



PENNSYLVANIANS
FOR MODERN COURTS
PMCAction

**Testimony before the House Judiciary Committee on House Bill 79
Concerning Mandatory Judicial Retirement**

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(H.B. 79 P.N. 58)

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I. Introduction

Thank you for the opportunity to testify regarding H.B. 79. Pennsylvanians for Modern Courts¹ and PMCAction² are statewide nonpartisan court reform organizations that work to ensure that all Pennsylvanians can come to our courts with confidence that they will be heard by qualified, fair and impartial judges.

We are here today to serve as a source of information rather than to testify in support of or opposition to the bill. While judicial retirement is an important issue, PMC has not taken a position at this point. However, we have done extensive research on the topic and would like to bring to your attention some of the key arguments on both sides of the debate, as well as some questions.

Over the past five months, the introduction of both legislation and litigation has moved consideration of mandatory judicial retirement to the forefront of judicial policy debates throughout the Commonwealth. In addition to the bill before us today, there are two bills that have been referred to the Senate Judiciary Committee: S.B. 85 eliminates the mandatory retirement age for judges and S.B. 368 raises the age to 75.

Further, litigation is pending in both state and federal courts on the constitutionality of mandatory retirement provisions. The Pennsylvania Supreme Court has granted the plaintiffs' King's Bench petition. Arguments are scheduled for May 8.

¹ **Pennsylvanians for Modern Courts** is a statewide, nonprofit, nonpartisan organization that works to ensure that all Pennsylvanians can come to our courts for justice with confidence that the most qualified, fair and impartial judges will preside over their cases. PMC functions as a court watchdog, identifying and speaking out on issues that impact the public's confidence in our courts.

² **PMCAction** is a statewide nonpartisan, nonprofit organization that lobbies for court reform initiatives and educated the public and legislators about the need to reform the Commonwealth's judicial system through the adoption of various reforms.

II. Current State of Judicial Retirement in Pennsylvania and the United States

In Pennsylvania, judges are required to retire at the end of the calendar year after they have reached 70. Judges may serve as senior judges until the end of the calendar year in which they turn 78. Senior judges must be certified by the Supreme Court each year.

Mandatory retirement has been in place since 1968.³ The provision is included in the state constitution.⁴ A bill to change the timetable of mandatory retirement from attainment of age 70 to the end of the calendar year in which a judge turns 70 was introduced in 1993.⁵ After several subsequent introductions in the Pennsylvania House of Representatives, a constitutional amendment was approved in 2001 to implement this change.⁶ In 2010, another bill was introduced aimed at eliminating mandatory retirement altogether.⁷ That bill failed to be reported out of the House Judiciary Committee.⁸

Thirty-three states, plus the District of Columbia, have provisions requiring mandatory retirement of judges.⁹ Judicial retirement is constitutionally mandated in twenty-seven of those states, and required by statute in the remaining six. The mandatory retirement age around the country ranges from 70 to 75 years old and varies from state to state.¹⁰ In 2003, Vermont increased the age for mandatory retirement of judges to 90, making it the only state outside of the standard range.¹¹

Currently, sixteen states, including Pennsylvania, are considering bills introduced during the 2013-2014 legislative session that address mandatory judicial retirement.¹² There is a national trend toward increasing and/or eliminating mandatory retirement requirements for judges.¹³ Despite the fact that there are numerous proposals on these issues, however, only

³ Matt Miller, *Battle Over PA Judge Retirement Mandate Laps Into Commonwealth Court*, Patriot-News (Mar. 1, 2013), http://www.pennlive.com/midstate/index.ssf/2013/03/battle_over_judge_retirement_m.html.

⁴ Pa. Const. art. V, § 16(b) (“Justices, judges and justices of the peace shall be retired on the last day of the calendar year in which they attain the age of 70 years.”)

⁵ Bill Raftery, *Ohio Issue 1: What other states tried to increase or remove their judicial retirement ages and how did they do?*, Gavel to Gavel (Oct. 27, 2011), <http://gaveltogavel.us/site/2011/10/27/ohio-issue-1-what-other-states-tried-to-increase-or-remove-their-retirement-ages-and-how-did-they-do/>

⁶ *Id.*

⁷ *Id.* (H.B. 2657, 2009-2010 Gen. Assemb., Reg. Sess. (Pa. 2010))

⁸ *Id.*

⁹ Bill Raftery, *Arizona Proposition 115: What courts/states have mandatory judicial retirement and at what age?*, Gavel to Gavel (Feb. 12, 2013), <http://gaveltogavel.us/site/2012/10/11/arizona-proposition-115-what-courtsstates-have-mandatory-judicial-retirement-and-at-what-age/>

¹⁰ *Id.*

¹¹ *Id.*

¹² Bill Raftery, *Update on mandatory judicial retirement legislation: bills in 16 states, but so far no enactments; Hawaii appears to be closest but has choppy history on the subject*, Gavel to Gavel (Mar. 19, 2013), <http://gaveltogavel.us/site/2013/03/19/update-on-mandatory-judicial-retirement-legislation-bills-in-17-states-but-so-far-no-enactments/>

¹³ See Bill Raftery, *Ohio Issue 1: What other states tried to increase or remove their judicial retirement ages and how did they do?*, Gavel to Gavel (Oct. 27, 2011), <http://gaveltogavel.us/site/2011/10/27/ohio-issue-1-what-other-states-tried-to-increase-or-remove-their-retirement-ages-and-how-did-they-do/>; Bill Raftery, *Update on mandatory judicial retirement legislation: bills in 16 states, but so far no enactments; Hawaii appears to be closest but has*

minimal change has been achieved.¹⁴ Over the course of nearly twenty years, four state legislatures have adopted statutes that alter judicial retirement.¹⁵ It is worth noting that many bills proposing to change mandatory judicial retirement also include provisions affecting other unrelated legislative initiatives.¹⁶ The failure of these legislative efforts to affect change relating to retirement may not accurately reflect the public's feelings on the issue, but rather, the public's negative attitude towards the unrelated proposals included in the same legislation.

III. Arguments

While there are many important considerations on all sides of this issue that need to be weighed, two arguments lie at the heart of this debate and are discussed below. Other arguments supporting positions to sustain retirement at age 70, increase it to 75, and eliminate it altogether are further presented in the attached chart.

A. Age-related Deterioration v. Increased Life Expectancy

Mandatory retirement provisions recognize that age-related deterioration of a judge's mental capabilities is a detriment to the court system. The role of a judge is intellectually and physically demanding. When a judge struggles to perform the position's necessary duties, it is the public that suffers.

The physical and mental decline that can occur with aging is the strongest argument in favor of maintaining mandatory judicial retirement. Proponents of mandatory retirement argue that it protects the integrity of the court by removing aging judges from the bench before problems arise. Since older judges are most at risk of becoming incompetent, mandatory retirement reduces the need for discipline that embarrasses the judges and threatens public confidence in the courts.

On the other hand, age affects individuals differently. There is no evidence to support the notion that 70 is a cutoff where age begins to take its toll.¹⁷ There are many examples of jurists who served splendidly well past the age of 70.¹⁸ Some of the most famous and revered judges of our time – Justice Holmes, Justice Brandeis, and Judge Learned Hand – served into their 80s.¹⁹

choppy history on the subject, Gavel to Gavel (Mar. 19, 2013), <http://gaveltogavel.us/site/2013/03/19/update-on-mandatory-judicial-retirement-legislation-bills-in-17-states-but-so-far-no-enactments/>

¹⁴ Bill Raftery, *Ohio Issue 1: What other states tried to increase or remove their judicial retirement ages and how did they do?*, Gavel to Gavel (Oct. 27, 2011), <http://gaveltogavel.us/site/2011/10/27/ohio-issue-1-what-other-states-tried-to-increase-or-remove-their-retirement-ages-and-how-did-they-do/>

¹⁵ *Id.* (Indiana 2011 [eliminate]; Kansas 2003 & 2010 [increase from 70 to 75]; North Carolina 1992 [increase from 70 to 72]; Vermont 2003 [increase from 70 to 90])

¹⁶ *Id.* (Arizona SCR 1001 altered provisions related to merit selection system, increased judicial term to 8 years and raised retirement age from 70 to 75.)

¹⁷ Bernard S. Meyer, *Should Judicial Retirement Laws Be Changed?*, 10 *Experience* 19, 19 (2000).

¹⁸ Scott Makar, *In Praise of Older Judges: Raise the Mandatory Retirement Age?*, 17 *Fla. B.J.* 48, 49 (1997).

¹⁹ *Id.*

Even if 70 used to be an invisible threshold marking the descent into old age, times have changed. People are living longer.²⁰ Advances in medicine have allowed people to stay healthy, active, vibrant, and productive for longer than ever before.²¹

Further, the Judicial Discipline System is in place to remove unfit judges from the bench, regardless of age.²² Removal proceedings may be difficult for the court system and upsetting to the public, but they are necessary to ensure the quality of the judiciary. If anything, the disciplinary process should reassure the public that “bad apples” are removed from the bunch.

B. Creating Space for New Judges v. Loss of Institutional Wisdom

Mandatory retirement allows for the regular infusion of fresh blood into the judiciary and prevents incumbent, older judges from securing a monopoly over the bench. Without mandatory retirement, eager young lawyers aspiring to become judges might get frustrated waiting for years for a vacancy.

Courts are constantly evolving. Precedents and legal doctrines need to keep pace with the times. Proponents of mandatory retirement argue that older judges may have a difficult time adapting to new legal or cultural trends and young minds can bring new ideas to the forefront and help the judiciary move forward.

On the other hand, there is no evidence to support the assertion that younger judges are more open-minded or more aware of modern legal trends.²³ The argument favoring younger judges also relies on two untrue assumptions. The first assumption is that age is a reliable indicator of a judge’s beliefs.²⁴ The second assumption is that ideology is a sound qualification for judging.²⁵

Further, mandatory retirement opponents argue that there is a cost associated with the loss of institutional knowledge that accompanies mandatory retirement. They argue that judging is a “learn-by-doing” profession.²⁶ The best judges tend to be the ones that have the most experience.²⁷ Mandatory retirement forces the oldest judges, who often have the most experience, off the bench. While senior status allows some judges to continue serving, even senior judges are subject to age-related limitations.²⁸

²⁰ *Id.*

²¹ *Id.*

²² *What Does the Judicial Discipline Process Address?*, Pennsylvanians for Modern Courts, <http://www.pmconline.org/node/22>

²³ Christopher R. McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. Rev. 81, 121 (2000).

²⁴ *Id.* at 111-13.

²⁵ *Id.*

²⁶ Scott Makar, *In Praise of Older Judges: Raise the Mandatory Retirement Age?*, 17 Fla. B.J. 48, 48 (1997).

²⁷ Christopher R. McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. Rev. 81, 83 (2000).

²⁸ *Fact Sheet: Senior Judges*, Pa. Courts, <http://www.pacourts.us/assets/files/setting-2236/file-1752.pdf?cb=afe398>

Being a judge requires a specific skill-set. Along with a deep knowledge and understanding of the law, judging requires a cool head and even temperament.²⁹ Proficiency in these skills is typically honed over a course of years.³⁰ Further, age, wisdom, and practice breed confidence.³¹ A confident, seasoned jurist is able to perform duties effectively and efficiently.³² All of these characteristics – knowledge, experience, temperament, and confidence – are positively correlated with age.³³

IV. Outstanding Questions

1. What is the effect of changing mandatory retirement on senior judges?
 - a. This legislation does not address the issue of senior judges. Currently, the senior judge system uses retired judges to fill in gaps and ease the caseload in Pennsylvania's courts. These judges receive temporary assignments and are paid on a per diem basis for their work.

Whether the age is increased to 75 or eliminated altogether, it is unclear whether senior judges are necessary. Their service is limited currently to age 78. If a mandatory age is eliminated, judges would no longer need a supplemental service option, as they could remain on the bench until they are ready to leave service entirely. On the other hand, senior judges have proved to be a vital court staffing resource. They help to alleviate the overload of cases burdening the court system. It is uncertain what would happen if this pool of judges were entirely eliminated.

By way of comparison, the federal courts, which do not have mandatory retirement, allow judges to take "senior status." This allows for openings on the bench for new judges, but avoids many of the problems with mandatory judicial retirement.

2. What is the financial impact of increasing or eliminating mandatory judicial retirement?
3. What effect, if any, will this have on the judicial discipline process?
 - a. Other states without mandatory retirement include age-related "disability" within the jurisdiction of their disciplinary bodies. They do not have independent commissions that examine the fitness of judges over a certain age. Mental and physical decline is often encapsulated in the term "disability" and is reviewed according to the standard disciplinary procedures.

²⁹ Christopher R. McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. Rev. 81, 84 (2000).

³⁰ *Id.*

³¹ *Id.* at 121.

³² *Id.*

³³ *Id.*

4. Are there additional prophylactic measures that should be put in place if mandatory retirement is eliminated or increased?
 - a. Periodic review of judges over a certain age could mitigate or eliminate the threat of age-related deterioration in the judiciary. To be effective, the review would have to consider several aspects of the judge's performance including, but not limited to: efficiency, temperament, rate of reversal, and perhaps mental and physical acuity.

This would require the commitment of resources from an already underfunded system. PMC has not found any other state that uses a similar process, so it is difficult to ascertain what the cost would actually be.

V. Other Considerations

It is important to look at bills such as the one before us today in the context of the operation of the judiciary as a whole. Accordingly, there are a number of additional measures we believe would improve the functioning of the judiciary.

1. Judicial Ethics Training: All judges should be required to attend periodic ethics training on an annual or semi-annual basis. These trainings would serve the dual purpose of reminding judges of their ethical obligations as well as providing a forum to address new ethical challenges that may arise during a judge's term.
2. Judicial Performance Review: All judges should be subject to judicial performance reviews during their term on the bench. These performance reviews would collect data regarding, among other qualities: the judge's temperament, productivity, knowledge of the law, behavior on and off the bench, and rate of reversal. The data would be collected from litigants, lawyers, law clerks, court staff and self-evaluations completed by the judges, as well as samples of the judges' written opinions and orders.

States with official judicial performance reviews report that these reviews are a valuable source of information to the public who vote on whether or not a judge should be retained. Further, the reviews provide the judges themselves with honest feedback about their performance which allows for self-improvement.

VI. Conclusion

The issues surrounding mandatory judicial retirement are complex. Whether mandatory retirement provisions are sustained, increased, or eliminated, the most important considerations are the quality and reputation of the judiciary. The correct course of action will be the one that best promotes the excellence and independence of the bench.

Thank you again for the opportunity to speak with you today.

JUDICIAL RETIREMENT

SUSTAIN Maintain Mandatory Retirement at age 70	EXTEND Increase Mandatory Retirement age to 75 H.B. 79 P.N. 58; S.B. 368 P.N. 291	ELIMINATE Eliminate Mandatory Retirement age S.B. 85 P.N. 172
<ul style="list-style-type: none"> • Mental capabilities deteriorate with age <ul style="list-style-type: none"> ○ Judges may not recognize mental deterioration ○ Allows removal of judges before problems arise ○ Removal proceedings are embarrassing and can undermine public confidence in judiciary • Senior judge system allows retirees to continue serving while enjoying some benefits of retirement <ul style="list-style-type: none"> ○ NOTE: senior judges have fewer staff, are paid per diem and service is still limited to 78 • Makes room for new, younger judges • Legal precedent supports the status quo • Judges themselves are divided on whether change is necessary 	<ul style="list-style-type: none"> • Age is relative* <ul style="list-style-type: none"> ○ Increased life expectancy and better health, including mental health • Judicial discipline system removes unfit judges of any age* • Nationally, judges unlikely to be removed for dementia • Prevent loss of institutional experience and wisdom* • Establishing a blanket policy (at any age) eliminates the need for difficult, individualized judgment calls about judicial fitness** • Compromise position 	<ul style="list-style-type: none"> • Any age is arbitrary • Raising to a particular age is not a permanent solution; as people live longer, appropriate mandatory retirement age may change again. • Decision to retire should be individual and voluntary • No guarantee that newer, younger judges will perform better • No need for mandatory retirement because judges will choose to retire • Federal judges do not have mandatory retirement, but there are still vacancies <ul style="list-style-type: none"> ○ NOTE: Federal judiciary also has senior judges, so judges can take senior status which creates vacancy, even though still sitting; uncertain whether will still have senior judges in PA • Mandatory retirement may violate equal protection and due process rights • Other elected officials do not have mandatory retirement <ul style="list-style-type: none"> ○ NOTE: other elected officials have shorter terms • Could be done in conjunction with periodic testing on mental capabilities***

* Argument also applies to ELIMINATING retirement age

** Argument also applies to SUSTAINING current retirement age

*** Argument also applies to EXTENDING the retirement age

