



Pennsylvania Bar Association Testimony Concerning House Bill 79 Before the House Judiciary Committee

Good morning, Committee members and staff. I am Thomas G. Wilkinson, Pennsylvania Bar Association President, representing the 28,000 members of the Association. Thank you for inviting us to testify concerning the possible extension of the judicial retirement age for justices, judges and justices of the peace from 70 to 75 years of age.

Our members are keenly interested in legislation impacting our judiciary, and we appreciate the invitation to submit testimony that you may find helpful in your deliberations. The bill under consideration, which has been widely distributed to various committees and sections of our Association for comment, would amend Section 16(b) of Article V of the Constitution, and thus would require a majority vote of two consecutive sessions of the General Assembly as well as an affirmative vote by the electorate.

The current status of consideration of this bill within our Association is that a resolution emanating from our Judicial Administration Committee¹ favoring the bill is scheduled to be considered by our Board of Governors and House of Delegates, which serves as our policymaking body, in May. We would be pleased to convey the outcome of those discussions to this Committee.

Recognizing that the PBA has not yet adopted a policy on the issue, we are prepared to offer various considerations on both sides of the matter that our members and staff have developed in their due diligence process to date. First, I will briefly review the arguments in favor, and then I will discuss the concerns that have been expressed about extending the judicial retirement age.

The arguments in favor include: (1) the average life expectancy has lengthened since the time the current mandatory retirement age was adopted; (2) many federal judges sit and perform at a high level well beyond age 70; (3) the justice system benefits from the experience and wisdom of long-serving judges; (4) there is a system in place to remove judges for misconduct or failure to perform duties; (5) modern American society's general rejection of judging people based on generalizations; and (6) the people should be empowered to decide the age of mandatory judicial retirement.

Mandatory judicial retirement was a result of the 1967-1968 Constitutional Convention. However, between 1970 and 2010 life expectancy for those already 65 years of age, according to the CDC, has increased from 15.2 to 19.1 years.² If the life expectancy for a 65-year-old is now 84, it makes little sense to adhere to a mandatory retirement age of 70.

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The federal judiciary has no mandatory retirement age. At the present time there are more than a dozen senior district judges older than 70 accepting case assignments in the Eastern District of Pennsylvania alone. Were there a mandatory retirement age of 70, Supreme Court Justices Breyer, Ginsburg, Kennedy, and Scalia would not be allowed to serve.

In *The Federalist No. 78*, Alexander Hamilton argued in favor of lifetime judicial appointments. Hamilton made two arguments that justify increasing the mandatory retirement age: the length of time it takes to master the law and that a temporary appointment will inhibit the best from becoming a judge. Why retire a productive judge with significant and valuable experience?

There is in place a process to remove judges. Article V, Section 18 of the Constitution provides for a Judicial Inquiry and Review Board, and for the removal of any justice or judge. The Supreme Court has adopted Rules of Judicial Procedure for the Court of Judicial Discipline and for the Judicial Conduct Board, which has jurisdiction to address any complaint arising under the Code of Judicial Conduct.

Significantly, our society has largely rejected judging people based on general characteristics. Instead, we judge people as individuals, recognizing that to do otherwise risks stereotyping. The federal Age Discrimination in Employment Act (ADEA), when enacted, prohibited discrimination against those 40 to 65 years of age; the upper limit was raised to 70 in 1978 and discarded completely in 1986. No institution is more important in ensuring that fundamental rights are protected than the judiciary, and yet in Pennsylvania, we stereotype judges by making them retire at 70. The fact that we already have a substantial number of senior judges sitting by appointment shows that state court judges can function effectively and productively beyond age 70.

Finally, as the drafters of the 1967-68 constitutional amendments intended for the people to have a say on the retirement age of judges, House Bill 79 should be passed as the first step to placing the issue before the voters.

The arguments against House Bill 79 include: (1) the current system affords an opportunity for senior judges to serve, but simply in a different capacity; (2) other states' practices; (3) concerns over declining mental and physical capacity among seniors; (4) the need for turnover on the bench; (5) avoiding potentially creating a shortage of judges; and (6) the uncertain financial and budgetary impacts of altering the current system.

Under the current system, judges who reach age 70 and who have shown that they are competent to continue to serve and whose services are needed in a particular county may apply to be certified as a senior judge with the approval of the Supreme Court. This system affords flexibility to address the caseload on a county-by-county basis and serves as a screen to ensure that well-qualified senior judges satisfy established criteria for service.

According to the National Center for State Courts, 24 other states have a mandatory retirement age below 75, 19 of which require retirement at 70.³ These provisions suggest some

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broad-based consensus that judges should retire at a certain age and that such a retirement requirement is not unusual.

Judges have great power over people's lives, and judges operating with some mental impairment or incapacity can do real harm. Reference Manual No. 1 prepared for the delegates of the 1967-1968 Pennsylvania Constitution Convention by the Preparatory Committee chaired by Lieutenant Governor Raymond Broderick noted, "Problem judges who neglect their duties or mistreat counsel or witnesses or whose age or health render them incapable of performing normal duties of their offices are not numerous, but completely destructive of judicial processes when they exist." Given that we do not yet have a system for regular judicial performance assessment, and the vast majority of judges succeed in retention elections, the mandatory retirement age is a key tool for preventing less than capable judges from continuing to serve on the bench.

During the 1967-1968 Constitutional Convention, Delegate Strickler stated:
[S]peaking for the sub-committee on Retirement, this committee considered this for a long time There are a lot good men who have to retire. All in all, considering age, a lot of them cannot function properly after 70. We feel the Constitution should state that specifically.

This statement still has some validity. A new study from the RAND Corporation estimates that almost 15 percent of Americans at least 71 have dementia as of 2010.⁴ Moreover, the "risk for dementia doubles every five years after age 65."⁵ Hence, moving the judicial retirement age to 75 places citizens at some risk of appearing before an impaired judge.

Some of our members, particularly in rural counties with fewer judges, have expressed the view that there is a natural time for turnover on the bench, and there should be opportunities for well-qualified attorneys to seek judicial office. Extending the retirement age would tend to reduce the frequency of such opportunities.

Concern also has been expressed that extending the retirement age could decrease the number of available judges per county. Under the current system, a county has its allotment of judges and can also have senior judges sit per assignment. With a retirement age of 75, the judicial allotment per county will not increase, but the number of senior judges would likely decrease.

Finally, it is unclear at this stage what the budgetary impacts would be if the legislation were adopted. As noted, presumably the ranks of senior judges (currently numbering over 100 in the Common Pleas courts) would dwindle and some judges reaching the age of 70 would not desire to remain on the bench in a full-time capacity. While the actual financial impact may be revenue neutral over time, the fiscal consequences deserve further examination.

Regardless of the direction Pennsylvania proceeds, a careful review of the judicial retirement age is also an opportunity to consider the benefits of establishing a statewide judicial performance assessment system, in order to ensure that each and every judge maintains the competency and productivity the public has a right to expect. A PBA Task Force on Judicial

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Performance Assessment has worked for several years developing a model for judicial performance assessment that would review a judge's performance in several critical areas, including performance and management, temperament and demeanor, and objectivity. Such a system would help to identify and address those hopefully rare instances where a judge no longer has the capacity to serve. A fair assessment system would help to ensure that all judges, particularly those more senior, would continue to serve the public effectively through retirement.

Thank you.

¹ The Judicial Administration Committee's charge is to review, study and make recommendations concerning legislative issues regarding the operation, procedure and reform of the state and federal court systems. The committee also develops and recommends measures seeking to improve the administration of the courts and issues of court reform consistent with established PBA policy.

² <http://www.cdc.gov/nchs/data/hus/2011/022.pdf>.

³ http://www.pennlive.com/midstate/index.ssf/2012/08/why_must_pennsylvanias_judges.html.

⁴ http://www.rand.org/pubs/external_publications/EP50247.html.

⁵ <http://www.alzheimer.ca/en/on/About-dementia/Dementias/What-is-dementia/Facts-about-dementia>.