

TESTIMONY–PROPOSED CONSTITUTIONAL AMENDMENT:

RETIREMENT AGE OF JUDGES

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Good morning. My name is Ken Gormley and I have the privilege of serving as Dean of Duquesne University School of Law in Pittsburgh. It is an honor to have an opportunity to testify today, about this issue of importance to all citizens of Pennsylvania. My thanks to Representative Glen Grell, Chair of the House Judiciary Committee’s Sub-Committee on Courts, as well as Representative John Sabatina, the minority Chairman. Also, my thanks to Representative Ron Marsico, the Chair of the Judiciary Committee, and Representative Thomas Caltagirone, minority Chair, as well as members of both distinguished Committees. I will be brief, but I welcome any questions the Sub-Committee might have at the conclusion of my prepared remarks.

I have been teaching law in one fashion or another for over 30 years. My areas of expertise include Constitutional Law, as well as State Constitutional Law, which I have been teaching since 1985. I am editor of a book entitled: “The Pennsylvania Constitution: A Treatise on Rights and Liberties” (George T. Bisel 2004 & Supp. 2013). Thus, I continue to remain active as a teacher and scholar in the field of Pennsylvania Constitutional Law, and I suppose it is for that reason that I have been invited to testify today.

I support a proposed Constitutional amendment to Article V, Section 16(b) of the Pennsylvania Constitution, changing the first sentence to provide that “Justices, judges and justices of the peace shall be retired upon attaining the age of 75 years,” rather than “shall be retired upon attaining the age of 70 years.” I believe that such an amendment makes sense for practical reasons, as well as in furtherance of the overall long-term vitality of the Pennsylvania Constitution, which is designed to be amended to adapt itself over time through a systematic constitutional amendment process.

First, let me say a word about the pragmatic reasons for favoring this Constitutional amendment. At the time the current Constitution was overhauled during the Constitutional Convention of 1967-1968 – now nearly a half-century ago – the age established for the retirement of judges was sensible. The age of 70, for any jurist at that time, was an advanced one. Indeed, the debates at the Constitutional Convention expressly addressed this subject. The Framers were focused on selecting a definite, clear-cut, reasonable age for the retirement of judges, to replace the prior system by which judges in Pennsylvania were not required to retire at any specific time. The age of 70, in 1968, represented the high end of the spectrum. The average life expectancy in the United States at that time

was 66.6 years for males and 74.1 years for females, with an overall average of 70.2.¹ Needless to say, there were very few women judges in Pennsylvania in 1968. Thus, the age selected was well beyond the average life expectancy of most judges on the bench at that time. Today, in 2013, the average projected life expectancy for males is 76.2 years and females 81.1 years, with a combined average of 78.7 years.² By modern standards, therefore, a retirement age of 75 is a sensible one. It is especially sensible when one focuses on the female life expectancy that has now surpassed 80 years. The dramatic increase in the number of female judges serving today as compared to in 1968 is particularly important. It means that maintaining a retirement age of 70 disproportionately impacts female judges in an adverse fashion. Conversely, amending the Constitution to change the retirement age to 75 is particularly fair to the growing number of female jurists in this Commonwealth. Moreover, given advances in medical science, the age of 75 is much more in sync with the productive work cycle of all lawyers, jurists and professionals (generally) in our modern society.

I should note that the members of the Constitutional Convention who framed the current version of Article V, Section 16(b), in 1968, anticipated that the age of 70 might have to be altered as time passed and circumstances changed. During the Constitutional Convention, Delegate Mercer D. Tate, a Democrat from Philadelphia, proposed adding language that would permit this body -- the Pennsylvania Legislature -- to "make such changes in that mandatory retirement age (for judges) as it might deem appropriate from time to time."³ Delegate Tate explained: "None of us knows sitting here today what medical science may be able to do with our longevity. It may be that age 70 will be entirely unrealistic 30, 50 or 75 years from now....Therefore, rather than have to go through the cumbersome task of a mandatory process, I would like to open the door for the Legislature to make some changes here."⁴ Delegate W. Walter Braham, a highly-respected Republican from Lawrence County, concurred that it might be most prudent to give the Legislature flexibility to increase the retirement age. Setting the age too low, he said, did not "leave enough time" for a lawyer to move up the ladder of the profession and then to dedicate his or her prime years to serving on the judiciary. Delegate Braham thus emphasized that age 70 should be a *minimum* acceptable retirement age, not a hard-and-fast ceiling. "I wanted to see 70 retained as the bottom limit," he stated. "I would not object to having it 70, and above."⁵

Ultimately, the proposal to add language permitting the Legislature to change the age of retirement by statute, periodically, did not gain a majority of votes. Yet this discussion demonstrates that the Delegates were extremely cognizant of the fact that the age of 70 selected for mandatory retirement might have to be revisited in future years.

Indeed, Reference Manual No. 5 of the Pennsylvania Constitutional Convention of 1967-1968, entitled "The Judiciary," discussed in some detail the proposed mandatory retirement of judges at a

¹ Laura B. Shrestha, CONG. RESEARCH SERV., RL32792, Life Expectancy in the United States, 27 (2006).

² Sherry L. Murphy et al., *Deaths: Preliminary Data for 2010*, Centers for Disease Control and Prevention, 60 Natl. Vital Statistics Reports 4 (2012).

³ Pa. Const. Convention Journal, Vol. 1 no. 48, remarks of Delegate Tate, 1078 (Feb. 21, 1968)

⁴ *Id.*

⁵ *Id.* at 1079, remarks of Delegate Braham.

fixed age.⁶ This document, prepared by the Convention itself for its Delegates, reveals that a variety of possibilities were considered, some of which would have given more flexibility to the retirement age. For instance, the Pennsylvania Bar Association advocated a mandatory retirement age to be determined by the General Assembly, “but not less than seventy-two years for justices of the Supreme Court and judges of the Superior Court, and not less than seventy years for all other judges.”⁷ The principal goal was to lock down a specific age under Article V, so that the retirement age for judges did not remain open-ended. As Reference Manual No. 5 stated, regardless of which age was selected, establishing a fixed mandatory retirement age:

[E]liminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal; everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided...prevention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.⁸

Even as Reference Manual No. 5 embraced a fixed retirement age of 70 for judges, however, it went on to note that it is: “[D]ifficult to fix a suitable retirement age... age is biological, not chronological. Moreover, with continuing advances in medical and health technology to be expected, a fixed retirement age may soon become unrealistic.”⁹

Thus, even the drafters of Article V recognized that the retirement age of 70 was a compromise, at that moment in time, which might have to be revisited in the future. Their predictions have now come to pass. Forty-five years later, times have changed, our society has changed, more women have entered the legal profession, and both men and women are physically and mentally capable of performing judicial functions at a much higher level for much longer.

Second, it is both appropriate and fitting for this body, nearly a half century later, to use the amendment process set forth in Article XI of the Constitution to revise the retirement age for judges. The amendment process is designed for precisely these sorts of changes in our fundamental charter.

State Constitutions, unlike the federal Constitution, are designed for regular, relatively uncomplicated amendments. The U.S. Constitution purposely sets high hurdles before that document can be changed: It requires two thirds of both Houses of Congress, or two thirds of the fifty States, to

⁶ *Reference Manual No. 5 for Delegates to the Pennsylvania Constitutional Convention: The Judiciary* (1967) (available at http://www.duq.edu/Documents/law/pa-constitution/_pdf/conventions/1967-68/reference-manuals/reference-manual05.pdf).

⁷ *Id.* at 203. This was based upon an argument that “retirement age for trial judges should be lower than that for appellate judges because trial work is more exhausting and demanding.” The National Municipal League, in its sixth edition (1963) of its Model State Constitution, advocated a mandatory retirement of all judges at the age of seventy. *Id.*

⁸ *Id.*

⁹ *Id.* at 204.

propose an amendment; thereafter, ratification only occurs if agreed to by three fourths of the States.¹⁰ The Pennsylvania Constitution, on the other hand, is much more flexible when it comes to the amendment process. (This is true of most State Constitutions). The Pennsylvania Constitution requires only a simple majority vote by both Houses of the Legislature, in two successive sessions, along with publication in newspapers of general circulation to inform the citizenry. Thereafter, a simple majority of the electorate voting in a particular election can approve such an amendment and make it part of the State's Constitution. The ease of this process is quite intentional. Pennsylvania's Constitution – like most State Constitutions – is longer and more detailed than the federal Constitution. It includes topics ranging from the qualifications of judges of the Traffic Court (Article V, Sec. 12(b)) to the amount of debt that can be incurred by the City of Philadelphia (Article IX, Section (2)). State Constitutions like Pennsylvania's were designed to be more readily amended in order to keep current with modern times. While the U. S. Constitution has only been amended seventeen times in its nearly 226 year history, the Pennsylvania Constitution has been completely overhauled four different times. Hundreds of provisions, both short and long, have been amended since the fundamental charter's adoption in 1776.

Thus, I believe the proposed legislation currently before this Committee, changing the mandatory retirement age for judges from 70 to 75, is the best possible solution to an issue that has sparked lawsuits and controversy over the past several decades. I should note that I do not favor a constitutional amendment which would change the retirement age for judges to 80. Nor do I favor a provision that would leave the retirement age open-ended such that there was no mandatory retirement age at all. In my role as Dean of a Law School in this Commonwealth, I am extremely sensitive to the fact that younger men and women entering the legal profession need to have an opportunity to advance and, ultimately, to have a chance to serve the Commonwealth by election or appointment as judges on the courts of this Commonwealth. If there is no point at which judges must retire and/or take senior status, this may ultimately harm the citizens of this Commonwealth if there is no opportunity for fresh ideas, fresh talent, and a diverse pool of qualified candidates to have an opportunity to compete for judicial elections or appointment.

Yet I believe that changing the retirement age to 75 strikes the perfect balance. It adjusts the mandatory retirement age to reflect the fact that men and women live longer, and are mentally and physically productive longer. At the same time, it establishes a firm retirement age – just as the original provision did – so that there is an automatic process for judicial retirement rather than leaving this important matter to individual situations and circumstances.

Moreover, the new provision would still allow for judges who are active and competent to be assigned to temporary judicial service by the Supreme Court, pursuant to Article V, Section 16(c). Thus, jurists can continue to serve the Commonwealth even after retirement, in appropriate circumstances. Moreover, in the event a jurist has a physical or mental infirmity that limits his or her ability to function properly as a judge – even prior to reaching the mandatory retirement age – there are provisions under Article V, Section 18(d), as well as the inherent suspension powers of the Supreme Court, that permit

¹⁰ U.S. Const. art. V.

the Supreme Court to suspend an impaired jurist for good cause and/or to refer the matter to the Judicial Conduct Board.¹¹

Finally, there are several additional reasons that support making this Constitutional change, that I will mention only briefly.

First, voters will still have a chance to decide which judges should be retained, through the ordinary retention process. Thus, if voters do not think that a particular jurist is competent to continue doing his or her job due to any impairment, the voters are still empowered to make that decision.

Second, judges in Pennsylvania receive good, well-funded pensions at the time they retire. It benefits the citizens of this Commonwealth if judges continue to work longer if they are being paid using taxpayer dollars, in any event. Allowing judges to work more years, if they are getting paid anyway, seems to be a fiscally prudent approach.

Third, many judges who have reached the age of 70 have in fact continued to serve by appointment, beyond that retirement age. This is evidence that they are quite capable of doing productive work; indeed, it confirms that their judicial experience and expertise is invaluable in allowing our system of justice to work efficiently.

In conclusion, I believe that it is both prudent and appropriate for the General Assembly to amend the Constitution to revise the mandatory retirement age for judges from age 70 to age 75. In the end, I believe that such a change will benefit all citizens of this Commonwealth. It will ensure that able jurists – both males and females -- who dedicate their careers and legal talents to serving the public on the bench will be able to do so throughout their productive years, rather than being removed at the peak of their productivity, due to a provision that is now outdated and anachronistic. At the same time, it strikes a careful balance by maintaining a specific retirement age that is fair and rational, thus eliminating the uncomfortable situation of requiring the Supreme Court to intervene on a regular basis to remove judges who are mentally or physically impaired. The latter situation should be a rare occurrence; the current proposal would help to ensure that this remains so. It would also have the salutary effect of ensuring that young men and women entering the legal profession have an opportunity to be elected or appointed to the bench, after they gain the requisite expertise and experience, rather than making it impossible to achieve turnover at a reasonable stage in an individual jurist's career.

For all of these reasons, I support the current proposed Constitutional Amendment that is being considered by this Sub-Committee. I appreciate the opportunity to testify about this important matter, and I am happy to answer any questions that members of this Sub-Committee might have.

¹¹ Article V, section 18(d) outlines the process for removal, stating, "any justice or judge...may be retired for disability seriously interfering with the performance of his duties" by the Judicial Conduct Board. Alternatively, Article V, section 10(a) provides that "[t]he Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace..." This provision has been used to expedite the process in the past, allowing the Supreme Court to suspend an impaired jurist and then refer the matter to the Judicial Board of Conduct for a final determination.