



PENNSYLVANIANS
FOR MODERN COURTS

Civic Education & Engagement ♦ Equal Access to Justice ♦ Judicial Modernization & Reform

Merit Selection Myths and Realities

Judicial selection is a complex issue. In discussing judicial selection reform, it is important to keep arguments grounded in facts about merit selection and state judicial elections. Through the years, certain “myths” have been bandied about by some opponents of merit selection. Outlined below are some of those myths and the facts that demonstrate their falsity.

MYTH: Judges should be elected just like other public officials.

REALITY: Judges are different from all other elected public officials.

Judges serve the public, but they do not represent the public, nor do they represent special constituencies. Judges are sworn to uphold the law – they apply the law to the facts, regardless of popular opinion, political pressure, or personal belief. This is decidedly different from legislators and executive branch officials who advance the interests of their constituents and are elected based on their ability to do so.

MYTH: The problem of financial contributions to judicial campaigns can be solved by campaign finance reform or altering judicial recusal standards.

REALITY: Limiting contributions or reforming recusal practices will not guarantee the appearance of neutrality in courtrooms.

Typically, [the most active donors in judicial campaigns](#) are lawyers, law firms and organizations that frequently litigate in the state courts. Although judges are not supposed to take into account whether a party or lawyer contributed to his or her campaign, judges are not required to recuse or disqualify themselves from cases in which campaign contributors are lawyers or parties.

As a result, during litigation, it is often the case that one party or counsel for one party has contributed to the campaign of the judge. This situation could create the appearance of bias and undermine public confidence in the judge and the judiciary as a whole, regardless of how much the campaign contribution was. After all, [76% of respondents in an American Judicature Society survey](#) believed that campaign contributions influence judicial decision-making

More stringent recusal requirements for judges would also not be a workable policy—the American Judicature Society found that 60% of those who appear in Pennsylvania’s Supreme Court have made contributions to one or more judicial candidates. If judges were required to recuse for all of these cases, it would create a shortage of qualified judicial officers.

MYTH: Merit selection in Pennsylvania would mirror how federal judges are chosen.

REALITY: Merit selection is different from the federal system for appointing judges in 2 important ways.

1. How judges are nominated

- In the federal system, the President nominates anyone of his/her choosing. In a merit selection system, the Governor nominates only from the nominating commission's list of recommended candidates.
- While a President could potentially only select nominees belonging to his/her party, the bipartisan composition of the nominating commission helps assure that both parties are represented in the list of nominees.

2. Term length and retention

- Federal judges serve for life. In a merit selection system, judges serve for an initial term of several years.
- While federal judges are not subject to any type of periodic retention review, judges in the merit selection system must win retention elections in order to keep their places on the bench.

MYTH: Merit selection will result in the appointment of only big firm lawyers from major metropolitan areas to the appellate bench.

REALITY: Merit selection will actually open up the judicial selection process to qualified lawyers from all over the Commonwealth and from many different sectors of the legal community.

American Judicature Society statistics confirm that in merit selection states, judges come from all different types of legal practice. Moreover, once partisan elections are eliminated, there would be no advantage to hailing from a large city (where the most voters are located and the money is concentrated). Thus lawyers from small cities, towns and rural areas would have as much chance to be considered and selected as big city lawyers.

MYTH: Merit selection means that the people will never have a say in who sits on the appellate bench.

REALITY: In a merit selection system, citizens will still be involved in the selection of appellate judges.

Public input is present in a merit selection system *in every phase of the process:*

1. Adoption of a merit selection system

- Merit selection can only be implemented once a majority of Pennsylvania's citizens have approved the change through a referendum.
- [93% of Pennsylvanians](#) want the opportunity to vote on how judges are selected.

2. Approval of nominating commission members

- Members of the nominating commission must be appointed by publicly elected officials.
- When electing a Governor or state legislator, citizens are indirectly influencing who will serve on the nominating commission.

3. Input on nominees

- Once the nominating commission sends its list of highly qualified candidates to the Governor, members of the public can communicate with the Governor directly about the candidates on the list.
- After the Governor has submitted a nominee to the Senate for confirmation, citizens can communicate with the Senate as it considers the nominee.

4. Voting in retention elections

- Through periodic yes/no retention elections, the public directly decides whether a judge who reaches the bench through merit selection should continue to serve.

MYTH: Merit selection is just as political as a partisan election system.

REALITY: Merit selection systems reduce the influence of partisan politics on judicial selection.

No judicial selection process is entirely apolitical. What's important is to what extent politics dictates who ultimately sits on the appellate bench. The current election process is *totally* dependent on partisan politics, with no official focus on candidate qualifications.

The American Bar Association Coalition for Justice highlighted the benefits of a merit selection system in [a 2008 report](#):

“While there is no system that can completely eliminate political influence, merit selection significantly diminishes such influence. Even when politics does enter into the process, the effect is tempered by the initial bipartisan screening process. The fact that the appointment can be made only from among a carefully selected few limits the opportunity for political cronyism. The ultimate appointment, usually by the governor, is constrained by the role of the broader-based commission. In addition, the governor is also subject to voter and media scrutiny.”

MYTH: The partisan election system should be improved rather than discarded.

REALITY: The election process is not "fixable."

None of the most commonly proposed election reforms -- public financing, rotating ballot position, eliminating county designation from the ballot, capping lawyers' contributions to judicial campaigns-- solves the core problems associated with electing judges. Judicial candidates still would have to raise money and attract substantial political support, and voters still would not have enough valuable, relevant information to make truly informed decisions.

MYTH: A legislator's vote for merit selection of appellate judges in the General Assembly is the same as a vote for eliminating partisan elections.

REALITY: A legislator's vote for merit selection is the first step in a lengthy process that ultimately allows the people of Pennsylvania to vote on a constitutional amendment to change the judicial selection system.

Changing the judicial selection system requires a constitutional amendment approved by both the Senate and House in two consecutive sessions. The issue is then put to the voters in a statewide referendum. Therefore, a lawmaker casting a vote in favor of a merit selection proposal does nothing more than create the opportunity for citizens to decide for themselves how appellate judges should be

chosen.

MYTH: Voters are informed about and involved in judicial elections.

REALITY: Judicial elections are the least understood, least covered by the media and least visible of all elections.

Most voters feel unprepared to make critical decisions about who is qualified to be a judge. Voters report that they are uninformed about the candidates and have difficulty finding information upon which to base their decisions in the voting booth. Although PMC and other organizations work to fill this information gap, this is further evidence that elections are not designed to get the most qualified individuals on the bench.