly costly — a 1993 candidate for the Pennsylvania Supreme Court spent over \$1.5 million. Guess who the biggest contributors are? Special interest groups and lawyers who routinely appear before the appellate courts. In 1993, a grand jury found that one Supreme Court Justice kept a list of lawyers or campaign contributors whose cases received special handling.

● **PLAY THE LOTTERY: JUDGES BY CHANCE**

Nine out of ten voters could not even name the candidates for statewide judicial office, according to one respected poll. That is why judges are often chosen because of irrelevant factors such as top ballot position, county of residence, a familiar name or who can produce the most convincing attack on an opponent.

● **PACK YOUR BAGS — BIG CITY APPLICANTS ONLY**

Only 4 out of the 31 appellate court judges live outside the Philadelphia or Pittsburgh metropolitan areas. Many talented lawyers living elsewhere don't stand a chance against the well-organized big-city party machine candidates. No "outsider" has been elected to the Supreme Court since 1981.

● **MIRROR, MIRROR ON THE WALL — DO OUR COURTS REFLECT ALL OF US?**

More than 3/4 of the current appellate judges are white men. No woman, and only one African-American, has ever been elected to the Pennsylvania Supreme Court. Other racial minorities have not served on the appellate courts.

Merit Selection: The Supreme Choice For Pennsylvania

Finding what's wrong with how appellate judges are chosen is easy. Figuring out what works better is easier still.

A blueprint has already been drafted by a Judicial Reform Commission of interested citizens, academics, lawyers, judges, and court administrators from across the state. In its 1988 report, the Commission concluded that selecting appellate judges according to an appointive method based on merit — **MERIT SELECTION** — would "minimize partisan and special interest influences and best provide for...an impartial and competent judiciary."

Many scandals later, merit selection is needed now more than ever.

HOW DOES MERIT SELECTION WORK?

- A bi-partisan, independent nominating commission composed of men and women from regions across the state — non-lawyers and lawyers, from different occupational, racial and ethnic backgrounds — would be selected by the Governor and legislative leaders from both political parties. The Commission would review applicants for appellate judgeships and recommend a short list of the **most qualified** for appointment;
- The Governor would nominate a candidate from the list for confirmation by the state Senate. The successful candidate would serve an initial term; and
- The judge could seek additional terms of office, without his/her party affiliation listed, in retention elections. This means voters would be asked to vote "yes" or "no" on whether the judge deserves to stay in office.

Commonly Asked Questions About Merit Selection

WHY ARE APPELLATE JUDGES DIFFERENT FROM OTHER ELECTED OFFICIALS?

Voters should know where gubernatorial, legislative or mayoral candidates stand on controversial issues. We vote for them precisely because of those stands and we have every right to expect that, if elected, they will create and implement policies reflecting their campaign promises.

The role of judges, on the other hand, is to resolve disputes based solely on the law and evidence — not to satisfy any pre-announced political philosophy or persons who helped get them on the bench.

Judges themselves know how important this is. Their Code of Judicial Conduct forbids candidates from revealing personal opinions on issues they may rule on later.

HAVEN'T ELECTIONS PRODUCED GOOD APPELLATE JUDGES?

Sometimes we get lucky and elections produce fine judges. But why trust chance? Our goal should be a system that ensures that all appellate court judges are chosen only for their qualifications.

WILL THE PUBLIC HAVE A VOICE WITH MERIT SELECTION?

Yes — and it's a voice that will finally matter.

Critics mischaracterize merit selection as an attempt to take away the voters' right to choose judges. Let's be frank: do we really have a "choice" now? In truth, the real choices are usually made long before the electorate enters the picture when political bosses meet in smoke-filled rooms to endorse appellate court candidates. Polls show that most voters are forced to select candidates whose names they do not recognize and whose qualifications they do not know.

Merit selection gives citizens a **meaningful** voice in the judicial selection process, recognizing the fact that appellate judges ought to be chosen in a different way than other elected officials.

All candidates must first be recommended by a diverse nominating commission of citizens from all across the state. No one can actually become an appellate judge unless chosen by the Governor and confirmed by members of the Senate, all elected officials accountable to the voters.

Finally, voters have the final say on whether a judge deserves to stay in office through non-partisan retention elections. This vote will be truly informed since the judge will have a proven record of performance on the appellate bench.

WOULD NOMINATING COMMISSION MEMBERS BE "POLITICAL PUPPETS"?

No. Critics are wrong in assuming that nominating commission members would take "marching orders" from those who appointed them. Commission members in New York proved otherwise in 1992 when they publicly stated that they would not tolerate interference with the merit selection process.

Merit selection neutralizes partisanship in the judicial selection process by having an equal number of Democrats and Republicans on the nominating commission, appointed by the Governor and legislative leaders from both political parties. No appointee is permitted to hold public or political office.

Commission appointments would be for fixed and staggered terms — that is, appointments would not coincide with the term of office of the appointing authority — thereby safeguarding the independence of the commission. Finally, merit selection gives the appointing authorities no power to "fire" commission members if they are dissatisfied with the list of recommended appellate court nominees.

WHY LIMIT MERIT SELECTION TO APPELLATE JUDGES?

While it has been argued that merit selection should apply to judges at all levels, the need to replace elections for **appellate judgeships** is most compelling. This is because statewide voter turnout is abysmally low, the candidates are largely unknown, enormous amounts of money are raised from lawyers and potential litigants, campaign advertising has become increasingly offensive and there is little geographical, gender and racial diversity.

Moreover, the Supreme Court crisis has further eroded the public's faith in the appellate courts and renewed calls for legislation changing the way statewide judges are selected.

WILL APPELLATE JUDGES BE CHOSEN IN THE SAME WAY AS FEDERAL JUDGES?

Not at all. Merit selection is significantly different than the process used for selecting judges who sit on the federal courts.

The heart of merit selection is its **constitutionally created bi-partisan, broad-based and independent nominating commission**. The Governor can only select a nominee from among those recommended by the Commission, making that body an important safeguard against a statewide judiciary of only one political party or philosophy, or whose members are too similar in race, gender, ethnicity or county of residence.

By contrast, the United States Constitution does not require the creation of a nominating commission to recommend federal judges. The President, a "commission" of one, can use any system he/she wants, and the President is hardly bi-partisan!

WOULD IT MAKE MORE SENSE TO IMPROVE, RATHER THAN REPLACE, ELECTIONS?

No. Over the years, various bills have been introduced in the General Assembly that purport to remedy one or another problem of judicial elections.

Some propose "band-aid" reforms such as eliminating the importance of top ballot position by rotating the names of candidates and reducing the risk of geographical bias by removing the designation of a candidate's home county. Other proposals seek to "overrule" the judges' own Code of Judicial Conduct by allowing candidates to speak out on issues they may later have to decide as judges.

Finally, there have been literally hundreds of suggestions for limiting funding of judicial candidates by special interest groups and/or providing a supplemental source of public monies. Not one of these suggestions does what merit selection would do: eliminate the need for candidates to raise money at all.

The bottom line is this: Why treat the symptoms when you can cure the disease?

ARE "REGIONAL ELECTIONS" AN ALTERNATIVE TO MERIT SELECTION?

No. An election is an election is an election.

Proposals to divide the state into judicial districts and elect appellate court judges from within each district "solve" only one problem — the geographical disparity on the courts — and, in fact, create many more:

Appellate judges should not represent regions. Judges who sit on statewide courts protect the rights of citizens in each and every county of Pennsylvania. They cannot, and should not, "represent" one region over any other.

Dividing the states into judicial districts would be a potential nightmare. How would judicial districts be defined — according to population or geography? If divided into equal geographic areas, there is certain to be a court challenge based on the principle of "one person/one vote." Equally certain will be the litigation brought when population shifts require redistricting. Which court would the litigation land in — judges whose jobs are on the line?

Fundraising pressures will escalate. The pressure on lawyers to contribute, and the potential conflict of interest for judges, will be that much greater when the election takes place within the smaller districts where contributors are likely to have personal ties to the candidates.

Merit selection has none of these problems, yet it would result in geographically diverse appellate courts as the experience of other merit selection states confirm. Nominating commission members would come from across the state and would be sensitive to the need for balance. If qualified lawyers who live outside the big cities have a real chance to become judges, the pool of applicants would widen significantly.

WILL MERIT SELECTION INCREASE THE NUMBER OF WOMEN AND MINORITY APPELLATE JUDGES?

Yes. Once appellate judgeships no longer depend on raising money or strong political ties, the number of women and minority judges will increase. According to 1993 statistics compiled by the American Judicature Society, three times as many women and African-American judges serving on state appellate courts were initially chosen by merit selection than through partisan elections.

HOW DO OTHER STATES SELECT APPELLATE JUDGES?

Pennsylvania is in the distinct minority: only seven states initially choose all of their appellate judges through partisan elections. A majority of states select appellate judges through an appointive process, most with the help of a nominating commission. Not one state that has switched from partisan elections to merit selection has gone back.

WHO SUPPORTS MERIT SELECTION?

Support for merit selection of appellate judges comes from all corners. It includes statewide organizations such as the League of Women Voters of PA, Common Cause of PA, PA Environmental Council, PA Council of Churches, PA Bar Association, Hispanic Bar Association of PA, PA Chamber of Business and Industry, PA Manufacturers Association and the State Conference of Trial Judges.

Countless regional supporters include community groups, business associations and lawyers' organizations. Many newspaper editorial boards across Pennsylvania have endorsed merit selection, as have thousands upon thousands of concerned citizens.

WHO OPPOSES MERIT SELECTION?

The primary opponents of merit selection are trial lawyers and organized labor.

Merit Selection: The People's Choice

Merit selection can only be adopted by amending the state constitution. It must be passed by two consecutive sessions of the Senate and House, and then approved by the voters.

It is therefore up to our legislators to introduce a merit selection constitutional amendment and vote to put this important issue on the ballot.

Then, and only then, will we have a chance to decide how our appellate judges should be chosen.

Critics Charge Pennsylvania Courts Are Stuck in 'Judicial Dark Ages'

Elections of justices don't result in the best getting chosen, they say

Judicial elections rival Ziegfeld for follies

Merit selection' gains new steam in the House



Select judges on merit — not the almighty dollar

Merit selection

Voters deserve chance to decide

Many voters indifferen- t to state's judicial race

Race for high court leaves electorate in foggy bottom

State's top court