PHILADELPHIA BAR ASSOCIATION

TESTIMONY OF
CLIFFORD E. HAINES, VICE CHANCELLOR,
PHILADELPHIA BAR ASSOCIATION,
BEFORE PENNSYLVANIA HOUSE JUDICIARY COMMITTEE
REGARDING REGIONAL MERIT SELECTION OF JUDGES

Wednesday, August 30, 1995
Room 22, Capitol Annex
Harrisburg, Pennsylvania

Good morning. My name is Clifford E. Haines and I am a partner with the Philadelphia law firm of Litvin, Blumberg, Matusow & Young. With me today is the Association's immediate past-Chancellor, Lawrence J. Beaser of Philadelphia's Blank, Rome, Comisky & McCauley.

As Vice Chancellor of the 13,000 member Philadelphia Bar Association, I am very pleased to be here today, and to communicate to you our very strong support for a change from an elective system of selecting our appellate judges to a merit-based appointive system.

This hearing is specifically intended to focus on House Bill 1320, which provides for merit selection of appellate judges on a regional basis. Because our Board of Governors has not yet considered the regional component of Representative Clark's proposal, I must necessarily confine my remarks to the merit selection component of House Bill 1320.

The Philadelphia Bar Association has supported the concept of choosing judges based on merit for many years. We firmly believe that merit selection of appellate judges will give the people of Pennsylvania a more distinguished, more independent and more representative appellate bench. Pennsylvanians deserve the very best the legal profession has to offer, and we are confident that can be accomplished only if we abolish the political election of judges in favor of some form of merit selection.

Our Association's support for merit selection predates the events of recent years surrounding our Supreme Court, and is one issue on which the majority of our member have agreed over the years. When we surveyed our membership in 1984, 94% of our members wanted the Association to speak out in favor of merit selection of judges. When we surveyed our membership again in 1990, merit selection topped the list again, with more than 90% of our membership identifying merit selection as an issue of primary importance. Early returns from our 1995 membership survey again indicate that merit selection leads the list of issues of concern to our members.

Most of our reasons for supporting a change from the popular election of judges to a merit-based selection system stem from limitations which are inherent in the elective process itself.

To win election to the bench, a successful judicial candidate need not necessarily convince voters that he or she will be a good judge; instead, aspiring candidates for statewide judicial office must persuade political party leaders that he or she should be a candidate. With all due respect to the individuals involved, newspaper accounts of meetings at which party endorsements of Supreme and Superior Court candidates were made during the current election cycle illustrate how highly politicized our present system is and, more significantly, how little consideration is given to the qualifications of candidates for the positions they seek.

That is not surprising - after all, political parties are in the business of being political. It is therefore both inevitable and extremely unfortunate that political concerns will continue to be prioritized over merit, unless you and your colleagues begin the slow process of reform by passing a merit selection constitutional amendment.

Having received the necessary party endorsements, a judicial candidate then faces an even more formidable task under our present system. In 1988, the Report of the Governor's Judicial Reform Commission (the "Beck Report") reported that in 1983, the successful candidate for Supreme Court raised campaign funds totalling almost $193,000. Six years later, in 1989, the amount raised by the successful candidate had risen to more than $ 1.4 million, more than half of which was contributed by members of the legal profession. Final figures are obviously not available for the spending in this year's Supreme Court races, but we can safely guess that the numbers will be high and that members of the bar will again represent a significant percentage of contributors.

Fund-raising by judicial candidates raises troubling issues which are qualitatively different from those faced by candidates for other elective offices. Candidates for non-judicial office are able to garner financial support from those who believe in their stated positions and ideology.

But when they engage in fund-raising, judicial candidates by necessity seek out their natural constituency: the members of the bar. Paradoxically, the Judicial Canons which establish the ethical rules governing judges appear to be at odds with the notion of campaigning for judicial office and fund-raising, particularly among lawyers. And as the pressures to run a well-funded campaign continue to escalate over the years, so will the temptations to cut ethical corners.

Each of you as an elected member of the General Assembly owes some measure of success to the elective process. You or your colleagues might easily find a certain superficial appeal to the notion that if partisan elections for the legislative and executive branches serve the best interests of the public and the Commonwealth, then there is nothing wrong with similarly

electing members of the judicial branch. But this argument ignores the fundamental, qualitative difference between the legislative and judicial functions. As Alexis de Tocqueville wrote in 1835, "The power vested in the American courts of justice... forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies.[1] Thus, it is uniquely the role of the courts to exercise a "counter-majoritarian force"[2] when necessary, so as to protect the rights of the minority from the will of majority.

John Marshall once said that the judiciary "comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience?"[3]

Today, judges continue to rule on issues which "come home" with us, rulings which affect how we live, where our children go to school, the people with whom we associate in our personal and professional dealings, and a myriad of other issues which are central to the quality of our lives and our society. The importance of protecting judges and judicial candidates from outside influences cannot be over-stated. Again, we applaud Representative Clark's efforts to remove partisan elections and their vast potential for improper influence and misdirection from our judicial selection process.

These are only some of the reasons why the Philadelphia Bar Association initially took a stand in favor of merit selection of judges, why we strongly endorsed the recommendations of the Beck Commission in 1988, and why we have continued over the years to advocate for a merit selection constitutional amendment. This year, that goal - at least with regard to appellate judgeships - may finally be within our grasp.

As any good Philadelphia lawyer knows, it is dangerous to overstate one's case. So I will not tell you that merit selection is a perfect system, nor will I tell you that a change to a merit-based selection system of choosing appellate judges will remove politics from the process. After all, as Dan Rottenberg wrote in *The Philadelphia Inquirer* in 1993, merit selection will not "remove fallible humans from judicial selection and delegate the task instead to computers assessing objective scientific standards."

However, if our objective is to provide the people of Pennsylvania with the very best and most representative appellate bench possible, merit selection is a vast improvement over the

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[1] *Democracy in America* 1:129-30 (Francis Bowen trans. 1862) (1835).

[2] Alexander M. Bickel, *The Least Dangerous Branch* 16 (1962).

[3] Debates of the Virginia State Convention, 11 Dec. 1829, in *Proceedings and Debates of the Virginia State Convention of 1829-30,* at 616 (1830).

elective system. As evidence of the superiority of merit selection systems over elective systems, since 1950, every state that has changed the way it selects judges for statewide positions has moved away from highly politicized election systems - all but one changed to a merit selection system. Georgia, the exception, changed from a system of partisan elections to non-partisan elections.

Opponents of merit selection frequently point to the federal system of judicial selection as an example of a merit selection system, and argue that we here in Pennsylvania do not need that kind of system. Certainly the federal system can be justly criticized as highly political and the federal judicial selection process often may have little to do with true merit. But the proposals we support provide for true merit selection, rather than the political appointment of judges which often occurs under the federal system.

Many people have expressed concern that an ideological litmus test has been applied under the federal selection system from time to time. Unlike the federal system, the merit selection proposal before you does not readily allow for a litmus test on any particular issue as a prerequisite to recommendation by the nominating body.

There are those who fear that "merit selection" is a scheme propounded by the "old boys network" to keep women and minority lawyers off the bench. The experiences of other jurisdictions demonstrates that the contrary is true, however.

According to statistics compiled by the American Judicature Society in July, 1991, 17 of the 50 (34%) African-American jurists serving on state appellate courts were initially chosen by merit selection (appointment from a list submitted by a judicial nominating commission) as compared to 9 (18%) who first reached the bench through partisan elections. The remaining African-American judges were initially chosen by either gubernatorial or legislative appointment without a nominating commission --17 (34%) -- or through non-partisan elections --7 (14%).

For women jurists, 45 of the 131 (34.4%) serving on state courts of last resort and intermediate appellate courts were initially chosen by merit selection as compared to 33 (25%) who first reached the bench through partisan elections. The remaining women judges were initially chosen through either gubernatorial or legislative appointment without a nominating commission --41(31%) -- or through non-partisan elections -- 12 (9.2%).

In short, merit-based selection systems have resulted in more minority and women judges serving on appellate courts than have elections.

There are those who are concerned that, under a merit selection system, the people will lose their voice in the selection process. It is true that citizens will no longer vote directly for candidates for our appellate courts under these proposals. But until the public has had a chance to decide for itself by referendum whether to adopt a merit-based selection system, any argument against merit selection on this basis is no more than populist rhetoric.

In conclusion, the Philadelphia Bar Association whole-heartedly endorses merit selection of our appellate judges. We hope you will let the people of Pennsylvania decide whether to continue as we have with the current system or whether we too, like so many other states, are willing to take the positive steps needed to effect real change and real reform.

Again, thank you for the opportunity to be here today and to be heard in support of merit selection in Pennsylvania. If you have any questions for us now, we would be happy to address them. We are grateful for your attention today and look forward to working together with you in the future on this very important issue.