

COMMENTS OF PENNSYLVANIANS FOR MODERN COURTS IN SUPPORT OF HB 111

Introduction

With the vote on HB 111 fast approaching, Pennsylvanians for Modern Courts (PMC) is grateful to have this opportunity to address the value to our Commonwealth of a judicial appointment/merit selection system over money-fueled partisan elections. We will also respond to the few objections that have been raised to this system of judicial selection.

Why give Pennsylvania's voters the right to choose appointing appellate judges and justices over electing them in low information, PAC-influenced races?

1. Merit, Not Money

In Pennsylvania even the most qualified judicial candidates for statewide appellate judgeships are dependent on campaign contributions from individuals and special interest groups with business before the courts. This dependency creates an appearance of impropriety that ultimately undermines public

confidence in Pennsylvania's courts and potentially threatens judicial independence.

As of 2001, ninety percent of voters nationwide believed that special interest groups attempt to shape policy by contributing to judicial campaigns.ⁱ Eighty percent of judges reported having the same concerns.ⁱⁱ As one Texas judge memorably said, calling judicial electoral systems "'imperfect' is a G-rated description," and noted that he and every member of his court "aggressively" favors replacing them.ⁱⁱⁱ Recognizing that judicial elections would also eliminate the need for aspiring judges to fundraise, PMC has been a longtime supporter of merit selection reform.

As recently as November 7, 2017, Pennsylvanians voted to retain two sitting Supreme Court Justices and elected one for a ten-year term, all of whom were required to raise some amount of money in order to be competitive candidates. One of the candidates for the open seat on the bench raised significant dollars from an interest group that were used to fuel a last-minute television ad blitz against the candidate's opponent that some people viewed as unfairly slanted.

The 2017 election, not unlike others in the past, also resulted in candidates who were deemed “unqualified” for the bench by the Commonwealth’s bar associations defeating candidates who were deemed “highly qualified.”

According to the Brennan Center for Justice, a nonpartisan nonprofit that tracks court issues, Pennsylvania’s 2015 Supreme Court election “cost” nearly \$16 million dollars, including \$12 million in television spending—a form of advertising that often disseminates negative or inflammatory information about judicial candidates and their past decisions.^{iv} Moreover, voters usually had no idea who was paying for this advertising. The Center found that only 3% of the organizations that funded television spending in the race did so transparently—the identities of most donors were undisclosed.^v

While these most recent Pennsylvania Supreme Court elections have placed in stark relief the major issues raised by judicial elections—extreme campaign fundraising, perceptions of decreased judicial independence, reduced governmental transparency and negative “attack ads” that decrease public confidence in the courts while damaging civil political discourse—such

problems are not unique to Pennsylvania. Between 2000 and 2009, judicial campaign fundraising in state elections more than doubled^{vi} and indicated a substantial relationship between campaign contributions and judicial decision-making by the judges who were the recipients of such largess.^{vii}

The huge impact that money, dark, grey, beige, whatever color you like, is having on judicial races can no longer be denied. It is beginning to fill the headlines.

Take the recent decision by State Farm to settle a federal class action suit for \$250 million alleging it manipulated a judicial race: it was alleged to have recruited, funded and directed the campaign of a candidate it wanted on the Illinois Supreme Court, a candidate who won that election and then voted to overturn an earlier \$1 billion verdict against the company.

2. The Most Highly Qualified Judicial Candidates Are Not Necessarily Those Who Excel at Fundraising and Campaigning

When you think about which attributes are most important in a highly qualified judge in our tripartite system of government, neither fundraising nor making

stump speeches springs to mind; experience, education, judicial temperament, commitment to community and independent thinking do.

Many superb lawyers and local judges never throw themselves into the judicial campaigning fray, because they do not have the personality nor the political backing to run for the bench. Is that what we want? Or do we want all highly qualified candidates to approach the bench from a level playing field? Do we want back room negotiations or for all applicants to have the opportunity to present themselves to a nominating commission charged with interviewing them and identifying the best of the bunch?

3. Campaigning is Antithetical to the Judicial Role

In addition, the Code of Judicial Conduct narrowly constrains what candidates are permitted to say during their campaigns in the hope that they will not reveal to potential funders how they will rule on any individual matter that comes before them.

In light of these limits on their public pronouncements, why would we require them to go through the campaign gauntlet to reach the bench? Why would we encourage them to raise money from precisely those

people who will appear before them following the election?

Placing judicial candidates in the same position as legislators – presenting their positions on issues and securing funding from people who support those issues -- is not only unproductive, it contravenes the standards we expect them to meet while serving us as judges.

The time has come to give Pennsylvania's voters their opportunity to decide if they want our appellate judges and justices to come from a broad pool of qualified candidates nominated by a citizen's commission or to remain at the mercy of special interests and party politics.

The objections to HB 111, while thoughtful and deeply felt, can be met and need not stand in the way of introducing merit selection in Pennsylvania.

1. *Eliminating people's right to vote for judges is not acceptable. Fortunately, HB 111 retains ample opportunities for voter participation.*

There had always been, and remain, cries that this appointive system eliminates citizens' right to vote for their judges. PMC has been particularly sensitive to this

issue and respectful of those who voice it. We have worked hard to address it, too.

There have not always been elections for our jurists. We take the current system for granted, but the history of the selection process for judges is long and complex.

What is abundantly clear to us, however, is that the system outlined in HB 111 retains the best of elective and appointive systems:

1) The voters of Pennsylvania will be the ones to decide through a ballot referendum whether we move to a merit selection system. They have the ultimate vote.

2) Voters will continue to select Magisterial District Judges and those for the Courts of Common Pleas. Unlike in statewide judicial races, many voters at least have some idea who their local judicial candidates are and can cast reasonably thoughtful votes, particularly in smaller counties.

3) When a judge is on the list of five candidates for an open position nominated by the Citizen's Commission, selected by the Governor and approved by a 2/3 majority of the Senate, that judge will run for retention after only four years on the bench. At that time, all of

us will have the information we need to evaluate thoughtfully their ability to remain on our judiciary.

And finally, we are the ones who elect the Governor and Senators. If we are not happy with the ways in which they play their roles in this process, we have the votes to change the situation. Clearly, voters are not being ignored.

2. Merit appointments should be made on a statewide basis only. Creating three regions for the sole purpose of ensuring that highly qualified candidates outside of Pittsburgh and Philadelphia have some chances to serve on our courts does not undermine the essential features of the appointment system and maintains its most important.

For the past 30 years, PMC has remained committed to bringing a judicial appointment system to Pennsylvania. The many scandals that have rocked our courts over these three decades have only served to deepen that commitment.

For most of those 30 years, we have taken the position that justices for the Supreme Court and judges for the Superior and Commonwealth Courts should be selected

on a statewide basis without the creation of any judicial districts from which they would be chosen. A statewide selection process is the purist form of merit selection, and in a perfect world would be the process of choice.

For better or worse, we do not live in a perfect world, and those of you who toil in the legislature understand that fact better than most others. The world we live in is one in which perception is reality. And the perception of many legislators from the middle of our state is that lawyers/judges from the Pittsburgh and Philadelphia regions have advantages over lawyers/judges from mid-state, advantages that make it harder for people not from those regions to become appellate judges, regardless of their merit.

It will not be easy to dispel this perception. And so you must ask yourself this critical question when deciding whether to support HB 111: “Is it better to supplant partisan judicial elections with a merit appointment system that allows for *highly qualified* candidates from the eastern, middle and western parts of our Commonwealth to serve on our judiciary, or to retain the current system with its gross distortions that undermine everyone’s confidence and belief in the rule of law and its application by our courts?” PMC hopes

that you see the wisdom in shifting the paradigm and returning our state judiciary to its rightful place in our tripartite form of government.