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JUDICIAL SELECTION IN PENNSYLVANIA: A PROPOSAL

BRUCE W. KAUFFMAN †

I. INTRODUCTION

PENNSYLVANIA enjoys the dubious distinction of belonging to the small and dwindling number of states which select their appellate judges by means of partisan political elections.¹ These elections take place in an atmosphere of nearly total indifference on the part of voters² and almost unbearable ethical tensions on the part of judicial candidates.³ As such, this system undercuts the independence of Pennsylvania's judges and diminishes the availability of well-qualified candidates.⁴

That there are talented, even brilliant, members of the Pennsylvania bench, despite the electoral ordeal, begs the important question. As Justice Roger Traynor, the respected former Chief Justice of the California Supreme Court, wisely noted, "there is

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1. Only Alabama, Arkansas, Georgia, Illinois, Mississippi, New Mexico, North Carolina, Tennessee, Texas, and West Virginia join Pennsylvania. See L. BERKSON, S. BELLER & M. GEMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 18-21* (1981); Berkson, *Judicial Selection in the United States: A Special Report*, 64 *JUDICATURE* 176 (1980).

2. For a discussion of voter apathy, see text accompanying notes 17-23 *infra*.

3. For a discussion of these ethical tensions, see text accompanying notes 24-37 *infra*.

4. As a retired Justice of the Texas Supreme Court observed:

Able attorneys are rarely disposed to accept the ordeal and expense of even an initial election with the consequent possibility of public humiliation through defeat. Still less are such people likely to relish foregoing a sure career off the bench for a career on the bench which may from one term to another be placed in vital jeopardy simply because someone else who happens to be a more skillful politician, a more publicized personality or endowed with a better political name happens to want the job.

Garwood, *Breakfast Observations on Selection of Judges*, 44 *J. AM. JUDICATURE Soc'y* 134, 140 (1960).

little cause for continuing to muddle along with so lunatic a procedure merely because '[b]y luck the populace sometimes gets better than one might expect or by luck an unlikely choice proves worthy of office.'"⁵ The time has come for Pennsylvania to amend its Constitution and to abolish its antiquated system of partisan judicial elections by creating a Judicial Nominating Commission charged with recommending judicial candidates to the Governor who, with the advice and consent of a majority of the Senate, would fill appellate judicial offices by appointment.

II. POPULAR ELECTIONS CORRODE JUDICIAL INDEPENDENCE

The philosophy underlying judicial elections assumes that the judiciary is no different from the other two branches of a representative government and that judges, like members of the legislative and executive branches, should be responsive to the public will. As a bland restatement of democratic maxims, this may have superficial appeal, but the plain fact is that partisan judicial elections are antithetical to the single most important principle underlying judicial decision-making in a free society—judicial independence.⁶ This system fails to recognize that unlike the other two coequal branches in our government of checks and balances, the judiciary was never intended to reflect the current, often volatile, will of the public,⁷ and that a judge's accountability for his decision-making must be not to the public but to the law. It is a

5. Traynor, *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266, 1277 (1967), quoting Traynor, *The Unguarded Affairs of the Semikempt Mistress*, 113 U. PA. L. REV. 485, 488 (1965).

6. As Bernard G. Segal, the distinguished former President of the American Bar Association observed:

Another popular misconception is that election of judges is a democratic institution indigenous to democratic nations. Nothing could be further from the truth. The arresting fact is that except for a few minor court judges in Switzerland, the only places in the entire world, outside of this country, where judges are still elected, are Russia and its satellite nations. There, the elective method is practiced exclusively. And does this sound familiar—in the Soviet Union, judges serve for short terms only, and they must be approved by the political hierarchy of the State before they can even become candidates.

Address by Bernard G. Segal, *Judges, Politics and the American Dream*, Law Day, Wichita, Kansas (May 1, 1967).

7. Our founding fathers recognized the necessity of a genuinely independent judiciary by providing for lifetime presidential appointment of federal judges with the advice and consent of the Senate. U.S. CONST. art. II, § 2 & art. III, § 1. See THE FEDERALIST No. 78 (A. Hamilton).

judge's peculiar responsibility to construe and apply the law notwithstanding, and even despite, public clamor or controversy. If public opposition to judicial interpretation runs deeply enough for long enough, the law can ultimately be changed either through legislation or, where appropriate, by constitutional amendment.⁸

Underlying the principle of judicial independence is the conviction "that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values."⁹ It is an independent judiciary, rather than an elected legislative assembly, that is best adapted to nurturing and safeguarding these values.¹⁰ As Alexander Bickel has observed:

Men in all walks of public life are able occasionally to perceive this second aspect of public questions. . . . Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view. . . . Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.¹¹

The use of periodic partisan elections for the selection of our judiciary erodes the "insulation and the marvelous mystery of time which give the courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."¹² Only an independent judiciary can be expected to protect individual constitutional rights "from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion serious oppressions of the minor

8. This system reflects our underlying governmental structure in which the judiciary is responsible for interpreting the law, not making it.

9. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962).

10. *Id.*

11. *Id.* at 24-25.

12. *Id.* at 26.

party in the community." 13

A judiciary which is not independent in spirit as well as in name cannot perform its fundamental obligation to serve as a check on the abuse of power by the legislature or the executive. As the constitutional arbiter,¹⁴ the judiciary must be given the "necessary constitutional means and personal motives to resist the encroachments"¹⁵ of its coequal branches. While an elected judiciary may possess, from time to time, the fortitude to resist attacks upon fundamental constitutional rights, the wisdom of our founding fathers suggests that such courage is more likely to be found, and fostered, among truly independent judges.¹⁶

A. Voter Apathy and Ignorance

The notion of public accountability is not only misplaced in the context of judicial selection, it is illusory. Experience, unfortunately, has shown that only a handful of the public evinces the slightest interest in exercising its right to choose among judicial candidates. In Pennsylvania's judicial elections of November, 1981, for example, over sixty percent of those *registered* to vote, and an even greater fraction of those *eligible* to vote, stayed home.¹⁷ Moreover, the evidence overwhelmingly suggests that

13. THE FEDERALIST No. 78, at 469 (A. Hamilton) (New Am. Libr. ed. 1961). See also *United States v. Jannotti*, 673 F.2d 578, 612 (3d Cir. 1982) (Aldisert, J., dissenting). In *Jannotti*, Judge Aldisert recently emphasized:

[T]he rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors — Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court . . . drew the line of demarcation between permissible and impermissible police conduct to insure the enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending. Like District Judge John P. Fullam, those federal judges were unwilling to relegate the formulation of these protections to the "coquetry of public opinion"

Id. at 616 (citation omitted).

14. *In re Rivers*, 19 Bankr. 438, 440-44 (E.D. Tenn. 1982).

15. THE FEDERALIST No. 51, at 321-22 (J. Madison) (New Am. Libr. ed. 1961).

16. See C. WARREN, THE MAKING OF THE CONSTITUTION 532 (2d ed. 1937). One recent candidate for the Pennsylvania Supreme Court observed: "[S]ince judges in Pennsylvania are elected, that means they're involved in politics. And how, I ask, can you be only halfway in politics." Philadelphia Inquirer, May 7, 1982, at B2, col. 4.

17. In the judicial primary election of May, 1981, fewer than thirty percent of registered voters statewide (and fewer than fifteen percent in Philadelphia) bothered to go to the polls. See Department of State, Bureau of Elections, Registration for Municipal Primary Election, May 19, 1981, Votes

judges are elected in a climate of nearly total voter ignorance. A survey conducted in New York ten days after a judicial election in 1954 revealed that, except for one extraordinarily prominent candidate, only four percent of the voters could name a candidate for whom they had voted. Fewer than one percent of the voters could name a candidate for whom they had *not* voted, and less than twenty percent could name a single court for which judges had been elected.¹⁸ Twelve years later, a similar study uncovered that only one percent of the voters could name the candidate who was overwhelmingly chosen as Chief Justice.¹⁹

Those few who do vote in judicial elections tend to be influenced by factors totally unrelated to the candidates' qualifications to hold judicial office, such as ballot position, name recognition, party label, and geographical base.²⁰ Additionally, the outcome of judicial contests frequently hinges on the results of simultaneous and more highly publicized gubernatorial or presidential races. As one eloquent observer, Fred L. Williams, former Justice of the Supreme Court of Missouri, sardonically noted: "I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did *not* keep us out of war. In both of the elections, no more than five percent of the voters knew I was on the ticket."²¹ The particu-

Cast for Justice of the Supreme Court, Primary Election, May 19, 1981 and Votes Cast for Justice of the Supreme Court, Municipal Election, November 3, 1981.

18. Warden, *The Bench and the Ballot: The Case for Merit Selection*, 8 STUDENT LAW. 32, 34 (1979).

19. *Id.* See also Ellis, *Court Reform in New York State: An Overview for 1975*, 3 HOFSTRA L. REV. 668 (1975). In a recent editorial, the New York Times commented, "What could better expose the farce of judicial elections? Most voters have never heard of the judges they vote for and can scarcely evaluate those they can identify." N.Y. Times, "The Judicial Election Farce," October 11, 1982, at A18.

20. In 1981, one candidate filed for all three appellate court elections in Pennsylvania, and then withdrew from the contest for all but the one for which he drew the best ballot position.

There are only three qualifications to be met in order to run for an appellate judgeship in Pennsylvania. 1) The candidate must be a resident member of the Pennsylvania bar. PA. CONST. art. V, §12(a); 42 PA. CONS. STAT. ANN. §3101(a) (Purdon 1981). 2) The candidate must gather the signatures of at least one hundred registered voters in each of at least five counties. 25 PA. STAT. ANN. §2872(b) (Purdon 1963). 3) The candidate must pay a filing fee of \$50.00. 25 PA. STAT. ANN. §2873(b)(1) (Purdon 1963). As one recent president of the Pennsylvania Bar Association lamented, it is only a matter of time until Pennsylvania elects to its Supreme Court a 28-year-old with little or no legal experience but with the right name and the luck to draw the number one ballot spot. See Statement of David B. Fawcett, Jr. before the Pennsylvania House Judiciary Committee (Apr. 23, 1981).

21. Teller, *The Selection of Judges: The Faults of the Pennsylvania Plan*, 41 A.B.A. J. 137, 141 (1955) (quoting Justice Fred L. Williams).

larly high correlation between the gubernatorial vote in Pennsylvania and votes cast in the state supreme court election²² tends to confirm the adage that judicial candidates are "nothing more than a tail on the party kite."²³

B. *Ethical Problems Associated With Judicial Campaigns*

The dearth of voter interest in judicial elections can be traced, at least in part, to the strictures of Canon 7 of the Code of Judicial Conduct, which places severe limits on the topics of public debate in which candidates for judicial office may engage.²⁴ Under Canon 7, a judicial candidate may not answer legal questions submitted to him in a radio program;²⁵ nor may he hint at his probable decisions from the bench.²⁶ In fact, even a judicial campaign slogan promising "[a] strict sentencing philosophy" is considered to lie beyond the pale.²⁷

22. A recent study of contested races for Supreme Court Justice and Governor for the period from 1948 to 1974 found a .91 correlation between votes cast in Pennsylvania for Governor and votes for Pennsylvania Supreme Court Justice, suggesting that voters who cast their ballots for Democratic gubernatorial candidates also voted for Democratic judicial candidates; similarly, Republican candidates for Justice and Governor tapped the same base of partisan support. DuBois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 LAW & SOC. REV. 757, 766 (1979). In recognition of this obvious fact, the Pennsylvania Constitution was amended in 1969 and now expressly mandates that "[j]ustices, judges and justices of the peace shall be elected at the *municipal election* next preceding the commencement of their respective terms of office." PA. CONST., art. V, § 13(a). These elections are scheduled in odd-numbered years. PA. CONST., art. VII, § 3. *General elections*, at which the Governor is elected, are scheduled for even-numbered years. PA. CONST., art. VII, § 2. *But see* Cavanaugh v. Davis, — Pa. —, 440 A.2d 1380 (1982) (ordering that the judicial office of Chief Justice Henry X. O'Brien, which expires on January 3, 1983, be filled by election at the November 2, 1982 *general election*).

23. Gray, *Pennsylvania Plan for the Selection and Tenure of Judges*, 103 LEGAL INTELLIGENCER 107 (Jan. 25, 1954).

24. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972). Canon 7(B)(1)(c) of the Code provides that:

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues. . . .

See also COMMONWEALTH OF PA., JUDICIAL INQUIRY AND REVIEW BOARD, GUIDELINES TO JUDICIAL CAMPAIGNS (revised June 7, 1979).

25. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93 (1933).

26. *See* Anderson, *Ethical Problems of Lawyers and Judges in Election Campaigns*, 50 A.B.A. J. 819, 821 (1964).

27. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980).

In practice, however, few prospective judges find themselves able to adhere to the canons in toto. Inevitably, judicial candidates are pushed into taking definitive stands on such controversial legal or political issues as sentencing procedures or the death penalty.²⁸ As one observer has noted, "[i]t is unfortunately plain, however, that even the most ethically conducted campaign involves a series of exceptions to the canons which warp their spirit and which add nothing to the public respect for our judicial system."²⁹

Unlike a candidate for mayor, governor or president, who is rightly expected to be partisan, to have a platform and to take committed stands on controversial issues, a candidate for judicial office can offer no more than "a modicum of understanding of the law, a breath of compassion, a spark of originality."³⁰ It is not for the judicial candidate to "manufacture issues and then promise dramatic judicial solutions to them."³¹ In virtually no other office is a partisan candidate expected to sever all political ties and to purge himself of all partisanship immediately upon assuming office. A judge must refuse to discuss his decisions even with those responsible for his election, and he has virtually no patronage to offer to potential supporters. It is small wonder, then, that ethical judicial candidates find it difficult, if not impossible, to raise adequate funds or to arouse widespread public interest in their normally lackluster campaigns.³²

28. See, e.g., *The Reading Eagle*, Apr. 7, 1981, at 17, col. 4 (quoting one Pennsylvania Supreme Court candidate as stating "I think I'd pull the switch myself" when asked about capital punishment). Another recent candidate promised that his election would bring a needed "perspective of law enforcement from . . . the prosecutorial side . . ." *Pittsburgh Post Gazette*, Feb. 21, 1981, at 3, col. 1.

29. Anderson, *supra* note 26, at 823. An attempt to abrogate totally the ethical strictures on judicial candidates announcing positions on disputed legal or political issues recently surfaced in Pennsylvania. See Pa. S. 491, 165 Sess. Gen. Assembly (1981). This bill, if enacted and constitutional, would overturn portions of the Code of Judicial Conduct and would allow judicial candidates to state their views on controversial public issues. It passed the Pennsylvania Senate on April 20, 1982 by an astonishing vote of 46-3. 166 PA. SEN. LEG. J. 2151 (Apr. 20, 1982). The measure was referred to the Pennsylvania House State Government Committee on April 21, 1982. No subsequent action has yet been taken on the bill.

30. CROCKETT, *JUDICIAL SELECTION AND THE BLACK EXPERIENCE*, 58 *JUDICATURE* 437, 438 (1975).

31. Waltz, *Some First Hand Observations on the Election of Judges*, 63 *JUDICATURE* 185, 187 (1979).

32. Although the foregoing views are applicable to all judicial elections, they apply with special force to state-wide elections for Pennsylvania's appellate courts. While it may be possible in some counties for a common pleas court candidate to become known personally by a substantial portion of the electorate, it is all but impossible for a state-wide judicial candidate to do so

Fund-raising for judicial campaigns raises separate and even more alarming ethical dilemmas. Campaigning for a statewide judicial office is an expensive undertaking.³³ Though a judicial candidate may not himself solicit or accept campaign funds, he may "establish committees of responsible persons to secure and manage the expenditures of funds for his campaign."³⁴ Such committees are not prohibited from soliciting contributions from lawyers or accepting contributions from the coffers of political organizations. Numerous observers have warned that "[a]s long as a judge's campaign committee must accept gifts of money and work from lawyers, there will be gnawing doubts as to his freedom from influence and bias."³⁵ Justice Traynor likened a judicial campaign, with its inevitable round of barnstorming, back-slapping, and fund-raising, to a three-ring circus, only worse:

In the circus he would need only to please the onlookers, and it is only they who would pay the price for his antics. In a political contest in which he must market the soul he once called his own, it is the public who must pay the price for his blighted independence.³⁶

Leaving to one side the inevitable suspicion which fund-raising casts upon a judge's capacity to administer his duties impartially, Pennsylvania's judicial election system effectively dis-

without the expenditure of huge sums of money or without possessing an already famous name. When the enormous size of Pennsylvania is coupled with normal voter apathy and ignorance in judicial elections, the result is selection by lottery rather than by consideration of the candidates' qualifications. Indeed, in most communities, voter interest in selecting local traffic court judges or township commissioners is greater than that expressed in statewide judicial elections.

33. In the Pennsylvania judicial elections of 1981, one candidate for the Superior Court spent nearly one quarter of a million dollars. Of the four candidates for Supreme Court Justice, two spent approximately \$100,000; and one spent well over \$200,000. Philadelphia Inquirer, Dec. 10, 1981, at B11, col. 1.

34. CODE OF JUDICIAL CONDUCT, Canon 7(B)(2) (1972).

35. See, e.g., Anderson, *supra* note 26, at 823.

36. Traynor, *Rising Standards of Courts and Judges: The California Experience*, 40 J. ST. B. CAL. 677, 684 (1965). Another commentator, lamenting the effect of political campaigning on judicial independence, observed:

Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire pullers inclined to use every office as a means of rewarding political services and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.

J. BRYCE, THE AMERICAN COMMONWEALTH 512-13 (rev. ed. 1931).

courages numerous qualified men and women from seeking judicial office. It is a deplorable fact of life that so long as Pennsylvania clings to its outmoded practice of electing its judges, there will be gifted lawyers "who will not enter the lists of such a contest, knowing that they must either compromise the very qualities that make a good judge, notably a dispassionate unconcern with popular fads and fancies, or risk losing the contest to a fad-and-fancy candidate."³⁷ The prospect of donning judicial robes during the day and then doffing them to make the round of ward meetings at night unquestionably deters countless distinguished members of the bar from ever considering a career on the Pennsylvania bench. Alexander Hamilton recognized this problem when he advocated life tenure for federal judges:

[A] temporary duration in office, which would naturally discourage such characters ["those who unite the requisite integrity with the requisite knowledge"] from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.³⁸

III. ALTERNATIVES TO JUDICIAL ELECTIONS

Pennsylvania's anachronistic system of partisan judicial elections works to undermine the very independence necessary for effective judicial checks and balances. Only ten other states require their highest court judges to run the gauntlet of political campaigns.³⁹ Pennsylvania now stands virtually alone among northern industrial states in selecting its appellate judges in this totally unsatisfactory manner.⁴⁰

The popular election of judges is a relic of a bygone era. It was in large measure a product of Jacksonian democracy. Following the American Revolution, all of the original thirteen states chose their judges through appointment.⁴¹ This appointive system

37. Traynor, *The Unguarded Affairs of the Semikempt Mistress*, 113 U. PA. L. REV. 485, 487-88 (1965).

38. THE FEDERALIST No. 78, at 471-72 (A. Hamilton) (New Amer. Libr. ed. 1961).

39. See note 1 *supra*.

40. See note 1 and accompanying text *supra*.

41. L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 1, at 3. The popular election of judges, however, began prior to the Jacksonian era. For example, Georgia provided for the popular election of lower court judges with an amendment to the state constitution in 1812. *Id.*

came under serious attack in the Jacksonian era, and by 1861 the members of the judiciary in twenty-four of the then thirty-four states were selected by popular election.⁴²

Disenchantment with the election of judges, however, set in as early as 1913. In that year, the American Judicature Society was founded and set as its goal the replacement of partisan election of judges with a system of merit selection. Less than twenty-five years later, the House of Delegates of the American Bar Association approved a nonpartisan plan for the selection of judges, and in 1940, Missouri became the first state to adopt the American Bar Association's proposal.⁴³

Under the Missouri plan, potential nominees for the judiciary are recruited and screened by a nominating commission composed of lawyers elected by members of the state bar and nonlawyers appointed by the Governor. For each judicial vacancy, the nominating commission submits a panel of three nominees to the Governor who then appoints one of the three to judicial office. There is no provision for legislative confirmation; instead, judicial appointees subsequently run in nonpartisan retention elections at stated intervals.⁴⁴

Since 1940, sixteen states have followed Missouri's lead and have instituted a system of gubernatorial appointment for positions on their court of last resort, based on the recommendations of a judicial nominating commission.⁴⁵ The American Bar Association's House of Delegates unanimously reaffirmed ABA support for merit selection in 1974.⁴⁶

42. *Id.* at 3-4.

43. See generally Finch, *Judicial Selection and Tenure*, 70 F.R.D. 239 (1976) (outlining the early efforts of the American Judicature Society and the ABA to secure nonpartisan selection of judges).

44. *Id.* at 240.

45. L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 1, at 7. Of those states which have not created judicial nominating commissions, fourteen have substituted nonpartisan elections for partisan judicial elections. In four other states (California, Maine, New Hampshire, and New Jersey), appointments are made by the Governor alone, with confirmation by the Senate or a similar body; in four others (Connecticut, Rhode Island, South Carolina, and Virginia), appointments are made by the legislature. *Id.* at 6.

46. See *ABA Strongly Reaffirms Merit Plan Endorsement*, 57 JUDICATURE 370 (1974). The ABA-endorsed merit selection plan calls for the creation of an eight member judicial nominating commission comprised of four non-lawyer members (appointed by the Governor for staggered terms of at least three years), three members of the legal profession (selected by an official bar association which includes all active members of the bar, also with staggered terms of at least three years), and the Chief Justice (or a Justice nominated by him) to serve as a non-voting chairman. Within thirty days of a judicial

On January 23, 1964, Pennsylvania's Governor William W. Scranton became the first governor in the nation to establish a judicial nominating commission by executive order alone. The Scranton Commission, consisting of one judge, three lawyers and three lay-citizens, was charged with supplying a list of qualified candidates from which the Governor could fill five vacancies which arose when the Pennsylvania General Assembly created five new judgeships in the Philadelphia trial courts.⁴⁷ From a list of fifteen names submitted by the commission, Governor Scranton appointed five exceptional lawyers to these positions.

While it was a positive step, the Scranton Commission suffered from a fatal weakness which it shared with the other judicial nominating commissions subsequently created in Pennsylvania by executive order.⁴⁸ This weakness is that each judge appointed to fill a vacancy still must eventually face a partisan election.⁴⁹ Only

vacancy, the commission must submit to the Governor, and simultaneously announce to the public, the names of at least three persons qualified for appointment. Under the ABA plan, fewer than three names may be submitted if the commission certifies that there are less than three people with the requisite qualifications. The Governor must then appoint one of those whose name has been submitted; if he fails to do so within thirty days after the list of nominations has been submitted to him, the Chief Justice is empowered to select an appointee from that list.

The ABA merit selection plan further provides that appointees would hold judicial office either a) during good behavior until reaching the age of retirement or b) for a preliminary term of two years and until the next general election thereafter, at which point his or her name would be submitted, without opposing candidates, for confirmation or rejection by the electorate in a retention election. *Id.*

47. See Segal, *Nonpartisan Selection of Judges: Pennsylvania's Experiment*, 50 A.B.A. J. 830 (1964).

48. Governors Milton Shapp and Dick Thornburgh both used the power of the executive to set up judicial nominating commissions. See Exec. Order No. 1973-5, 7 PA. ADMIN. BULL. 1868 (1977) (creating an Appellate Court Nominating Commission and a Trial Court Nominating Commission); Exec. Order No. 1979-1, 9 PA. ADMIN. BULL. 543 (1979) (creating an Appellate Court Nominating Commission).

49. See PA. CONST. art. V, § 13(b). The Pennsylvania Constitution empowers the Governor to fill judicial vacancies by appointment. Judges so appointed serve only for a limited time. *Id.* When that term expires, the Constitution requires that they face a political election. PA. CONST. Art. V, § 13(a). It is noteworthy that of Governor Thornburgh's five merit nominees who ran for full terms in the 1981 Superior and Commonwealth Courts elections, only two survived. In early 1980, the writer was appointed by Governor Thornburgh, through a merit selection process, to fill a vacancy on the Pennsylvania Supreme Court for an unexpired term of approximately two years and was unanimously confirmed by the Senate. In early 1981, the writer declared his personal view that, as a matter of principle, it would be ethically inconsistent for a sitting member of the state's highest court to be a partisan political candidate. Accordingly, he stated that he would run for a full term only if endorsed by both major political parties. When his conditions were

an amendment to the Pennsylvania Constitution which abolishes partisan judicial elections will secure a true merit selection procedure for Pennsylvania.⁵⁰

IV. A PROPOSAL FOR MERIT SELECTION IN PENNSYLVANIA

The Pennsylvania Constitution must be amended to eliminate the present hybrid system of gubernatorial appointment, Senate confirmation and partisan judicial elections. In its place, a gubernatorial appointment system, structured along the following lines, should be created:

1) A nine member Nominating Commission, comprised of four laymen, four lawyers and the Chief Justice of Pennsylvania (who would serve as chairman), would submit at least three names to the Governor to fill any appellate judicial vacancy. If dissatisfied with the first list submitted, the Governor would be limited to requesting only one additional list for each vacancy.⁵¹

2) From the list of nominees, the Governor would fill the vacancy within thirty days, subject to confirmation by a majority of the Pennsylvania Senate.⁵² If the

not met, the writer withdrew as a candidate. *Philadelphia Inquirer*, Mar. 1, 1981, at B1, col. 1.

50. The Pennsylvania Constitutional Convention of 1967-68 proposed such an amendment but it was defeated in the elections of 1969. *See* PA. CONST. art. V, § 13(d); COMMONWEALTH OF PA., PROPOSALS FOR REVISION OF THE CONSTITUTION OF PENNSYLVANIA ADOPTED BY THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-68, Proposal 7, § 14 at 32 (1967-68).

51. To allow the Governor endlessly to reject lists would effectively nullify the purpose of the Nominating Commission.

52. Presidential nomination followed by majority Senate confirmation is the procedure followed for federal judicial appointments. *See* U.S. CONST., art. II, § 2.

Under the present Pennsylvania Constitution, the Governor is empowered to fill judicial vacancies temporarily by appointment, with the advice and consent of two-thirds of the Senate. PA. CONST., art. V, § 13(b). The merit selection system proposed by the Constitutional Convention of 1967-68 would have eliminated Senate confirmation. *See* PA. CONST., art. V, § 13(d); COMMONWEALTH OF PA., PROPOSALS FOR REVISION OF THE CONSTITUTION OF PENNSYLVANIA ADOPTED BY THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-68, Proposal 7, § 13 at 31 (1967-68). Retention of Senate confirmation, however, would allow the qualifications of judicial candidates to be scrutinized in a public forum and would undercut the argument that to allow a nominating commission to select a pool of judicial appointees would be elitist and would take the power of judicial selection away from the people altogether and vest it in a small handful of persons allegedly unaccountable to the public. Confirmation by a majority, rather than by two-thirds, of the Senate is recommended because the greater number would be more likely to lead to political machinations unrelated to the qualifications of the nominee.

Governor should fail to do so, the Chief Justice would be empowered to select an appointee from the list.

3) Judges would hold office, as in the federal system, during good behavior.⁵³

4) The present system of retention elections after completion of the first term, which has compelled judges to raise campaign funds and engage in other unseemly electioneering activity, would be abolished. Retention elections originally were designed as a means of securing some balance between judicial independence and judicial accountability. However, the evidence strongly suggests that they have become an empty formality.⁵⁴ As one study has noted, "judicial defeats [in retention elections] have been so few as to amount to statistical rarities."⁵⁵ In the seven states which held retention elections in 1972, only four out of 308 judges were rejected, and in the thirteen states holding retention elections in 1976, 350 out of the 353 judges involved were approved, often by a lopsided majority.⁵⁶ In the State of Missouri, only one judge has failed to win a retention election in nearly forty years.⁵⁷

5) The four lay-members of the Commission would be appointed by the Governor and must reflect a truly representative cross-section of the Commonwealth's population.⁵⁸

53. See U.S. CONST. art. III, § 1.

54. At the same time, retention elections have a tendency to dilute judicial independence. Concern about controversial decisions mounts during the last years of a judge's term and, in practice, retention elections have encouraged judges to renew their political affiliations, vigorously participate in fund-raising, attend partisan political gatherings and otherwise mend their political fences in a fashion antithetical to judicial dignity and independence.

55. Griffin & Horan, *Merit Retention Election: What Influences the Voters?* 63 JUDICATURE 78, 79 (1979).

56. *Id.*

57. *Id.* The Griffin and Horan study shows that nonretention is most likely to take place in the case of trial judges. Four hundred and eighty-six judges ran in retention elections in 1978, only thirteen of whom were turned out of office. Twelve of the thirteen judges not retained held posts below the level of an appellate judgeship. *Id.* at 80.

The 1968 Amendments to the Pennsylvania Constitution provided for a system of retention elections in Pennsylvania. See PA. CONST. art. V § 15(b). In the intervening years, only four judges have failed to win retention. See 4 PA. LAW. 29 (Jan. 15, 1982).

58. See R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN 44-45* (1969).

6) Three of the four lawyer members of the Commission would be appointed by the Pennsylvania Supreme Court and the remaining member by the Governor.⁵⁹

7) The membership of the Judicial Nominating Commission would be bipartisan. No more than two of the four lay members nor more than two of the four lawyer members would be members of the same political party.⁶⁰

8) The guidelines for the Nominating Commission would explicitly prohibit the members from considering a candidate's political affiliation in making their recommendations.

9) Members of the Commission would be appointed for three-year staggered terms. In this fashion, no one Governor would be able to dominate the operations of the Commission by his appointments.

10) The Commission would be empowered to actively solicit and recruit potential nominees.⁶¹

11) A strong and effective judicial inquiry and review board with the authority to impose discipline, including removal from office, should be created to eliminate those

59. Selection of the four attorney members of the commission raises some difficult issues. For example, if selected by the organized bar, i.e., by the Pennsylvania Bar Association, there would be the danger that the Commission would be perceived as simply substituting "bar politics" for the traditional politics of a judicial election. See Sheldon, *Searching for Judges in Oregon: Where Would the Bar Look for Help*, 61 JUDICATURE 376 (1978) (suggesting that the outcome of a judicial nominating commission's search will vary depending upon whether the lawyers selected for the commission are comprised of bar "leaders" or rank-and-file attorneys).

60. A number of observers have noted that it is impossible totally to eliminate partisan political issues from the judicial selection process. However, the evidence shows that political influences are substantially diminished in states where it is explicitly required that commission membership be bipartisan. See, e.g., Alfini, *Partisan Pressures on the Nonpartisan Plan*, 58 JUDICATURE 216 (1974). The Alfini study finds that nearly 70% of the judicial nominating commissioners from Colorado (where no more than one-half plus one of the Commissioners may be members of the same political party) who responded to his survey indicated that political influences or considerations were never introduced into the commission's deliberations, whereas in Florida, Iowa and Maryland (three states in which there is no provision requiring bipartisan commission membership), the respective figures were 51%, 54% and 39%.

61. For a detailed analysis of the operating practices and procedures of the existing judicial nomination commissions, see A. ASHMAN & J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* (1974).

judges, if any, who fail to live up to the mandate of their judicial office.⁶²

V. CONCLUSION

Only a constitutional amendment such as that proposed here will bring Pennsylvania out of the judicial dark ages and restore public respect for the integrity and independence of our judges. There is no perfect method of selection, but virtually any appointive system would be a dramatic improvement over the "Russian roulette" system of partisan political elections routinely conducted in an atmosphere of voter apathy and ignorance. Under my proposed plan, the responsibility for any inadequate judicial appointment would be placed directly upon the Governor. His record could be carefully monitored by the press, the Bar Association, and any other organizations competent to comment on the quality of judicial administration. In recognition of the fact that judicial appointments will cast a lasting reflection upon an administration, most Governors will carefully select members of the Nominating Commission and responsibly appoint the best of those candidates submitted by the Commission. Senate confirmation, of course, would provide additional opportunity for public scrutiny of the process and public accountability for those selected through the process. While politics can never be totally eliminated as a factor in judicial selection, it no longer would be the sole or primary factor.

The system proposed here would avoid the legitimate criticism levelled at some merit selection plans. It would not be elitist in any respect, the Nominating Commission would be representative and bipartisan, and Senate confirmation would insure meaningful participation in the selection process by public officials who are directly answerable to the electorate.

Most importantly, replacement of partisan elections with merit lifetime appointments would dramatically contribute to the judicial independence vital to the survival of our democracy and vastly expand the pool of exceptionally well qualified lawyers who would be willing to make the personal sacrifices necessary to serve as members of the judiciary.

62. The Judicial Inquiry and Review Board created by the 1967-68 Constitutional Convention has the power only to *recommend* discipline to the Pennsylvania Supreme Court. PA. CONST. art. V, § 18(g).

The present system, which has become nothing more than an irrational lottery,⁶³ literally cries out for reform. Whatever drawbacks may inhere in the plan proposed here, it is infinitely superior to judicial selection largely on the basis of ballot position, name popularity, geographical base and political label. The public is ready for a change. The time has come for the responsible leadership of this Commonwealth to act.

63. As recently as May 1982, the endorsed Republican candidate for Supreme Court justice, an experienced and well-respected appellate judge who was rated "exceptionally well-qualified" by the Pennsylvania Bar Association, lost the Republican nomination to a Democrat who had crossfiled in the Republican primary. The victor, who failed to win the Democratic primary, had drawn the number one position on the Republican ballot and had a name reminiscent of a former Pennsylvania governor. *See* 4 PA. LAW. 12 (June 15, 1982).