

2007

## A VIEW FROM THE GROUND: A REFORM GROUP'S PERSPECTIVE ON THE ONGOING EFFORT TO ACHIEVE MERIT SELECTION OF JUDGES

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### Recommended Citation

Shira J. Goodman and Lynn A. Marks, *A VIEW FROM THE GROUND: A REFORM GROUP'S PERSPECTIVE ON THE ONGOING EFFORT TO ACHIEVE MERIT SELECTION OF JUDGES*, 34 *Fordham Urb. L.J.* 425 (2007).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol34/iss1/7>

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## **Cover Page Footnote**

\* Shira J. Goodman and Lynn A. Marks are the Associate Director and Executive Director, respectively, of Pennsylvanians for Modern Courts, a nonprofit, nonpartisan court reform organization in Pennsylvania. The authors wish to thank Caitlin Goodrich, J.D. Temple University 2008, for her assistance in the research and preparation of this essay.

## A VIEW FROM THE GROUND: A REFORM GROUP'S PERSPECTIVE ON THE ONGOING EFFORT TO ACHIEVE MERIT SELECTION OF JUDGES

*Shira J. Goodman and Lynn A. Marks\**

### INTRODUCTION

“[J]udicial reform is no sport for the short-winded,”<sup>1</sup> has always been a catch phrase used to demonstrate that those seeking judicial election reform must be patient and must persevere. This description captures not only the lengthy constitutional amendment process required to institute judicial selection reform, but also the challenges that arise during the course of efforts to reform a fundamental governmental structure.

This Essay explores some of these challenges as well as some of the solutions the nonprofit, court reform organization Pennsylvanians for Modern Courts (“PMC”) has developed to meet them. The composition and appointment of members to the nominating commission responsible for screening, evaluating, and recommending candidates for nomination to judicial office presents the most challenging area. This Essay, therefore, focuses mostly on this area, although it also identifies challenges arising in relation to other areas of a merit selection system.<sup>2</sup> It describes what has succeeded

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1. Arthur T. Vanderbilt, *Introduction* to MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xvii, xix (Arthur T. Vanderbilt ed., 1949). The phrase is attributed to New Jersey Chief Justice Arthur Vanderbilt, a noted early twentieth century state judicial reformer. *Id.*

2. The authors are aware that the organizer of this Symposium did not want the term “merit selection” to be used, given the longstanding debate over how to identify the preferred form of judicial selection. Another term that frequently has been used as an alternative to merit selection is “appointive selection system.” Both terms capture aspects of the commission-based nominating system herein, but neither fully identifies the essence of the proposal. In addition, both terms convey particular meanings to various audiences: while many people are heartened by the inclusion of the word “merit,” others believe it has elitist, exclusionary connotations. See John M. Morganelli, Op-Ed., *The Myth of ‘Merit Selection,’* PHILA. DAILY NEWS, Jan. 27, 2006, at 15. Similarly, while the term “appointive” describes a departure from an elective system, some believe it connotes a system like the federal system, which does not

and what has not, in an effort to share some of the lessons PMC has learned with others who seek judicial selection reform.

Section I of this Essay addresses briefly the history of judicial selection in Pennsylvania. Section II describes the judicial selection reform movement and the background and growth of PMC, the leading agent for judicial selection reform in Pennsylvania. Section III describes the merit selection system that PMC has been trying to achieve for Pennsylvania's appellate courts and, more recently, for the trial courts in Philadelphia County. Sections IV and V enumerate the challenges PMC has faced along the way, as well as the measures it has taken to meet those challenges. The Essay concludes with some advice for others seeking to achieve judicial selection reform in their own jurisdictions.

### I. THE HISTORY OF JUDICIAL SELECTION IN PENNSYLVANIA

The Pennsylvania Constitution provides for the method of judicial selection in article V, section 13 of the state constitution: "Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve."<sup>3</sup> Two consecutive sessions of the Senate and the House must pass any proposed

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include a constitutionally mandated bipartisan nominating commission or a provision for popular retention elections. BELDEN, RUSSONELLO & STEWART, MAKING THE CASE FOR MERIT SELECTION: PENNSYLVANIANS DISCUSS THE JUDICIARY 4-6 (2001) [hereinafter BELDEN, RUSSONELLO & STEWART, MAKING THE CASE] (on file with authors).

The authors chose to use the term "merit selection system," both in this Essay and in ongoing work for judicial selection reform in Pennsylvania, because it has been part of the lexicon of the debate in Pennsylvania for years and is a term well-known to the various parties who will play a role in transforming the selection process for appellate judges. In addition, recent focus groups confirm that the term "merit selection" is more appealing to voters than "appointive selection." In a 2001 survey conducted on behalf of PMC, one participant summed up the mood of the focus group when she said that the term "[m]erit is key. When you think of merit, you think of 'wow.' You think of all through school, if you get a merit scholarship or something." *Id.* at 15. In the same series of focus groups, the term "appointment" conjured images of backroom deals and cronyism. *Id.* at 5. Yet another participant felt that "gubernatorial appointment" sounded too much "like it's picking his friend." *Id.* at 13. In a similar focus group conducted on behalf of PMC in 2006, participants reacted positively to the term merit selection, stating that "[i]t carries this notion that there is going to be some sort of vetting of the candidates. There is some reason why they are being selected based on their merits, rather than just a judicial selection." BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS CONSIDER MERIT SELECTION FOR JUDGES 26 (2006) [hereinafter BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS] (on file with authors).

3. PA. CONST. art. V, § 13(a).

constitutional amendment to change the manner of judicial selection; each session lasts two years, and the identical amendment must pass each time by a majority vote.<sup>4</sup> Following each passage by the legislature, notice of the proposed amendment must be published across the state.<sup>5</sup> Once this has occurred, the electorate must approve the amendment in a statewide referendum vote.<sup>6</sup>

After considerable debate, Pennsylvania's first state constitution in 1776 provided for a judiciary with seven-year terms—subject to removal by the General Assembly for “misbehavior” or “maladministration”—appointed by a twelve-member Executive Council, whose members were elected by voters of the state's twelve counties.<sup>7</sup> In the Constitution of 1790, most notable for creating the position of Governor to replace the Executive Council, the new chief executive was given the power to appoint judges who were to serve “during good behavior.”<sup>8</sup>

The judicial appointive system came under attack during the administration of President Andrew Jackson (1829-1837), amid the growing sentiment that all governmental office holders should be accountable to the voters and, therefore, elected.<sup>9</sup> During Pennsylvania's 1837 Constitutional Convention, efforts to move towards an elected judiciary were unsuccessful.<sup>10</sup> Nevertheless, the 1838 Constitution approved by the voters reduced the tenure of supreme court justices from life to fifteen years.<sup>11</sup>

The critics of judicial appointments were not deterred and brought their demands for election to the chambers of the state

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4. *Id.* art. XI, § 1.

5. *Id.*

6. *Id.*

7. *Id.* §§ 19, 20, 22, 23 (1776). The 1776 Constitution also provided for Courts of Common Pleas and some minor courts in each county, joining the state Supreme Court and the Courts of Common Pleas in Philadelphia, Bucks, and Chester counties created in the Judiciary Act of 1722. *See id.* §§ 24, 26. The intermediate appellate courts did not come into existence until some time later: in 1895 the General Assembly established the Superior Court as authorized by the Constitution of 1874, and the constitution established the Commonwealth Court in 1968. *See* PA. CONST. art. V, § 1 (1874); PA. CONST. art. V, § 4 (1968).

8. PA. CONST. art. V, § 2 (1790); *see* 1 PROCEEDINGS & DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION 148 (John Agg ed., 1837) [hereinafter PROCEEDINGS & DEBATES].

9. *See* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 96, 98-99 (1944).

10. *See generally* 1 JOURNAL OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION (Thompson & Clark 1837).

11. *See* PA. CONST. art V, § 2 (1838); *see also* 4 PROCEEDINGS & DEBATES, *supra* note 8, at 307.

Senate and House. In 1850, the voters adopted, after passage by the legislature, a constitutional amendment for the popular, partisan election of all judges (including all sitting judges), with vacancies to be filled by gubernatorial appointment until the next scheduled election.<sup>12</sup>

This victory proved short lived; proponents of partisan elections soon found themselves defending their newly won system. At the 1872-1873 Constitutional Convention, the “election versus appointment” debate reignited with charges that now the political parties, instead of the governor, had a stranglehold over who reached the bench.<sup>13</sup> The resulting compromise increased the initial tenure of supreme court justices from fifteen to twenty-one years, but with no eligibility to serve a second term; voters subsequently approved the amendment.<sup>14</sup> Judicial vacancies henceforth required gubernatorial appointment and two-thirds Senate confirmation.<sup>15</sup>

Aside from a brief but unsuccessful experiment with nonpartisan elections,<sup>16</sup> talk of changing the judicial selection system largely subsided for decades. The middle of the twentieth century brought only periodic spurts of interest—most notably, endorsements of plans for the appointment of appellate judges by the Pennsylvania Bar Association in 1947,<sup>17</sup> the League of Women Voters in 1956,<sup>18</sup> and by two commissions studying revisions to the Pennsylvania Constitution in 1959<sup>19</sup> and 1963.<sup>20</sup>

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12. See 1851 Pa. Laws 758 (amending the Pennsylvania Constitution); see also COMMITTEE OF SEVENTY, JUDICIAL SELECTION GOVERNANCE STUDY 14 (1983), available at <http://www.seventy.org/reform/judicial/JUDICIAL.pdf> [hereinafter COMMITTEE OF SEVENTY, GOVERNANCE STUDY] (citing 1 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 127, 142, 217, 233 (1848)).

13. 3 PROCEEDINGS & DEBATES, *supra* note 8, at 746-47.

14. See COMMITTEE OF SEVENTY, GOVERNANCE STUDY, *supra* note 12, at 16-17 (citing 1 JOURNAL OF THE CONSTITUTIONAL CONVENTION 1872-1873, at 509 (1873)).

15. *Id.*; see also PA. CONST. art. V, § 13(b).

16. Legislation passed in 1913 provided for justices of the Pennsylvania Supreme Court and judges of the Superior Court to be listed on the ballot without reference to party affiliation. See Act of July 24, 1913, No. 457, 1913 Pa. Laws 1001. Continued political party involvement made farcical the legislature’s effort to inject “non-partisanship” into judicial elections, and the legislation was repealed in 1921. See Act of May 10, 1921, No. 198, 1921 Pa. Laws 423; Act of May 10, 1921, No. 199, 1921 Pa. Laws 426.

17. See Charles E. Kenworthy, *The Pennsylvania Plan to Divorce Judges From Politics*, 25 TEMP. L.Q. 410, 418-19 (1952).

18. See Langdon W. Harris, Jr., *The Pennsylvania Plan*, 62 DICK. L. REV. 217, 225-26 (1958).

19. See COMMITTEE OF SEVENTY, GOVERNANCE STUDY, *supra* note 12, at 19 (citing ROBERT W. WOODSIDE, REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 29 (1959)).

Then, during the 1967-1968 Constitutional Convention, the judicial selection debate erupted with renewed vigor on both sides. The result was to present the 1968 primary election voters with a new judicial article that retained partisan elections of judges, but with two key additions: one establishing retention elections for sitting judges seeking to continue in office after initial ten-year terms,<sup>21</sup> and the other allowing voters to vote separately on the issue of appointive selection of appellate judges during the 1969 primary election.<sup>22</sup>

The article passed and, the following spring, Pennsylvania voters were asked to decide whether or not they wanted statewide judges to be elected or appointed. The vote was extremely close, but the appointive system was ultimately voted down in favor of maintaining the status quo.<sup>23</sup>

## II. JUDICIAL SELECTION REFORM IN PENNSYLVANIA

The 1969 vote was an enormous disappointment for those hoping to end almost 120 years of partisan judicial elections. Proposed constitutional amendments for the appointment of appellate judges continued to be introduced in the General Assembly, but languished without legislative action.<sup>24</sup>

In 1988, the Pennsylvania Judicial Reform Commission was formed. Known as the Beck Commission, this blue-ribbon panel of civic leaders, public officials, legal professionals, and members of the judiciary was commissioned by Governor Casey and chaired by then-Superior Court Judge Phyllis W. Beck. The Beck Commission issued a report finding an appallingly low level of confidence

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20. *Id.* (citing REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION WITH RECOMMENDATIONS TO BE INTRODUCED INTO THE GENERAL ASSEMBLY 33-36 (1964)).

21. See 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-1968: SUPPLEMENTAL INFORMATION RELATING TO THE CONVENTION AND JOURNALS OF THE CONVENTION 94-97, 122-25, 149-51, 172-75, 226-27, 232 (Hon. Raymond J. Broderick & John W. Ingram eds., 1969).

22. See 2 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-1968, *supra* note 21, at 980.

23. See E.J. Hussie, *Suburban Returns are Favorable: Court Plan Killed in Pennsylvania*, PHILA. INQUIRER, May 22, 1969, at 5; Joseph H. Miller, *Party Regulars Oppose Referendum Proposal for Merit Selection of State Judges*, PHILA. INQUIRER, May 2, 1969, at 13.

24. See S.J. Res. 3, 180th Gen. Assem., Reg. Sess. (Pa. 1995) (suggesting, among other things, a Judicial Nominating Commission to replace the Judicial Qualifications Commission); see generally ELLEN M. KAPLAN, BLUEPRINT FOR THE FUTURE OF JUDICIAL SELECTION REFORM II, § B (July 1999), <http://www.pmconline.org/blue/index.htm>.

in Pennsylvania's judiciary, in large part due to the system of electing judges, including the fundraising that went along with it.<sup>25</sup> The report presented "a sensible and achievable blueprint for meaningful judicial reform."<sup>26</sup> The Beck Commission's recommendations included a "mixed" system of judicial selection—retaining partisan elections for local trial courts, except where county voters specifically opted for an appointive system, and implementing an appointive method of selecting appellate judges.<sup>27</sup>

The Beck Commission's report marked the beginning of a decade of unprecedented and intensive focus on the judicial system. Two scandals in particular received unrelenting media attention. The first occurred in the late 1980s, when numerous judges on the Philadelphia Court of Common Pleas and Municipal Court were found to have accepted cash from leaders of a local union.<sup>28</sup> Two of those judges received federal prison sentences and thirteen others who were implicated in the scandal either resigned or were removed from office.<sup>29</sup> The second scandal erupted in 1994, when, for the first time in the state's history, a justice of the supreme court was impeached by the House, convicted in the state Senate, and permanently removed from office.<sup>30</sup>

In the midst of all this, those motivated to achieve meaningful judicial selection reform created PMC, with a particular focus on reforming the selection of appellate judges. The founders of PMC believed that real reform required a new statewide organization, separate from established bar associations and independent of government-appointed commissions. Since that time, PMC has worked to achieve a merit selection system for Pennsylvania's ap-

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25. See generally PHYLLIS W. BECK, REPORT OF THE GOVERNOR'S JUDICIAL REFORM COMMISSION (1988).

26. *Id.* at 22.

27. *Id.* at 37-44.

28. See, e.g., Emilie Loundsberry, *Legacy of a Judicial Scandal*, PHILA. INQUIRER, Sept. 16, 1990, at 1-F.

29. *Id.*

30. In November 1993, former Pennsylvania Supreme Court Justice Rolf Larsen was found by an investigating grand jury to have maintained a list of lawyer friends/campaign supporters whose petitions to the high Court for allowance of appeal were to receive—and did receive—special treatment. Justice Larsen was convicted in April 1994 of criminal conspiracy for using state employees to purchase prescription drugs on his behalf and, six months later, was convicted by the state Senate on an impeachment charge involving an improper discussion with a lawyer about two pending petitions before the Pennsylvania Supreme Court. See H.R. Res. 324, 178th Gen. Assem. (Pa. 1994) (impeaching Larsen); S. Res. 163, 178th Gen. Assem. (Pa. 1994) (finding Larsen guilty of all charges and removing him from office); *In re* Investigating Grand Jury Report No. 1, No. 110 M. D. 1993 (C.P. Dauph. Oct. 22, 1993).



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pellate courts and, more recently, for the trial courts in Philadelphia.

### III. THE GOAL: WHAT MERIT SELECTION SHOULD LOOK LIKE IN PENNSYLVANIA

PMC generally does not operate in the realm of the ideal; instead, PMC tends to work more in the realm of what is possible and practical. This requires an understanding of the political and cultural realities informing reactions of various audiences to proposals for judicial selection reform. Pennsylvania is a large state and is geographically, racially, and ethnically diverse. Sharp political divisions exist between the eastern and western parts of the state, with cultural and political clashes between the two major cities (Philadelphia and Pittsburgh) and the large rural area in between. As political events and elections during the past year have demonstrated, it is difficult to predict what Pennsylvania legislators and what Pennsylvania voters are thinking or what they might do.<sup>31</sup> This makes reform work all the more difficult. That being said,

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31. See Charles Thompson & Jan Murphy, *It's Payback: Anger Over Raise Ousts Senate Leaders Brightbill, Jubelirer*, PATRIOT-NEWS, May 17, 2006, at A1. For a discussion of the unpredictability of the legislature's thinking and the public's reaction as demonstrated by the events since July of 2005, see Shira J. Goodman & Lynn A. Marks, *Lessons from an Unusual Retention Election*, 43 CT. REV. 6 (2006). In the middle of the night, just before the state legislature left Harrisburg for its summer recess, the legislators voted for a pay raise for judges, members of the executive branch, and the legislators themselves. *Id.* at 8. There was heavy criticism of the manner in which the pay raise was enacted, as well as of particular elements within the legislation which enabled legislators to take their pay raises immediately, instead of observing the constitutional prohibition on midterm pay increases. *Id.* at 9. In addition, many in the press and the public were dismayed by the involvement of the Chief Justice of Pennsylvania, Ralph Cappy, in the design of the new structure tying Pennsylvania's governmental officials' salaries to those of their counterparts in the federal government. *Id.* at 8.

The public distrust of and anger towards governmental officials was also demonstrated in the fall 2005 judicial retention elections; the only two statewide officials on the ballot were Supreme Court Justices Russell Nigro and Sandra Schultz Newman. *Id.* at 6-7. Both justices were targeted and bitter campaigns were waged against them. *Id.* at 10. For the first time since Pennsylvania judges began standing for retention in 1969, an appellate judge failed to win retention: Justice Nigro was not retained for another term. *Id.* at 11. Justice Newman retained her seat by a bare majority, a record low of fifty-four percent. *Id.* Public anger had not abated by the spring of 2006, and in the May primaries seventeen legislators failed to win their parties' nomination, including the Senate President Pro Tempore and the Senate majority leader. See Eric Kelderman, *Primaries Feed Incumbents' Jitters*, STATELINE, May 19, 2006, available at <http://stateline.org> (follow "Archives" hyperlink; then follow "Stories from 2006"). In addition, an unprecedented number of legislators did not seek reelection in 2006. See Thompson & Murphy, *supra*, at A1.

PMC has developed a preferred merit selection model, with core components essential for meaningful judicial selection reform.

A viable merit selection system requires four components: (1) a bipartisan, diverse nominating commission that screens, evaluates, and recommends candidates for nomination to judicial office; (2) an executive officer empowered to nominate recommended, and only recommended, candidates to judicial office; (3) a legislative confirmation process; and (4) a role for the public in evaluating the judges following an initial term in office. Before those elements of the process can be addressed, however, there is the initial challenge of creating criteria that candidates for judicial office must satisfy.

### A. Qualifications for Judicial Office

Currently in Pennsylvania, the only requirements to run for election to judicial office are residency in the Commonwealth for at least one year (or, for local elections, in the county), membership in the bar of the Supreme Court, and attainment of twenty-one years of age.<sup>32</sup> A candidate for judicial office is not required to have actually practiced law at all, let alone for any minimum number of years. As such, there is no requirement that a lawyer has tried any cases in the court to which she is seeking election. Dissatisfaction with this lack of more relevant qualifications is one of the most effective factors in uniting diverse audiences in support of merit selection.<sup>33</sup>

Part of the appeal of a merit selection system is the promise of establishing meaningful requirements and minimum qualifications for candidates seeking judicial office. These would include being engaged in the practice of law for a minimum number of years.<sup>34</sup>

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32. See Pa. CONST. art. V, § 12(a); 42 PA. CONS. STAT. § 3101 (2006).

33. See BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS, *supra* note 2, at 19. In a 2006 focus group conducted on behalf of PMC, participants had the following comments about merit selection's aim to create mandatory qualifications for judicial candidates: "I liked [merit selection] because it is telling us that they are trying to get us judges that are more qualified, as a whole."; "This is not sufficient . . . that they just need to be residents and attorneys, I liked the experience, the training, the leadership, scholarship, public service."; "It just seemed to me like the merit selection would go for quality."; "Those qualifications are really too minimal. Just being a resident. Anything that can get better qualified people is a move in the right direction."; and "If right now you only have to be an attorney and a resident and have enough money to participate in the election, then yes, I think any review of somebody's past experience, like your scholarship committee and that kind of thing, is going to put people in the pool." *Id.*

34. See PENNSYLVANIANS FOR MODERN COURTS, DRAFT JOINT RESOLUTION PROPOSING INTEGRATED AMENDMENTS TO THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, CHANGING AND ADDING PROVISIONS RELATING TO THE

“Being engaged in the practice of law” would be defined broadly, so that legal academics, legislators, policy developers, and others with relevant experience could be considered: “[E]ach person whose name is submitted to the Governor shall . . . for an aggregate of ten years, have either practiced law, served as judge of a court or courts of record in this Commonwealth, served as a judge of a federal court, or have been engaged in a law-related occupation.”<sup>35</sup>

In addition, other elements would be considered in an effort to bring to the bench people who would operate fairly, without bias or partiality, and with the highest respect for the ethical constraints of the position. Candidates’ reputations for honesty, integrity, and fairness would be considered, as would candidates’ commitment to and involvement in their communities and the legal community.<sup>36</sup> Finally, the process would recognize the importance of having a judiciary made up of men and women from diverse geographical, racial, and ethnic backgrounds.<sup>37</sup>

### B. The Nominating Commission

A nominating commission should be a racially and ethnically diverse, bipartisan group of men and women, with some lawyers from different practice areas and some non-lawyers from across the state (or locality if local trial level courts are at issue). The nominating commission should include well-respected and prominent members of the legal community, but elected officials and political party leaders and officers would be prohibited from serving on the nominating commission.<sup>38</sup> Ensuring that some members of the nominating commission are regular folks—people who might end up in court as litigants, witnesses, or jurors—would be critically important.

Commissioners should possess at least a basic understanding of the structure of the Pennsylvania court system. They should under-

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SELECTION OF JUSTICES AND JUDGES § 14(f) [hereinafter PMC, DRAFT JOINT RESOLUTION] (unpublished draft on file with authors); *see also* S.J. Res. 100, 189th Gen. Assem. § 14(j) (Pa. 2005).

35. PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(f).

36. *See id.* § 14(f)(iii).

37. *See, e.g.*, S.J. Res. 100, 189th Gen. Assem. § 14(a) (Pa. 2005); *see also* PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(f)(iii) (“[The commission is asked to] consider that each appellate court should include both men and women who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of this Commonwealth.”).

38. *See, e.g.*, S.J. Res. 100, 189th Gen. Assem. § 14(e) (Pa. 2005); PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(d).

stand which courts hear what types of cases, appreciate the diversity of issues and people that judges will confront on the bench, and be committed to finding well qualified, fair, impartial judges to be part of a diverse judiciary. Some of this can be accomplished through training for all members of the commission, especially non-lawyers, about the roles of courts and judges, as well as the ethical constraints governing judicial behavior.

The power to appoint members of the nominating commission should be shared among a number of different appointing authorities, including the governor, legislative leaders of both major political parties, bar associations, law deans, and others. In PMC's view, these "others" would not be elected officials or political leaders, but rather representatives of well-recognized, well-regarded established civic groups, such as the League of Women Voters, the NAACP, and other groups that garner trust and credibility with the average person.

In the establishment of separate nominating commissions for local trial courts, commissioners should be required to reside in the locality—paying taxes or working in the locality alone would not be sufficient.<sup>39</sup> In addition, efforts should be made to have authorities who also reside in the locality make most of the appointments to the nominating commission.

### C. Nomination by Governor

Interim vacancies on the Pennsylvania courts currently are filled through a process of nomination by the governor and confirmation by the senate.<sup>40</sup> This process of nomination and confirmation would be retained for all judicial vacancies under a merit selection system, but with some significant modifications. Most importantly, unlike the current system for filling vacancies, and in contrast to the federal system of appointment of judges, the governor would not simply be able to appoint any candidate of her choosing. Instead, the governor would be required to appoint a candidate from a list of the most highly qualified recommended candidates, submitted by the nominating commission.<sup>41</sup> In addition, the governor would not be permitted to request additional lists of candidates if

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39. See S.J. Res. 100, 189th Gen. Assem. § 14(b)(1) (Pa. 2005).

40. See PA. CONST. art. V, § 13(b).

41. See S.J. Res. 100, 189th Gen. Assem. § 13(a) (Pa. 2005); PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(g).

her preferred candidate was not on the list submitted by the nominating commission.<sup>42</sup>

#### D. Senate Confirmation

As noted above, the Pennsylvania Senate currently is responsible for confirming nominations to fill vacancies on the Pennsylvania courts.<sup>43</sup> PMC's preferred merit selection system would retain this feature, but again with some important modifications. First, the senate, like the nominating commission and the governor,<sup>44</sup> would be subject to strict time frames so that judicial vacancies would be limited in duration and the unusual schedule of the Pennsylvania legislature—very few session days with long recesses in between—could not be manipulated to avoid confirming qualified candidates.<sup>45</sup> In addition, the senate, like the governor, would be barred from requesting additional lists from the commission and would not be able to achieve this by default, by simply rejecting every candidate on the list. Instead, PMC's preferred model includes an impasse-breaking mechanism that would bypass the governor and the senate upon their repeated failure to confirm recommended candidates.<sup>46</sup>

#### E. Retention Elections

Since 1969, supreme court justices and judges in Pennsylvania seeking to serve beyond one term have been required to stand for retention in uncontested, nonpartisan elections.<sup>47</sup> In order to be retained, a judge must receive at least a fifty percent "yes" vote.<sup>48</sup> Until 2005, no appellate judge in Pennsylvania had lost a retention election, with most receiving seventy percent or more "yes" votes.<sup>49</sup> In 2005, however, Supreme Court Justice Russell Nigro failed to win retention, and Justice Sandra Schultz Newman barely

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42. See PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(g).

43. See PA. CONST. art. V, § 13(b).

44. See PMC, DRAFT JOINT RESOLUTION, *supra* note 34, §§ 13(a), 14(g).

45. See S.J. RES. 100, 189th Gen. Assem. § 8(b) (Pa. 2005); PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 13(a).

46. See PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 13(a) ("If the Senate rejects a total of three nominations made for a specific vacancy, the commission shall appoint any other person on the list without the consent of the Senate.").

47. See PA. CONST. art. V, § 15(b).

48. *Id.*

49. See Goodman & Marks, *supra* note 31, at 6. Over the years, a few judges of the common pleas courts, the trial level courts, have failed to win retention, but this too is rather rare. *Id.* at 11.

won, receiving just a fifty-four percent “yes” vote.<sup>50</sup> This experience, coupled with hard-fought retention battles elsewhere in the nation, might seem to caution against including retention elections in a merit selection system. PMC disagrees with this notion and believes that a retention election component is necessary to achieve a publicly trusted and valued merit selection system.

Retention elections guarantee a role for the public in a judicial selection system. In a process that eliminates direct elections, it is critical to maintain a role for the people in the process. This is even more important in light of the current political climate in Pennsylvania, where populist concerns are foremost in the minds of many voters.<sup>51</sup> Ultimately, eliminating Pennsylvania’s judicial elections in favor of merit selection requires a favorable vote by the people in a public referendum. Without a retention election component, it would be very difficult to garner the needed public support for the constitutional amendment. As a practical and political matter, then, retention elections are a necessary component of merit selection systems.

Beyond that, however, retention elections also serve an important evaluative function regarding how the merit selection system is working. Retention elections offer a voice to the people and a real way to assess a judge’s performance as a judge. Does she treat litigants, attorneys, witnesses, jurors, and court personnel fairly and with respect? Is the judge efficient in adjudicating cases? Is the judge respected by the lawyers who practice before her, even when she rules against them? How often is the judge overturned on appeal? How is the courtroom run—efficiently, with respect to the parties involved, or with an eye to the judge’s schedule? Has the judge made efforts to be out in the community—to educate the public about courts and judges?

In answering these questions with their votes, the public also passes judgment on the work of the nominating commission, the governor, and the senate in recommending, nominating, and confirming judicial candidates. Ideally, during the nomination and confirmation process, members of the public will have taken the opportunity to learn about the candidates recommended by the nominating commission and to make their opinions of the candidates known to the governor and senators. Retention elections offer yet another opportunity for public comment and participation. To make this opportunity truly meaningful would also require a

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50. *Id.* at 6, 11.

51. *See supra* note 31.

more formalized judicial evaluation process, expanded beyond that currently conducted by bar associations.<sup>52</sup> For this more substantive and idealistic reason, in addition to the more practical and strategic reasons enumerated above, a merit selection system for Pennsylvania must include retention elections.

#### IV. OBSTACLES TO ACHIEVING MERIT SELECTION AND EFFORTS TO WORK AROUND THEM: PART I—THE NOMINATING COMMISSION

##### A. Why the Composition of and Appointment of Members to the Nominating Commission is So Important

Traditionally, designing a nominating commission has been among the most difficult tasks in proffering a viable merit selection proposal. The problem is not so much in identifying the desirable characteristics of a nominating commission, but in setting up processes designed to ensure that those characteristics are reflected in the membership of the nominating commission. Experts in polling, public research, and public relations advise reformers, such as PMC, to talk generally about the need to employ a system that better assures qualified judges, to focus on the broader issues, and to avoid getting bogged down in the details and mechanics of how the merit selection system would operate.<sup>53</sup> The problem is that everyone—from elected officials to average people in focus groups—wants to know who will be appointing members of the nominating commission, or, more colloquially, “who picks the pickers.”

The answer to this question—who appoints members to the nominating commission—matters to the politicians who ultimately will have to vote on amending the constitution to adopt a merit selection system. These politicians want to know what power they will have in the new system.

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52. The Pennsylvania Bar Association has a formal process for evaluating all candidates standing for election to the appellate courts, as well as for appellate judges standing for retention. See Pennsylvania Bar Association Home Page, <http://www.pabar.org>. The Philadelphia Bar Association also evaluates candidates seeking election to the local courts in Philadelphia, as well as those local judges standing for retention. See Philadelphia Bar Association Home Page, <http://www.philadelphiabar.org>.

53. See, e.g., BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS, *supra* note 2, at 6 (“[C]ommunications to the public need to focus on the benefits of change that matter most to them. At this stage, communications should not discuss process issues. The first step in outreach to these voters is to get out front on the issue and establish the frame through which they will come to think about merit selection.”).

The answer also matters to political parties. The current electoral system results in a lot of campaign money flowing through and to the parties.<sup>54</sup> In a merit selection system, parties lose the endorsement power and the accompanying money. As a result, if the parties, and by extension the party leaders, will give up the power they wield in elections, they want to know what they will get instead under the new system. They see their most significant source of power in a merit selection system as having a role in deciding who sits on the nominating commission.

The answer also matters to the public. Even when people do not participate in these elections—and traditionally turnout for all judicial elections has been very low<sup>55</sup>—they care about having the *right* to participate. In return for giving up the right to directly elect judges, people want to be sure they can trust the nominating commission responsible for screening and recommending candidates. Many of the commissioners themselves will be unknown to the public at large, because elected officials and political party leaders would be prohibited from serving as members of the commission.<sup>56</sup> As a proxy, then, the public needs to have trust in the public figures appointing members to the nominating commission. The public has very strong and often conflicting ideas about who best represents their viewpoints and interests. While they cannot always figure out who should be on the nominating commission or who should have the power to appoint people to it, they certainly can identify whom they want to keep away from that body.

Finally, reformers are concerned about “who picks the pickers,” because how the commission is selected will, in large part, determine if it is a credible body that can fulfill the mandate of recommending qualified, fair, and impartial judges to form an ethnically, racially, and geographically diverse judiciary, with a wide range of legal experience. If it cannot accomplish this, because it is, or is perceived to be, a tool of politicians or special interests, judicial selection reform will not have achieved what it was meant to do.

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54. See Samantha Sanchez, *A Costly Contest: Pennsylvania 2003 Supreme Court Race Tops All 2001-02 Judicial Races in Fundraising* (2004), <http://www.followthemoney.org> (follow “Research & Reports” hyperlink; then scroll down to “A Costly Contest”).

55. See Goodman & Marks, *supra* note 31, at 6; see also Pa. Dep’t of State, Bureau of Comm’ns, Elections and Legislation Home Page, <http://www.dos.state.pa.us/bcel>.

56. See S.J. Res. 100, 189th Gen. Assem. § 14(e) (Pa. 2005); PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(d).



## B. Why Determining “Who Picks the Pickers” Is So Difficult

Because these groups care so much about who will appoint members of the nominating commission, and because each group has its own interests in mind, the question “who picks the pickers” often becomes a labyrinth from which the reform effort cannot escape. One person’s vision of the ideal nominating commission is another’s nightmare, filled with politicians, elitist lawyers, and members of the old boys’ network. It is very difficult to reach consensus on who should be given authority to appoint members to the commission, much less who would make a good member of the nominating commission.

Even if reformers could reach such consensus, and to date they have not been able to do so, solving the “who picks the pickers” dilemma presents a more basic structural difficulty: to paraphrase Chief Justice Marshall, this is a constitution we are drafting.<sup>57</sup> Its language must endure for years and must be clear enough to have long-term meaning and applicability. As a result, the amendment cannot simply name particular people, groups, or organizations that will be given a role in appointing members of the commission. To avoid irrelevance or, worse, an inability to implement, the language must instead identify the appointing authorities by specific, constitutionally defined, or at least recognized, positions or entities.

Further complicating the drafting of viable constitutional language governing the appointment of members to the nominating commission is the substantive goal of designing a commission whose membership is diverse, racially and ethnically, and balanced, between men and women. It simply is not possible to draft language “reserving” seats on the nominating commission or establishing quotas. Such language would itself doom the amendment.

This challenge stands in sharp contrast to the relative success PMC has had in drafting and gaining acceptance of language designed to ensure geographical and political diversity and balance on the commission. Because county of residence is not a constitutionally protected category, a constitutional amendment could prevent appointers with multiple appointments from appointing more than one member from any particular county of the Common-

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57. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). In this paramount case, Chief Justice Marshall famously stated, “[W]e must never forget that it is a constitution we are expounding.” *Id.*

wealth.<sup>58</sup> Similarly, language limiting the number of appointments from the same political party is possible.<sup>59</sup>

Drafting constitutional language designed to ensure diversity and balance on the nominating commission has proven very difficult. To achieve these goals without running afoul of other constitutional considerations, PMC has included in its proposals aspirational language about the value of diversity on the commission.<sup>60</sup> PMC's draft exhorts appointing authorities to be mindful of this value:

In making appointments to the commission, the Governor, the President Pro Tempore of the Senate, the Speaker of the House, the Senate Minority Leader and the House Minority Leader shall take into consideration that the commission should include men and women as well as individuals from the civic, labor, business and professional communities and individuals who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of this Commonwealth.<sup>61</sup>

### C. Principles to Guide Reformers in Solving the “Who Picks the Pickers” Dilemma

To meet these challenges, PMC has developed two guiding principles to govern the composition and appointment of members to the nominating commission. Both must be accommodated if success is to be achieved.

#### 1. *First Principle: Elected Officials Must Be Involved in Appointing Members to the Nominating Commission*

The first principle requires that elected officials be included among the appointers of members to the nominating commission. This is dictated by political and strategic reasons, as well as substantive ideals of popular representation and democratic governance.

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58. See PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(b) (“The four members appointed by the Governor shall be residents of at least four different counties.”).

59. See *id.* (“[N]o more than two of the members appointed by the Governor shall be registered in the same political party.”); see also S.J. Res. 100, 189th Gen. Assem. § 14(a) (Pa. 2005).

60. See, e.g., PMC, DRAFT JOINT RESOLUTION, *supra* note 34, §14(b).

61. *Id.*; see also S.J. Res. 100, 189th Gen. Assem. § 14(a) (Pa. 2005) (“The commission should include men and women from civic, labor and business communities and should reflect the geographical, political, economic, ethnic and racial diversity of the City of Philadelphia.”).

Strategically, it would be political suicide to leave elected officials out of the appointment process. Any merit selection amendment must pass the legislature in two sessions.<sup>62</sup> Thus, elected officials will be called upon twice to vote on the bill, and later will take public positions on the proposed amendment when it appears on the public referendum ballot. These officials, the state Senators and Representatives, will not accept being shut out of the process of appointing members to the nominating commission. Speaking in idealistic terms about the goals of reform, PMC is aware that reasons like this should not drive the structure of the nominating commission. Success, however, requires recognition of the political realities of how reform is accomplished.

Because elected officials occupy positions that, generally, are constitutionally defined, the language issues identified earlier are not a problem. It is not difficult to draft constitutional language identifying the Governor, the Senate President Pro Tempore, and the Speaker of the House as appointers: these positions are all constitutionally defined—they will continue to be filled year after year and there will be no dispute as to who the occupant of that position is at any particular time.

A more persuasive and substantively relevant reason to include elected officials among the appointers of members to the nominating commission is that elected public officials, theoretically, are accountable to the public. The appointments an elected official makes to the nominating commission will be subject to public scrutiny, and the official's constituents can hold the official accountable. This theory of responsibility and accountability has been called into question by years of distrust of politicians and especially by recent political events in Pennsylvania.<sup>63</sup> In general, however, people tend to trust elected officials, or at least feel that their interests are protected by their own elected officials—their state representatives or senators, their council members, even their own ward leaders.<sup>64</sup> In moving to a judicial selection system that eliminates a front-end role for voters at the polls, the role of elected officials in the operation of the system is imperative.

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62. PA. CONST. art. XI, § 1.

63. See *supra* note 31 and accompanying text; see also text accompanying note 51.

64. BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS, *supra* note 2, at 22. In a survey conducted on behalf of PMC, a participant stated that he would prefer to see a commission comprised of his "City Council representative, or from City Council in general, and/or someone from my neighborhood, someone I know, some sort of grass-roots block captain or something like that." *Id.*

Elected officials must play a role in appointing members of the nominating commission; however, their power should not be limitless. To that end, PMC is developing ways to reduce the influence of elected officials on the nominating commission by reducing the number of their picks, by having other non-elected individuals involved in appointing members to the commission, and by erecting ethical rules about the ability of pickers to communicate with, and thereby influence the work of, the members of the nominating commission.

2. *Second Principle: Non-elected Individuals Must Be Involved in Appointing Members to the Nominating Commission*

The second guiding principle requires a role for non-elected individuals and people outside the political party structure in appointing members to the nominating commission. If this principle is not honored and implemented, reform will have shifted from a direct electoral system to a process that at least appears to be, and may in fact be, totally controlled by politicians. As PMC works to achieve merit selection, charges of elitism often arise—accusations that it does not trust voters and therefore wants to give the power to select judges to elite lawyers or politicians.<sup>65</sup> A nominating commission that is appointed only by elected officials or political party leaders would serve to intensify these charges.

Interestingly, people do not usually request a specific role in appointing members to the commission for themselves or even for the organizations for whom they work or with whom they are affiliated.<sup>66</sup> They themselves do not feel qualified to select judges<sup>67</sup> and would prefer to have more knowledgeable, experienced people

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65. See Morganelli, *supra* note 2, at 15. In a response to an article written by PMC, District Attorney John Morganelli proclaimed that merit selection is a guise for the political elite, rather than the people, to pick our judges. It benefits political insiders, the well-heeled and the well-connected, and is only politics on a different level. With merit selection, only the connected are rewarded. The ultimate decisions are made by governors, senators and other influential politicians who often use judgeships to reward their friends.

*Id.* Some focus group participants stated that they distrusted others selecting judges for them. BELDEN, RUSSONELLO & STEWART, MAKING THE CASE, *supra* note 2, at 5. One participant stated that he “distrust[ed] anything that takes place behind closed doors in the political realm”; another felt that a commission appointed by the legislature was not necessarily a “good idea because they are going to pick who they want to pick and instead of putting people on there off the street, it’s still going to be heavy on one side or the other for political reasons.” *Id.* at 12-13.

66. During the 2005-06 Philadelphia focus groups and in community meetings convened by PMC, participants generally did not recommend that organizations they represent or belong to should have a role in appointing members to or serving on the

evaluating judicial candidates and recommending highly qualified candidates to the governor.<sup>68</sup> At the same time, they want to be sure they can trust these knowledgeable, experienced people. To that end, PMC often hears suggestions to include civic groups, educational groups, trusted cultural or educational institutions, or broader categories of professions in the appointment process. Recent suggestions, for example, include members of the clergy, college presidents, student leaders, and educational groups, like the League of Women Voters.<sup>69</sup> The public makes these suggestions because they tend to trust these organizations and groups.<sup>70</sup> Moreover, there is a sense that these groups represent and protect broader public interests.<sup>71</sup> Involving trusted, well-respected civic organizations, groups, and leaders in the appointment of the members of the nominating commission helps to build this trust and instill confidence in the process.<sup>72</sup> This is a crucial sentiment that must be buoyed and spread for the public to vote in favor of a constitutional amendment ending direct election of judges.

Finally, it is important to include non-elected individuals who are not political party leaders in the process because doing so brings another perspective to the process. This is necessary because the courts affect all our lives—custody issues, car accident cases, landlord-tenant disputes, and employment issues are all resolved in our courts. The process for selecting judges must take into account this universal nature of the courts and, by extension, of the judges. Judges must serve the people; they must be able to deal with peo-

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nominating commission. Instead, they identified other entities in the community that they trust and in whom they have confidence in giving this power.

67. BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS, *supra* note 2, at 12-14 (“With judges [sic] elections I don’t have enough time to really research the candidates, so I would rather not vote at all.”). In the 2005-06 focus groups, participants stated that they were apprehensive about voting for judicial candidates because they were not familiar with the candidates’ views on the issues, knew nothing about the candidates, and were overwhelmed by the number of candidates on the ballot. *Id.*

68. *Id.* at 1 (“I’m torn. It’s hard to get to know [judges]. I hate to think of the judges having to do what all the politicians do, and come up with enormous amounts of money, and take out huge television ads, yet I really feel that election is the better way. The other side of it is, the people that appoint the judges often are more aware of what the judge has done. They know how they’ve ruled on different things. It would take a whole lot of time for any one of us to look up. I’m thinking appointment with elections for retention seems like the best of both worlds.”); *see generally id.* at 12-14 (discussing voters’ views on election versus appointment systems for judicial selection).

69. *Id.* at 16, 21.

70. *See, e.g., id.* at 15-16.

71. *Id.*

72. *See supra* note 31 and accompanying text; *see also* text accompanying note 51.

ple at their best and worst. Often, when people come to court, they are there involuntarily and are frightened and nervous. It is important that judges recognize this. One way to ensure that the courts are staffed by judges who are aware of this human aspect is to involve regular people in the selection process.

Still, it is extremely difficult to design a merit selection system that assimilates this principle. First, and most easily overcome, under current Pennsylvania law, non-elected individuals cannot make public appointments.<sup>73</sup> Thus, including non-elected individuals among the appointing authorities would require a constitutional amendment. This could be accomplished in the text of the merit selection amendment. Even with this first hurdle overcome, however, obstacles to the participation of non-elected individuals remain.

Fundamentally, it is very difficult to determine who these non-elected pickers of the pickers should be. Aside from law school deans and/or bar association leaders (categories themselves which are not uncontroversial), consensus regarding non-elected appointers is hard to achieve. Moreover, the focus certainly cannot be limited to lawyers or law-related organizations. But how do you identify which groups to include? Once one group, organization, or interest group gets a seat on the commission or a role in appointing members to the commission, countless other groups would clamor to be involved as well. It is very difficult to draw the lines.

Finally, drafting constitutional language becomes extremely challenging in the arena of non-elected appointers. How do you define a specific group without naming it directly? What if a specific group is named in the constitution and then dissolves? Will its successor assume its appointing authority or, if there is no succeeding organization, will there be fewer members on the nominating commission? Drafting language to include seemingly obvious organizations, such as bar associations, proves difficult because, unlike many other states, Pennsylvania does not have a unitary bar association recognized by the state as the official bar association. Thus, to identify the Pennsylvania Bar Association in the constitution as having the power to appoint a member to the nominating commis-

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73. Under current Pennsylvania constitutional jurisprudence appointments to public office by nongovernmental entities are not permitted. *See, e.g.*, *Hetherington v. McHale*, 458 Pa. 479, 487 (1974) (“[I]t must be concluded that the Constitution prohibits delegation by private groups of the power to make governmental appointments. Since the process by which appellees were designated violates this principle, it is unconstitutional.”). The Pennsylvania Constitution must be amended to permit such appointments.

sion could write into the constitutional scheme an entity that may not exist at some point in the future.<sup>74</sup>

#### **D. Possible Solutions to the “Who Picks the Pickers” Conundrum**

##### *1. Concentrating the Power to Pick the Pickers in One Person*

One solution would mandate that the governor appoint all of the members of the nominating commission, provided that she make those appointments from lists submitted by legislative leaders, labor unions, business organizations, and civic groups. Such a plan affords a range of sources for potential members, but also concentrates accountability in one person. This would make it easy to hold the governor accountable and responsible for ensuring gender, racial, ethnic, geographic, and political balance and diversity on the commission.

The drawbacks of the plan include the possibilities that the commission likely will be viewed as controlled by the governor and that there will be no true political balance. There would be charges that a Republican governor will only pick Democrats who are virtually Republican and vice versa. While there might be more accountability under such a plan, the commission likely would not engender public confidence in its ability to act independently.

##### *2. Designated Seats on the Commission*

Another solution actually shifts the problem away from appointing authorities to the commissioners themselves. Under this plan, designated seats on the commission would rotate among a certain group of organizations. This way, the participation of these groups could be guaranteed without relying on one of the appointing authorities to pick a member from one of the groups. The rotation system might also help to bring diversity to the commission, because rotation among a small group likely would ensure the participation of women and minorities on the commission. The question, however, remains: which organizations or categories of organizations should receive such permanent commission seats? Again, the only obvious answers seem to be law school deans and bar associations. Perhaps there could be a union seat, but among which unions would it rotate? Who would determine this and

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74. Further, many lawyers view other bar associations, such as their local bar association or an association based on the subject nature of their practice, as a better representative than the Pennsylvania Bar Association.

oversee the endeavor? The same holds true for civic groups and groups representing business interests. How could this be administered?

PMC has developed a proposal for a lottery system to fill five designated seats on an appellate court nominating commission. Each of the five seats would be designated for a specific category of organization: civic groups; associations of lawyers; organizations representing businesses and agricultural interests; labor unions; and other professional associations. Pennsylvania organizations in these categories would assert their interest in having a member serve on the nominating commission to the Secretary of State. The Secretary of State would then determine the five largest organizations that applied in each category and hold a lottery to determine which of the five in each category would appoint someone to assume the seat for the designated term.<sup>75</sup>

This plan allows the nominating commission to have at least five seats appointed by non-elected officials, representing different segments of the population of the Commonwealth, and representing organizations that traditionally have been interested and active participants in judicial elections. PMC thought that the size requirement and the lottery would be most fair, and eliminate the co-opting of the commission by “fly by night” one- or two-member organizations.

There are, however, some drawbacks to this plan. One drawback is the inability to control for diversity among these picks; there is no one to hold accountable if each of the five groups picked white males from the same county. In addition, what about groups that do not fit into the five categories? Moreover, the civic organizations likely to have sufficient numbers to be in the lottery would not be educational, good government reform groups, but rather large, well-funded, special interest, single issue, agenda groups. Also, the idea of using membership size as a proxy for entry into the lottery was off-putting to some,<sup>76</sup> though PMC has been unable to find another objective measure. Another drawback is the complexity of this plan: it is hard to explain, hard to draft,

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75. PMC, DRAFT JOINT RESOLUTION, *supra* note 34, § 14(a).

76. In conversations with other judicial reform advocates, questions have been raised about using the size of the groups to determine entry into the lottery. Concerns include the barriers to entry of smaller, but well-respected and important, community organizations, as well as the potential for the size factor to bar the entry of some groups representing, or primarily composed of, members of minority groups. While PMC shares these concerns, as yet it has not found another objective measure that could viably be used to determine which groups would participate in the lottery.



and probably hard to administer. Nonetheless, PMC has been told that the plan is “intriguing,” “creative,” and worth further consideration.<sup>77</sup>

In sum, PMC is still working on it. It has yet to find the magic formula for the composition and appointment of members to the nominating commission. As PMC learns more and gets more information from its focus groups, meetings with stakeholders, and the experiences of other jurisdictions, it tweaks its plan and tries again.

## V. OBSTACLES TO ACHIEVING MERIT SELECTION AND EFFORTS TO WORK AROUND THEM: PART II—THE CONFIRMATION DEBATE, THE SPECTER OF THE FEDERAL SYSTEM, WHAT TO DO ABOUT THE LOCAL COURTS, AND CALLS FOR ELECTION REFORM

Although the question of “who picks the pickers” remains the most difficult hurdle to clear in designing a viable merit selection system, other challenges also stand in the way. This section outlines a few of the biggest difficulties.

### A. Senate Confirmation

After the composition and appointment of members to the nominating commission, the next major roadblock to designing a viable merit selection system is the vote required for confirmation of the governor’s nominee. In Pennsylvania, this historically has been among the most disputed items of any merit selection plan.<sup>78</sup>

A two-thirds vote by the Pennsylvania Senate is required to confirm appointments to fill interim judicial vacancies.<sup>79</sup> This should not necessarily determine the confirmation process in a merit selection system, however. The seven states with a commission-based,

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77. In conversations with legislative staffers, bar association leaders, lawyers, representatives of civic groups, and other reform advocates, PMC has been told that the lottery system proposal presents an innovative solution to the long-standing problem of how to involve people who are not elected officials in the nominating commission.

78. In conversations with legislative leaders, legislative staffers, political party officials, lawyers, and other interested parties, the issue of Senate confirmation has traditionally been hotly disputed. One’s views often correspond to whether one’s political party is in the minority or majority at the time. PMC has been variously told that requiring two-thirds confirmation is a “deal breaker,” while hearing from members of the opposition party that a simple majority requirement will be a “nonstarter.”

79. PA. CONST. art. V, § 13(b).

merit selection system that require legislative confirmation require only a majority vote for confirmation.<sup>80</sup>

A majority vote requirement would make the confirmation process smoother because a small group of senators would be unable to block confirmation by withholding necessary votes. As a result, a majority vote rule might enable the process to work without the need to develop a mechanism to overcome any impasse, such as successive failures to confirm, in the confirmation process.

The minority party in the Senate likely would oppose a simple majority vote proposal, as it would view the proposal as stripping it of power and denying it a role in the confirmation process, especially if the majority party and the governor's party are the same. A two-thirds vote requirement would, however, necessitate development of an intricate impasse-breaking mechanism to ensure ultimate confirmation and seating of a candidate to fill a vacancy.

Although PMC acknowledges good arguments on both sides of this debate, it also knows that the legislators will have to determine a solution among themselves as they work to pass merit selection legislation. As a result, PMC has focused its efforts on meeting the other challenges addressed herein and has resolved to allow legislative settlement of the confirmation question during legislative debates.

## B. The Specter of the Federal System

In the past, proponents of merit selection pointed to the federal system as a model of a successful appointive selection system that resulted in qualified judges and removed the influence of money from the judicial selection system. With the longstanding disputes surrounding the confirmation of federal judges and the concern that presidents may use "litmus tests" on hot button issues to screen potential candidates, however, the federal system is not the model it used to be. To the contrary, many fear that replacing elections with a merit selection system could lead to nasty and partisan confirmation battles, and long periods of court vacancies, as seen in the federal system.<sup>81</sup>

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80. See DEL. CONST. art. IV, § 3; HAW. CONST. art. VI, § 3; MD. CONST. art. IV, pt. VI, § 41(d); N.J. CONST. art. VI, § VI, para. 1; R.I. CONST. art. X, § 4; UTAH CONST. art. VIII, § 8; VT. CONST. ch. II, § 32.

81. See Mark B. Cohen, *Appointed Judges: Unfair to Philly—And a Plain Bad Idea*, PHILA. DAILY NEWS, Apr. 6, 2005 (on file with authors). This also relates to the debate over the confirmation requirement. See *supra* note 78.

As a result, reformers have had to distance their proposals from the federal model and work harder to explain the differences between the president's Article III appointment power and a merit selection system. The basis of this argument is that merit selection represents a hybrid system that combines the best parts of the federal system and the electoral process, and adds the crucial element of a bipartisan, independent, diverse nominating commission. Under a merit selection system, the governor, unlike the president, may not appoint anyone she desires, but rather is bound by the nominating commission's list of recommended, highly qualified candidates. Moreover, unlike the federal system, the appointment is not for life, but is for a short initial term, after which the judge will go before the people in a retention election.

A good case can be made as to why the current chaos of the federal system should not be a deterrent to adopting merit selection. The challenge is to be able to make that case to target audiences, in addition to the other education and advocacy work that must be accomplished in order for a merit selection system to be adopted.

### C. Local Courts versus Appellate Courts

Another possible roadblock in the effort to craft viable merit selection systems is that it may be necessary to design different systems for local trial level courts and for statewide appellate courts. Although the general nominating commission model (nomination, confirmation, retention) likely would work on both levels, the nominating commissions will have to be designed somewhat differently.

PMC initially assumed that the appellate court nominating commission model could easily be used for local courts. Due to local distrust of state officials, as well as the different stakeholders involved, particularly communities of color in the large urban centers, PMC subsequently has learned that a separate model is needed.<sup>82</sup>

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82. See BELDEN, RUSSONELLO & STEWART, PHILADELPHIANS, *supra* note 2, at 15-16 ("I don't think the State Legislature, and the State Senate, and the Governor really should have much to do with Philadelphia politics, especially, because they always screw us every chance they get."). Through focus groups, meetings with community leaders, and discussions with lawyers and bar associations, PMC has learned that a nominating commission for the local courts in Philadelphia cannot look just like an appellate court nominating commission. Instead, there must be an effort to have more appointees be Philadelphians, to ensure a role for minorities in appointing mem-

Designing a local court nominating commission is as difficult as, if not more difficult than, designing an appellate court nominating commission. The need to ensure diversity on the commission, as well as among those who appoint members of the nominating commission and among the commission's recommended candidates, assumes heightened importance, especially in minority-majority jurisdictions. In addition, while state officials must still be included in the appointment of members to the commission because of their role in the constitutional amendment process, there must also be a prominent role for local officials and local citizens. Ideally, the majority of appointing authorities would be from the locality at issue, but as more stakeholders need or demand a role in appointing members to the commission, the commission could reach an unworkable size.

Another unexpected challenge arising in the context of local merit selection is opposition by some long-time supporters of appellate merit selection.<sup>83</sup> Even some of those who concede that the current big city electoral process is not working are opposed to creating a new system at the local level. Rather than viewing the locality as a model for other jurisdictions and the statewide courts, some think that merit selection should proceed from the top down—starting with the appellate courts, and then, maybe, spreading to the trial courts.<sup>84</sup>

#### D. Calls for Election Reform

A final road block is that while many individuals and stakeholders will readily admit that the electoral system places too great an emphasis on fundraising and not enough consideration on the qualifications of the candidates, they suggest changing the election sys-

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bers to and serving on the nominating commission, and to minimize the role of government officials from outside the City. *See, e.g., id.*

83. In discussions with community leaders, bar association leaders and members, lawyers, and legislators, PMC has learned that even some longtime supporters of merit selection for the appellate courts are hesitant to embrace judicial selection reform at the local level. Some fear that in a racially diverse city like Philadelphia, reform will undo the gains minorities have made in electing African American and Latino judges to the local bench. There were specific concerns about ensuring a role for minorities in appointing members to and serving on the nominating commission, as well as about continuing to bring qualified minorities to the bench.

84. In addition to the concerns described in note 81 and accompanying text, PMC learned that some Philadelphians believed that Philadelphia should not be the experimental ground for merit selection, but rather that merit selection should be used first at the appellate level, and then, possibly, should expand to the lower courts across the Commonwealth.

tem rather than eliminating it altogether. Often, they will propose campaign finance reform, mandatory qualifications, or better voter education as preferable means to solving the problems with judicial elections.<sup>85</sup> While certain jurisdictions have adopted some of these measures,<sup>86</sup> none has come close to solving the problems of money in campaigns and the lack of emphasis on qualifications for serving as a judge. Reformers will need to expend time and resources in educating themselves and others about why these other reforms are not sufficient and why merit selection is the more effective way to achieve meaningful judicial selection reform.

### CONCLUSION

Despite the challenges enumerated above, PMC firmly believes that the effort to transform judicial selection in Pennsylvania and elsewhere is a worthy one. The goal of the Symposium was to develop a model merit selection plan. While this goal is important, PMC believes it is critical to recognize the unique histories, cultures, and political realities of the jurisdiction at issue if reform is to succeed. In this Essay PMC has undertaken to demonstrate why this is so and why failing to understand this can undermine reform efforts.

A model merit selection plan is a good place to start, but it is not enough. Each model must be adapted and tweaked so that it fits the state or locality to which it will be applied. As noted, even PMC's own model for statewide appellate merit selection in Pennsylvania would need to be tweaked substantially to create a viable model for merit selection at the local level in Philadelphia.

PMC's work in this regard is not complete. It is still working to develop good, workable, and achievable plans for Pennsylvania and Philadelphia. As PMC continues to educate the public about the problems inherent in judicial elections, the need for reform, and the reasons why merit selection is a better way to select judges,

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85. Through our meetings and discussions with legislators, lawyers, and community groups, PMC has learned that although many people are dissatisfied with the current electoral process, they are hesitant to eliminate elections. Instead, they propose alternative reform measures they believe might help to improve the process, reduce some of the expenses associated with elections, and eliminate some of the randomness of the process, wherein candidates succeed not because of their qualifications but because of ballot position, fundraising skill, and name recognition.

86. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), <http://www.ajs.org/js/JudicialSelectionCharts.pdf>. Seventeen states, including Arkansas, Michigan, and North Carolina, use nonpartisan elections. *Id.*

it learns more about the cultural and political realities of the jurisdictions in question. This learning process informs the development and revision of merit selection proposals.

Merit selection in Pennsylvania is a work in progress; PMC hopes that at the next Symposium it will be able to present a model that has been adopted through the constitutional amendment process and implemented to staff Pennsylvania courts. Then, the Pennsylvania model can become another source of information for judicial selection reformers in other jurisdictions.