PENNSYLVANIA HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

Session of 2012

March 1, 2012

Prepared Testimony of Professor Randy Lee
On House Bills No. 1815 & No. 1816

Good afternoon, Chairman Marsico, Members of the Judiciary Committee, and other distinguished guests. Thank you for this opportunity to testify concerning House Bills No. 1815 and No. 1816. The Pennsylvania Rules of Professional Responsibility identifies lawyers as "public citizens with a special responsibility for the quality of justice,"[1] and, in that spirit, I particularly appreciate the efforts of this Committee and the sponsors of these bills to try to improve the way in which our Commonwealth pursues justice.

My testimony reflects my knowledge and opinion as a constitutional law and legal ethics professor. I have published over forty professional articles, and my online continuing legal education programs are offered on the websites of the bar associations of at least six states including Pennsylvania. My testimony today represents my own views and is not intended to represent the views of my employer, Widener Law School, or any other organization or person.

Although I am happy to attempt to answer whatever questions the Committee would like me to address, I have organized my testimony around four questions:

1) Why are the people of the Commonwealth allowed to elect the appellate judges of Pennsylvania;

2) Are there persuasive reasons to deny the people of the Commonwealth their right to vote for appellate judges;

3) Would the selection process that would be created by House Bills No. 1815 and No. 1816 violate rights guaranteed by the United States Constitution; and

4) Apart from any federal constitutional issues, are there other problems presented by the selection process created by House Bills No. 1815 and No. 1816 that must be addressed before such a process could be implemented.

[1] PA. RULES OF PROF'L CONDUCT Pmbl. [1] (2011).

1. Why are the people of the Commonwealth allowed to elect the appellate judges of Pennsylvania

We elect judges in Pennsylvania because historically the people of the Commonwealth have recognized that people should have a say in who will rule their lives, and the right to elect a judge is the right to decide who will judge between me and my neighbor and who will stand between me and the state. One might, in fact, fairly argue that judges are the elected officials with the most direct and personal power over our lives. For all the power President Obama or Governor Corbett yield, they will never decide whether my child can continue to live in my home, whether I should go to jail, or whether it is I or my adversary who owe money to the other.

The debate over elected and appointed judges often forgets that neither Pennsylvania nor America embraced democracy because it was the most efficient or the most effective way to select anyone. We do not believe in democracy because we are ignorant of the fallibilities of that process or the flaws of human nature. We believe in democracy because we believe each person has been given a voice entitled to attention and respect. Although we would not all agree on when it was, almost everyone in America would agree that somewhere in the last five presidential elections, American voters made at least one mistake. Yet, we keep electing presidents. Perhaps, we could select consistently better presidents if we would turn the decision over to a panel of leading CEOs of particularly successful enterprises, but while that might yield more effective leadership in the White House, it would ignore our belief that every person has a right to be heard in the decisions that affect his or her life.

It is not, however, only a right to be heard that requires citizens to retain the right to vote for judges but the necessity that citizens be accountable for the quality of the justice their community metes out. Participation in the legal system imposes upon lawyers a "special responsibility for the quality of justice,"[2] and similarly the election of judges imposes upon all voters a responsibility for the quality of justice as well. Because we can vote and have the right to speak out about and participate in judicial elections, we, as citizens, are responsible for who are judges are, and because we are responsible for who are judges are, we are accountable for what our judges do. Thus, when our judges fail to act as wise and humble servants, we must take their failings upon ourselves and seek both to repair what they have done and to prevent their failures from reoccurring. Our democracy believes that by imposing upon each citizen a duty to be accountable for the quality of justice, we may have a judicial system that remains vigilant in its pursuit of being just.

Out of this spirit of right and duty, there is a presumption in America that decisions are to be made democratically unless there is a particularly good reason not to make them that way. To reflect the depth and strength of this presumption, we call the right to vote a fundamental right.

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[2] *Id.*

2. Are there persuasive reasons to deny the people of the Commonwealth their right to vote for appellate judges

Four reasons are frequently advanced for departing from this presumption of the people being able to exercise their right to vote in the context of selecting appellate judges. None of these reasons, however, should overcome the presumption of democratic selection in our democracy. First, there is the claim that an appointment process will produce better judges than elections do. This claim is built on two assumptions: first, that the appointment process will focus exclusively on merit, and second, that the people are not able to evaluate the merit of judges.

In response to the former assumption, it is certainly possible that the system created by House Bills No. 1815 and No. 1816 will focus exclusively on merit and everyone participating will act for the common good and look beyond any partisan interest; it is also possible, however, that the process will devolve into partisan horse trading amongst special interest groups who were lucky enough to win a spot on the commission. In fact, this would not be the first "merit" system to experience such a fate. One might note, for example, that President Dwight Eisenhower appointed Earl Warren Chief Justice of the United States Supreme Court in repayment for Warren's support at a Presidential nominating convention, and President Eisenhower appointed William Brennan to the Court because he wanted to appoint a New Jersey Catholic from the opposing party to the Court to invite support for his 1956 re-election campaign.

With respect to the latter assumption, it must be noted that the citizens of Pennsylvania are regularly entrusted with other decisions associated with the justice system and seem to perform them admirably. It has been noted for example, that "[t]he jury is the cornerstone of the American Justice System." Given that we consider the participation of citizens vital to the determination of guilt or innocence in courts, one would assume we would consider these same people capable of selecting judges. In addition, we entrust citizens with the election of the Attorney General and county district attorneys, and these positions require as much legal expertise and commitment to justice as does the position of judge. If the Commonwealth were to determine that the people were not fit to continue to select judges, the case could be made that they should not be electing these other law related officers either.

Second, some claim that the appointment process will produce a more diverse judiciary. That may depend on how one defines diverse. The seven justices of the Pennsylvania Supreme Court attended six different law schools. Fourteen judges of the Superior Court attended nine different law schools, and nine judges of the Commonwealth Court attended five different law schools. In contrast, six justices of the United States Supreme Court attended Harvard Law School—five of these graduated from Harvard and the sixth graduated from Columbia. The other three justices of the Supreme Court attended Yale Law School. In addition these nine justices attended a total of only five undergraduate institutions: Georgetown, Harvard, Princeton, Cornell, and Stanford; and one might argue all five of these institutions are of a very similar nature.

Third, some claim that the appointment process removes politics and money from judicial

selection and then lament that 4.7 million dollars was raised for the 2009 Supreme Court race. Of course interest groups and political parties also spent over 25 million dollars on the 2010 Pennsylvania United States Senate race, and no one is insisting that we appoint senators. Furthermore, when Illinois had to select a replacement for President Obama's Senate seat, politics and money did not disappear from that process because President Obama's replacement was to be selected by appointment.

Fourth and finally, there are those who observe that most other states appoint their appellate judges. While that may well be true, it is also true that most other states cannot claim to have been at the center of forming our democracy and to have set the example, from the time of William Penn, for respecting the rights of the individual. This seems hardly the issue or the time for Pennsylvania to aspire to be a follower.

3. Would the selection process that would be created by House Bills No. 1815 and No. 1816 violate rights guaranteed by the United States Constitution

Several United States Supreme Court cases invite federal constitutional challenges to the selection process that would be created under House Bill No. 1816. These challenges would likely center on House Bill No. 1816's exclusion in Section 2101 of "any organization formed for a religious purpose" from consideration as a "Civic group." This exclusion effectively bans the representative of any such organization from participating in the Appellate Court Nominating Commission. Ironically, such people are to be banned from the selection process even as House Bill No. 1816 insists it seeks to create a nominating commission marked by diversity of membership and viewpoint. This ban would likely be challenged as a violation of the Right to Free Exercise of Religion, the Right to Freedom of Speech, and the Right to Equal Protection under the Law.

Section 2101's exclusion first violates the Free Exercise of Religion rights of members of organizations with a religious purpose. In *McDaniel v. Paty*,[3] the United States Supreme Court held that the First Amendment's guarantee of the Free Exercise of Religion, applicable to the states through the Fourteenth Amendment, was violated by "a Tennessee statute barring 'Minister[s] of the Gospel, or priest[s] of any denomination whatever' from serving as delegates to the State's limited constitutional convention."[4] Although the Court was divided in its reasoning, the Justices were unanimous in finding that a prohibition of a religious official from participation in a government body offended the Constitution.

Writing for the plurality, Chief Justice Warren Burger rejected Tennessee's claim that such bans can be justified by a government claim that they are necessary to protect against a religious group imposing sectarian interests on the government:

> The essence of the rationale underlying the Tennessee restriction on ministers is that, if elected to public office, they will necessarily exercise their powers and influence to

[3] 435 U.S. 618 (1978).
[4] *Id.* at 620 (plurality opinion).

> promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.[5]

In addition to this Free Exercise concern, Section 2101's exclusion of representatives of "organizations formed for a religious purpose" from the nominating commission also violates the Right to Free Speech. In *Good News Club v. Milford Central School,*[6] the Supreme Court held "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[7] When the school attempted to justify this violation of speech rights as an effort to avoid Establishment Clause violations by preserving "neutrality," the Court rejected their argument as a mischaracterization of "neutrality:

> For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.[8]

A similar case could be made for organizations formed for a religious purpose that would seek to have their representatives considered for inclusion on the commission. Like the Good News Club, such organizations would be asking for "nothing more than to be treated neutrally and given access to speak about" judicial temperament and qualification in the same manner and to the same degree as other comparable 501(c)(3) organizations. Under such circumstances, treating the viewpoints of organizations formed for a religious purpose in exactly the same manner as other 501(c) (3) organizations "would ensure neutrality, not threaten it."

Finally, the Equal Protection rights of members of groups formed for a religious purpose are violated by Section 2101's exclusion of only representatives of organizations formed for a religious purpose and inclusion of representatives of every other 501(c)(3) organization that has "a majority of members who are Commonwealth residents." Justice White invited such a claim in his concurring opinion in *McDaniels* and indicated that such a claim should be afforded careful scrutiny to state regulations" because of "the importance of the right of an individual to seek elective office," which was implicated in *McDaniels* and is equally implicated here.[9]

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[5] *Id.* at 628-29 (plurality opinion) (citations omitted).
[6] 533 U.S. 98 (2001).
[7] *Id.*
[8] *Id.* (citation omitted).
[9] 435 U.S. at 644 (White, J., concurring).

The Supreme Court also gave credence to the equal protection implications of this case in *Romer v. Evans.*[10] In *Romer* the Court held that a Colorado constitutional amendment violated the United States Constitution when it restricted the government forums in which individuals who were of "homosexual, lesbian or bisexual orientation" could seek protection from discrimination. The Court insisted that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[11] Like the constitutional amendment in *Romer,* the exclusion of organizations formed for a religious purpose in Section 2101 also makes it more difficult for a particular group of citizens "to seek aid from the government." Under the proposed Amendment, every kind of public organization in the Commonwealth but one will be allowed to participate in the discussion of what constitutes a good judge and will have a hand in selecting the individuals who will ultimately have the final say in how the disputes of citizens in the Commonwealth are to be resolved.

4. Do House Bills No. 1815 and No. 1816 create additional problems that must be addressed before their judicial selection process could be implemented

House Bills No. 1815 and No. 1816 appear to present at least three problems that would need to be addressed before they could be implemented. First, related to the constitutional problems just alluded to, House Bill No. 1816 does not define what constitutes "a religious purpose" and, therefore, what types of organizations would be excluded from participating on the Appellate Court Nominating Commission as Civic Groups. While one would expect that churches would have a religious purpose, other organizations might not be so easily classified. For example, could a group operating a Christian radio station insist that it had the secular purpose of operating a radio station, or could Catholic Charities insist it had the secular purpose of caring for the poor?

Second, House Bill No. 1816 provides that "the five organizations in each of the categories [for public membership] with the highest number of members who are Commonwealth residents" will be invited to submit the name of a person in their organization for inclusion in a selection lottery. There does not appear to be, however, a definition of "member" in the bill, and all participating organizations would need a comparable standard for membership for the process to be fair. If a public radio station were to consider all its listeners "members," for example, would the station be able to report all those listeners on their application. In addition, if an organization advocates for a constituency group, are all the members of the constituency group members of the organization for purposes of the selection process. Given the incentive groups would have to inflate their membership numbers to qualify for the lottery, one would expect that this issue would need to be resolved before implementation.

Furthermore, once a definition of membership were settled on, auditing membership

[10] 517 U.S. 620 (1996).
[11] *Id.*

numbers could be difficult if not a violation of the federal Right to Freedom of Association. In *NAACP v. Patterson*,[12] the United States Supreme Court "recognized the vital relationship between freedom to associate and privacy in one's associations" and held that the government's request for the NAACP's membership lists during discovery in preparation for trial violated the NAACP's Freedom of Association. The situation here might well pose even more troubling constitutional implications than those in *NAACP*. This is so because, were Pennsylvania to have to check on actual numbers of members, it might have to go beyond even requesting membership lists, and, in addition, might have to request information to verify the nature of activity of an individual in the organization to determine if the individual was actually a member. While one might try to undermine the significance of this concern by arguing that privacy in one's associations was simply the price an organization would have to pay to participate in the selection of appellate court judges in Pennsylvania, it is not clear that the Supreme Court would view that as a constitutionally permissible price for the Commonwealth to charge.

Third, House Bill No. 1815 (b.1)(1) threatens in some circumstances to remove the selection of appellate court judges completely from not only the people but even from the political branches:

> If the Senate rejects a total of three nominations made for a specific vacancy, the commission shall appoint any other person on the list and the appointee shall take office upon notification of the appointment by the commission and neither the Governor nor the Senate shall participate further in the appointment process for that vacancy.

Thus, the bill allows for the possibility that some appellate judges might be appointed in such a way that there would be no one the people could hold accountable for the appointment.

Conclusion

Near the end of the novel *Johnny Tremain*,[13] readers find the Sons of Liberty meeting for the last time before the Revolutionary War. They are planning the revolution and hoping crazy, old James Otis doesn't show up to talk philosophical nonsense. Otis, they observe, hasn't been the same since the customs official hit him on the head.

Otis does show up, however, and when he overhears Sam Adams say the patriots are going to war, he asks why. When Otis is told it is because we have been occupied, he points out no occupying army has ever been so gentle. When he is told it is because we are taxed, he points out a few coins are hardly reason for young men to die and older men to lose everything.

Finally crazy, old Otis must answer his own question. "We fight," he says, so "a man shall choose who it is shall rule over him. We give all we have, lives, property, safety, skills, we fight, we die for a simple thing: only that a man can stand up."

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[12] 357 U.S. 449 (1958).

[13] ESTHER FORBES, JOHNNY TREMAIN (1943).

We forget in times of crisis, in the midst of a myriad of vacuous, deceptive, hurtful campaign ads, that the miracle of democracy has never been that it always yields the best answer. Rather, the miracle of democracy is that knowing who we are as people, we still insist that people have an "unalienable right" to set the rules by which they shall live, that the transcendent dignity of being human demands the opportunity for a man to stand up, and we still believe that given such an unalienable right, people will seek to raise themselves up to be worthy of the duty that must go with it.

There will always be utilitarian arguments that will call the right to vote into question, just as there will always be efficiency arguments that will cast doubt on the right to freedom of speech. Yet, two-hundred-thirty-seven years after crazy, old James Otis is said to have insisted that people have a right to speak and to vote in an effort to help choose who it is "that shall rule over them," Americans still insist on speaking, and Americans still insist on voting, and Americans still insist on dying to guarantee that they can continue to do both. For me, that is reason enough to leave well enough alone.

Thank you for your attention and for this opportunity to testify.