

**HOUSE JUDICIARY COMMITTEE  
SUBCOMMITTEE ON COURTS**

**STATEMENT OF ROBERT L. BYER**  
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Hearing on Judicial Reform Proposals  
Pittsburgh, PA  
November 18, 1994

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I deeply appreciate Chairman Dermody's invitation to testify today concerning various proposals to improve Pennsylvania's judiciary. I have long been an advocate of judicial reform, and my testimony is based upon my perspective as a lawyer who practices before the Pennsylvania courts, as a former chair of the Pennsylvania Bar Association's Civil Litigation Section, as one who has been active in the political process, especially with respect to judicial elections, and as a former judge of the Commonwealth Court of Pennsylvania.

My experience confirms that which I believe this subcommittee finds to be obvious. Pennsylvania's judiciary is in need of improvement. Recent events, culminating with the impeachment and conviction of a justice of our Supreme Court, have damaged the public's confidence in our courts and injured the reputation of the Pennsylvania judiciary. However, these unfortunate events have focused attention on areas where improvement is possible.

I will attempt to address several reform proposals which I understand the Subcommittee might be considering. However, I start from the major premise that the best reform proposal is one which will change our method of judicial selection to a merit selection system.

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A. Merit Selection

Pennsylvania now is one of only eight states which continue to choose all appellate judges by partisan elections. My comments concerning merit selection are based in large part on my experience as a candidate in statewide judicial elections. However, I was a strong supporter of merit selection long before I first became a candidate. My experience as a candidate, as explained in this statement, has strengthened my conviction that the time has come for Pennsylvania to join the overwhelming majority of states by moving to a merit selection system.

A large part of the reason Pennsylvania's appellate courts now have such a poor reputation nationally is the strong perception that our judges are chosen because of partisan, elective politics rather than qualifications. And recent, well-publicized events have fortified the related perception that some of our judges and justices have continued to engage in politics on the bench and have decided cases or granted favors to litigants for political reasons.

This perception not only is destructive of public confidence in the ability of our courts to dispense equal justice, but it also is costing us revenue and jobs. Businesses understandably are wary of locating or continuing to operate in

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My experience running both as a non-incumbent and as an incumbent in statewide judicial elections convinces me that we need to do away with the system of choosing judges in partisan elections and instead move to a merit selection system. I will discuss the reasons for that momentarily. However, there is one thing I want to clear up at the inception.

I have heard many people who oppose the creation of a merit selection system point to the method of selecting federal judges as evidence that a merit selection system would be as politically charged as partisan elections. I think this argument is based upon the false premise that judicial selection in the federal system is a "merit selection" process. I do not think that the way judges are picked in the federal system truly is a merit selection process, and I would never hold the federal system up as an example of how we should do things in Pennsylvania. Although the federal system does have the advantage of usually weeding out obviously unqualified people, judicial selection in the federal courts still places political considerations above considerations based solely upon the experience and qualifications of those under consideration. I think that the merit selection proposals which have been introduced in our General Assembly would be a great improvement over the judicial selection process used in the federal courts. What we are talking about today is merit selection. What

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However, judges are not supposed to be so influenced. Lobbying a judge with respect to a decision is totally improper and, if the lobbyist is a lawyer or another judge, he or she would be subject to disciplinary proceedings, as seen in the recent disciplinary proceeding against a Supreme Court Justice.

Because judges are limited to the law and the evidence in making decisions, judicial candidates are not permitted to express an opinion on any contested legal or political question. This makes judicial elections different from other elections, where candidates are expected to express their positions.

There is no good reason to choose impartial public officials through a system of partisanship. Such a selection process is inconsistent with the role of the judicial branch.

One of the most important functions of the judicial branch is to uphold the rule of law even in situations where to do so is politically unpopular. Judges throughout our history have safeguarded our valuable constitutional protections by protecting the rights of a minority against the will of the majority.

The selection of judges who feel that they need to be responsive to the public could compromise judicial independence. I have no doubt that if federal judges had been required to run for election, the federal courts could not have ordered an end to

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racial segregation in schools and other public institutions nearly forty years ago.

**2. Judicial Elections are inherently corrupting.**

The second reason I support merit selection is that partisan judicial elections are inherently corrupting. By requiring judges to be selected through a partisan political process, we run the risk that some individuals will continue to act in a political manner while on the bench. That, of course, is the root of some of the serious allegations involving members of our Supreme Court.

In addition, the inherently corrupting nature of the elective process becomes clear when one considers the impact of fund raising in judicial elections.

Like all statewide elections, judicial elections require the raising of money. However, the field of donors in judicial elections is far more limited than in elections for other offices. In judicial elections, the major donors are lawyers and litigants.

Although the ethical constraints on judicial candidates require that fund raising be conducted solely by a committee and preclude the judge from personal involvement in soliciting campaign contributions, the fact remains that judicial candidates are well

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decisions made before the election could have a profound impact on support, both political and financial, from various groups.

I found this particularly troublesome when I was an incumbent running for a full term. One of the hallmarks of our system of justice is our insistence not only on actual impartiality, but upon the appearance of impartiality. The system of partisan elections is destructive of that process. How would you feel if you were a litigant who lost a case before a judge running for election, only later to learn that the opposing party or the opposing lawyer had made a substantial contribution to that judge's election campaign and you or your lawyer did not? That the current system of partisan elections requires that we ask such a question is itself reason to abolish that system.

**3. Judges are elected for the "wrong" reasons, because voters do not have a basis upon which to vote.**

My third reason for favoring the adoption of a merit selection system is that under a system of partisan judicial elections, the voters are not provided any real basis upon which to exercise their votes.

Ten days ago, Pennsylvania voters cast their votes for candidates to be our Governor and United States Senator. I would imagine that most voters who voted in that election knew something about the major candidates for that office, had some idea of where

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those candidates stood on issues of interest to the voters and then cast their votes intelligently. And, nearly all of those voters today could tell you today for whom they voted. However, if we were talking about a judicial election, studies have shown that an overwhelming majority of those who voted would not be able to provide such information four months after the election.

This is not to say that voters are stupid. However, there are several good reasons for why votes generally are not cast on any intelligent or informed basis in a judicial election.

First, we are dealing with a specialized office which is not involved in partisan politics. When this is coupled with the fact that the candidates are not allowed to express their views on matters which would be of interest to the voters, most voters, particularly in a statewide election, are left with no basis upon which to make an informed judgment.

In addition, judicial elections are not newsworthy. The candidates are not expressing views on controversial issues, so the news media pay very little attention to a statewide judicial campaign, particularly as compared with other statewide elections. For a period of several months before the November 8, 1994 election, there was daily news coverage of the candidates running for statewide office. That never has been the case with respect to



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statewide judicial elections. Because of the absence of any sustained news coverage, most voters have no idea of the identity of the candidates before they go to vote, let alone any idea of the candidates' experience or qualifications for the office.

Under these circumstances, voters in statewide judicial elections have no more basis for deciding who would make the best judge than they would have in trying to vote in a partisan election to select the engineers responsible for designing highway improvements in Pennsylvania. And it would make about as much sense to elect the engineers as it does to elect judges.

Because of the absence of pertinent information, voters make their choices based upon political party affiliation, a perception of whether they recognize or like the candidate's name, ethnic identification and ballot position. Yet, none of these criteria has any relevance to one's fitness for holding judicial office.

In 1987, when as a non-incumbent I lost what is regarded as one of the closest statewide general elections in modern Pennsylvania history, most experts attributed my defeat to straight-party votes cast in connection with the mayoral election in Philadelphia. Therefore, a judge of the Commonwealth Court was

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elected based upon whether voters in Philadelphia preferred Wilson Goode to Frank Rizzo as their mayor.

In 1991, when as an incumbent I lost my seat on the Commonwealth Court by a margin of less than 1% of the votes, most of the experts attributed my defeat to straight-party voting in connection with the special election to fill the vacancy caused by the death of Senator John Heinz. Therefore, a Commonwealth Court judge was defeated and a new Commonwealth Court Judge was elected wholly without regard to a comparison of qualifications, experience or judicial performance, but because voters believed that Harris Wofford would make a better United States Senator than Dick Thornburgh.

What is particularly tough for me to deal with is that I was voted out of office even though no one challenged my qualifications or in any manner criticized my performance as a Commonwealth Court judge. Indeed, the election campaign did not result in one critical word about any opinion I had authored or any decision I had made as a Commonwealth Court judge.

Judicial elections are the only elections in which the results consistently are based on factors other than the qualifications, points of view and performance records of the

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candidates. To continue a system of partisan elections under such circumstances serves no legitimate purpose.

#### **4. Qualifications**

My fourth reason for supporting merit selection is that it is the only way to insure that those selected for judicial office have the requisite qualifications, experience and ability. With increasing frequency, partisan judicial elections have resulted in the defeat of better qualified candidates for reasons unrelated to any factor relevant to fitness to serve on the bench.

This has not always been the case. There was a time when there were strong political leaders at the head of each of the political parties in Pennsylvania. Those leaders recruited and selected judicial candidates who not only had performed service to the party but whose experience and qualifications to be a judge were such that the political leader was proud to have that person as a candidate for judge. And, those strong leaders had the ability to enforce their endorsements. I do not have to tell members of the General Assembly how the strong political leadership has broken down in each of the political parties. In my opinion, this is as true for the Republicans as it is for the Democrats. In both parties, judicial candidates are selected primarily on the basis of political considerations unrelated to qualifications.

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Each time I was a candidate for the Commonwealth Court, I told people that the fact that the Pennsylvania Bar Association had given me a rating of exceptionally well qualified and the fact that I was on the ballot were largely coincidental. I continue to believe that is the case.

**5. A Suggested Improvement to the Merit Selection Proposals.**

I do make one suggestion for how the merit selection bills which previously have been introduced could be improved. I believe that under a merit selection system, there should be a requirement that no two successive nominees for the same court may be registered in the same political party. Such a provision would require bipartisanship in the judicial nomination process, preventing the Governor from nominating only members of the Governor's own political party, and I think that requirement fits well with the current requirement that a nominee be confirmed by a two-thirds vote in the Senate.

The people of this Commonwealth deserve a better judiciary than one which is selected on the basis of random partisanship. Instead, judges should be elected on the basis of their fitness to be impartial jurists on a particular court, and we should take the judiciary out of elective politics.

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B. Regional Selection or Election of Appellate Judges

I oppose a system of regional selection or election of appellate judges. The use of regional rather than statewide elections does not solve any of the problems discussed earlier in this statement with respect to an election system. All of the problems inherent in a judicial election would be present even if the elections are held on a regional basis.

I also would oppose a system of regional merit selection. If a merit selection system is to be meaningful, then the selection of judges must be based primarily upon legal ability, experience and judicial temperament. Although geographic diversity might be desirable, it should not be a controlling consideration any more than political registration or other forms of diversity. If all things were equal, then a merit selection system should result in promoting geographic diversity as well as other types of diversity. But, if a potential nominee from Philadelphia were more qualified than a potential nominee from somewhere else, it would be contrary to the goals of merit selection to select the less qualified person merely because of a requirement of regional selection.

In addition, I strongly believe that judges do not represent constituencies, and that there is not a "regional perspective" on the law. Our appellate courts are statewide in nature, because they deal almost exclusively with issues of

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statewide application. The regional considerations in litigation are addressed by having Common Pleas Court judges selected from and sit at the county level.

Finally, I have some concern about whether moving to a regional election or selection system would result in the necessity of decennial redistricting as the result of population shifts disclosed by the census. This adds a level of complication which is not offset by any corresponding benefit to the judicial system.

Moving to a pure merit selection system will enhance the opportunities of worthy individuals to serve on appellate courts even though they lack the political base of a major city. Once such an irrelevant political consideration has been eliminated by abolishing partisan elections, I believe that we will see a greater number of appellate judges from outside of the large population counties.

#### C. Judicial Administration and Rulemaking.

I believe that Article V of the Pennsylvania Constitution places too much of an administrative burden on the justices of our Supreme Court. The primary function of our Supreme Court justices should be to decide cases. Management of the unified judicial system should not be part of the day-to-day duties of Supreme Court justices, but our state constitution currently requires Supreme

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Court justices individually to be involved in the micro-management of the judicial system.

When I was on the Commonwealth Court, individual justices of the Supreme Court had to make decisions regarding whether my secretary could receive an increase in her starting salary based upon her experience before coming with me to the court and whether one of my law clerks could be classified as a Judicial Clerk III based upon her experience in clerking for a senior judge of the Commonwealth Court before joining my staff. I was shocked that such decisions would require the attention of a Supreme Court justice.

I would like to suggest the following reforms in the area of judicial administration:

1. The chief justice of Pennsylvania would be nominated by the governor and confirmed by the Senate, as is the case in the federal system, instead of the current system pursuant to which the justice with the most seniority automatically becomes chief justice.

2. A judicial council of Pennsylvania should be created. The chief justice and the judicial council, working through the court administrator, would have the responsibility for management of the unified judicial system.

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In addition, I believe there should be changes in the Supreme Court's rulemaking authority under Article V of the Pennsylvania Constitution. Currently, the Constitution provides that rules promulgated by the Supreme Court may suspend statutes which deal with matters within the Supreme Court's rulemaking authority. While the power of the court to suspend statutes is limited to matters of procedure or matters affecting the regulation of lawyers or judges, the court over the years has made an expansive interpretation of that power. For example, the Supreme Court, through its rulemaking authority, has:

1. Suspended the Sentencing Code enacted in the mid-1970's;
2. Suspended provisions of the Open Meeting Law as they relate to the Supreme Court's rulemaking committees;
3. Suspended provisions of the Ethics Law which would have required financial disclosure by municipal solicitors;
4. Suspended a statute giving the Commonwealth the right to a trial by jury in a criminal case even though the defendant chooses to waive a jury trial; and



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5. Suspended the section of Act 1990-6 which provided for financial sanctions against lawyers and litigants who engage in frivolous or bad faith conduct in litigation.

Although I believe that the Supreme Court should have the power to promulgate rules of practice and procedure, I do not think rules promulgated by the Supreme Court should supersede or suspend statutes enacted by the General Assembly, even on matters of procedure. Instead, I favor a system similar to that used by the federal courts and congress, under the Rules Enabling Act, pursuant to which rules promulgated by the Supreme Court can be suspended or amended by Congress.

#### C. Commerce Court Proposal.

In past sessions of the General Assembly, proposals have been introduced for the creation of a chancery court, which would be a specialized court designed to handle complex corporate and other business litigation. The idea is to create a tribunal which would be comparable in both operation and reputation to that of the Delaware Chancery Court. I understand that the name of this proposed court now is being changed to the Commerce Court.

Although I had favored the creation of such a specialized tribunal in Pennsylvania, I understand that the coalition which has been lobbying for the adoption of this proposal now has decided

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that the legislation to be introduced in the 1995-96 session of the General Assembly should provide that the judges of the Commerce Court would be elected instead of appointed by a merit selection system, as had been the case in each of the preceding proposals. With that change, I now oppose the proposal to create a Commerce Court.

If the idea is to create a specialized tribunal comprised of judges with experience and recognized ability in handling complex corporate and business litigation, then that purpose is defeated by having the judges chosen by a partisan election process. If the judges of the Commerce Court are to be chosen by election, then there is no reason why business cases should not continue to be decided by the judges of the Courts of Common Pleas and the Pennsylvania appellate courts. In short, I see no purpose to be served by the creation of an additional, specialized court if any lawyer, regardless of experience or ability, can be elected to serve on that court. For that reason, I regrettably now oppose this proposal.