



# PHILADELPHIA BAR ASSOCIATION

TESTIMONY OF KATHLEEN D. WILKINSON  
CHANCELLOR-ELECT, PHILADELPHIA BAR ASSOCIATION  
BEFORE PA HOUSE JUDICIARY COMMITTEE  
REGARDING HB 1815 AND HB1816, ON SELECTION OF APPELLATE JUDGES  
Thursday, March 1, 2012  
Philadelphia, PA

## **A. Introduction**

Good afternoon. My name is Kathleen Wilkinson. I am a partner in the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, in its Philadelphia office.

I am also the Chancellor-Elect of the Philadelphia Bar Association and have been authorized to speak to the pending legislation on behalf our approximately 13,000 members. The Philadelphia Bar Association is the oldest metropolitan bar association in the United States. For centuries, we have promoted justice, professional excellence and respect for the Rule of Law.

I am here today to convey the Philadelphia Bar Association's longstanding support for changing the way we select appellate judges in Pennsylvania, as presently proposed in House Bills 1815 and 1816.

## **B. The Need for Reform**

House Bills 1815 and 1816 set forth a form of the same "merit selection" approach originally suggested in 1914.<sup>1</sup> The Philadelphia Bar Association has supported such merit selection for more than half a century. In 1952, a publication celebrating the Philadelphia Bar Association's 150<sup>th</sup> anniversary proudly noted the Association's "active campaign of information and education in support of the 'Pennsylvania Plan' for improving the caliber of the judiciary through adoption of a constitutional amendment providing for a better method of judicial selection."<sup>2</sup>

By 1952, Pennsylvania was one of the leaders in the discussion about merit selection. Only California and Missouri had actually adopted a merit selection approach by then.

In the intervening years, proposals to adopt merit selection in Pennsylvania have been made several times, but have been defeated in the legislature or at the ballot box.

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<sup>1</sup> See PAUL D. CARRINGTON, JUDICIAL INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY IN HIGHEST STATE COURTS, 61 LAW & CONTEMP. PROBS. 79, 96 N.119 (1998).

<sup>2</sup> See PHILADELPHIA BAR ASSOCIATION: THE PROCEEDINGS, ADDRESSES AND HISTORICAL DISPLAYS AND OBSERVANCES OF THE 150TH ANNIVERSARY OF THE ASSOCIATION, 1802-1952 (1952).

In the rest of the country, today, two thirds of all states have some form of merit selection. No state that has adopted merit selection has ever rescinded it. Moreover, only eight states still choose appellate court judges by partisan election, as we do in Pennsylvania.

In the decades since merit selection was first proposed in our Commonwealth, times have shown that the need for a better method of judicial selection has only increased. Seven figure fund raising has become the norm in statewide judicial elections. In the 2009 race for a seat on the Pennsylvania Supreme Court, the candidates raised more than \$5.4 million in campaign contributions.<sup>3</sup> That was the highest of any state and exceeded the next highest by more than \$2 million.<sup>4</sup> Surely, that money could be put to better use, particularly in these economic times.

With all that money being raised and spent, however, the candidates can say very little to the electorate about how they will rule in cases or on issues. Canon 7B(1)(c) of the Pennsylvania Code of Judicial Conduct provides that a candidate for judicial office “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court or misrepresent their identity, qualifications, present position, or other fact.”

This restriction makes sense, because unlike other elected officials, judges are not chosen to fulfill political pledges or implement the will of the electorate. Their job is to apply the rule of law to the facts of each case that comes before them.

The qualifications needed to do be a judge are not readily discerned from a statewide judicial election campaign. The average voter frequently has little information from which to determine whether a candidate actually possesses the characteristics that would make a good judge, such as knowledge of the law, integrity, judicial temperament and a devotion to the improvement of the quality of justice.

Our democracy requires an informed choice by voters. With so little information available about the factors that matter in choosing a qualified candidate, it is very difficult for even the best intentioned voter to be well informed.

The average voter does understand, however, that when judicial candidates air statewide television and radio ads, travel across the Commonwealth to attend campaign events, engage in direct mail marketing and place advertisements in newspapers, it is necessary for large sums of money to be raised. It is common knowledge that lawyers and political action committees representing business groups, unions and other special interest groups, account for most of the money raised. Consequently, citizens become suspicious that promises were made to secure campaign contributions and that judges are beholden to party officials, influential lawyers or special interests.

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<sup>3</sup> See ADAM SKAGGS, MARIA DA SILVA, LINDA CASEY & CHARLES HALL, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10 at 5, <http://www.brennancenter.org/page/-/Democracy/NewPolitics2010.pdf>.

<sup>4</sup> Id.

As a result, many citizens question whether they will receive fair treatment in a court of law. In a 2010 survey of Pennsylvania voters, 76% of respondents believed that campaign contributions influence judicial decision making.<sup>5</sup> And voters are not the only people concerned about this issue. In a 2001 survey, 72% of Pennsylvania judges expressed concern that special interests were trying to use the courts to shape policy.<sup>6</sup>

Retired Supreme Court Justice Sandra Day O'Connor has become an ardent supporter of merit selection. She experienced the judicial election process herself when she ran for Justice of the Arizona Supreme Court. Justice O'Connor has condemned the soaring campaign contributions that have marked many statewide judicial elections. Recently, she wrote in a New York Times Op-Ed: "When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."<sup>7</sup>

The current system of electing judges also discourages judicial service by well qualified lawyers who are not actively involved in politics and who do not have the inclination to raise the large sums of money necessary to mount a successful election campaign.

In addition, with little relevant information about judicial candidates, voters often make choices for reasons that have nothing to do with qualifications for judicial office. In primary elections, ballot position can determine an election. In the general election, voters often choose a candidate based on an identity of ethnicity, residence or the appeal of a television ad.

Election of appellate judges can also lead to less diversity. Appointive methods are more likely to value diversity, to seek diverse candidates, and to seek to nominate diverse judges to the state appellate courts.<sup>8</sup> Such diversity is important, because courts that reflect the diverse composition of the citizens of the Commonwealth of Pennsylvania will tend to generate more widespread public support and respect.

The late Third Circuit Court Judge Leon A. Higginbotham wrote, "Pluralism, more often than not, creates a milieu in which the judiciary, the litigants -- indeed, our democratic system -- benefit from the experience of individuals whose backgrounds reflect the breadth of the American experience. Pluralism does not mean that only a judge of the same race as a litigant will be able to adjudicate the case fairly. Rather, by creating a pluralistic court we make sure judges will reflect a broad perspective."

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<sup>5</sup> See <http://judgesonmerit.org/wp-content/uploads/2010/06/2010-Merit-Selection-Poll1.pdf>.

<sup>6</sup> See JUSTICE AT STAKE, NATIONAL SURVEY OF AMERICAN VOTERS AND STATE JUDGES (2001).

<sup>7</sup> See Sandra Day O'Connor, *Opinion*, N.Y. Times, May 23, 2010.

<sup>8</sup> See MALIA REDDICK, MICHAEL J. NELSON AND RACHEL PAINE CAUFIELD, AMERICAN JUDICATURE SOCIETY, EXAMINING DIVERSITY ON STATE COURTS (2010).

The time has come to stop electing appellate court judges, to restore the confidence of the electorate in our judicial system, and to open the process to a wider and more diverse pool of well qualified candidates.

Merit selection eliminates the possibility that judges will hear matters involving lawyers who contributed to their campaigns and minimizes political influence by eliminating the need for candidates to raise funds, advertise and make campaign promises, all of which can compromise at least the perception of judicial independence.

Through merit selection, the best qualified candidates are sought out, and those who are unqualified to serve are eliminated from consideration. The emphasis is on professional qualifications, not political credentials. Nominating commissions recruit those who meet stringent standards, such as knowledge of the law and rules of evidence, integrity, judicial temperament and a devotion to the improvement of the quality of justice.

Unquestionably, many well qualified judges have been elected to our appellate courts. However, in the current partisan elective system there are no minimum standards or qualifications concerning a judicial candidate's legal background, experience or abilities.

Where merit selection has been instituted, it has been reported that the quality of the court systems have noticeably improved and that the judges chosen through merit selection are less frequently disciplined for ethical violations than judges who are elected.<sup>9</sup>

### **C. The Current Bills**

House Bills 1815 and 1816 go a long way toward implementing an appropriate system of merit selection in Pennsylvania.

The Philadelphia Bar Association supports the gubernatorial appointment process with Senate confirmation, as outlined in House Bill 1815 for Supreme Court justices and judges of the Superior and Commonwealth Courts.

In addition, we strongly support the establishment of an Appellate Court Nominating Commission, as proposed in House Bills 1815 and 1816, which would recommend candidates based on their integrity, temperament, professional competence and experience, and commitment to the community, as well as consideration of the need for the appellate courts to reflect the diversity of our Commonwealth's residents.

### **D. Suggested Revisions**

We suggest, however, that the commission be *required* to conduct the interviews of candidates and obtain the documents described in Section 2104(b)(3)-(4) of House Bill 1816 for all candidates whose names are ultimately submitted to the Governor, rather than making interviews optional as presently provided in those subsections.

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<sup>9</sup> See MALIA REDDICK, AMERICAN JUDICATURE SOCIETY, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS AND JUDICIAL DISCIPLINE (2010).

We also recommend that the commission be *required* to include more specific selection criteria in the rules of procedure adopted under Section 2103(d)(2). Such criteria would help ensure that only highly qualified candidates are elevated to an appellate bench.

The selection criteria should clearly delineate the characteristics sought in a judicial candidate, such as the standards used to evaluate candidates for the Philadelphia County Court of Common Pleas by the Philadelphia Bar Association's Commission on Judicial Selection and Retention.<sup>10</sup> The more rigorous the requirements, the more likely it is that we will be able to have a high quality judiciary.

#### **E. Conclusion**

For all of these reasons, the Philadelphia Bar Association supports adoption of House Bills 1815 and 1816. We would prefer amendment of the bills to include the revisions suggested above, but even without those amendments, the proposed selection process would be far better than our current system of partisan elections.

Lastly, since our Commission on Judicial Selection and Retention has more than 30 years of experience evaluating judicial candidates, the Philadelphia Bar Association would be willing to assist the Appellate Court Nominating Commission with respect to its adoption of specific criteria and rules, should the proposed legislation be adopted.

Thank you for the opportunity to testify before this Committee regarding merit selection and the Philadelphia Bar Association's support for the proposed legislation. If you have any questions, I will be happy to answer them.

Respectfully yours,



Kathleen D. Wilkinson  
Chancellor-Elect, Philadelphia Bar Association

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<http://www.philadelphiabar.org/page/StandardsForEvaluatingCandidates>.