



# WHO CHOOSES?

THE NEED FOR JUDICIAL REFORM  
IN PENNSYLVANIA



PREPARED BY THE COMMITTEE OF SEVENTY



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*The Need For Judicial Reform In Pennsylvania*

### TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b> .....	1
<b>INTRODUCTION</b> .....	3
<b>FOCUS GROUP STUDY</b> .....	4
Focus Group Methodology .....	4
Background: General Views About The Judiciary .....	4
Limitations And Frustration .....	5
Sources That Are Available .....	6
Endorsements .....	6
Factors In Judicial Voting .....	8
<b>JUDICIAL VOTERS SURVEY</b> .....	11
Judicial Voters In Fourteen Pennsylvania Counties.....	11
Judicial Voters By County And Region.....	12
<b>THE NEED FOR REFORM</b> .....	13
What's So Bad About The Current System? .....	13
Is There A Better Way? .....	13
How Does It Work?.....	14
Why Bother?.....	16

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# EXECUTIVE SUMMARY

Unlike most states, Pennsylvania elects all of its judges in partisan elections. But few people actually vote in the state's judicial elections, and those who do have insufficient information about the people they are electing.

These are the basic and long-held assumptions of most observers of Pennsylvania's judicial system. But are these assumptions correct, and if so, how does that affect our evaluation of the system?

The Committee of Seventy designed two research projects in response to these questions. First, Seventy conducted two focus groups to determine what guides the decisions of those who do vote in judicial elections. Second, Seventy calculated the percentage of eligible voters who consistently vote in judicial elections.

These two projects were designed to quantify the basic assumptions people make about Pennsylvania's judicial system. Using the results of its research, Seventy then considered how the system could be improved.

## THE FOCUS GROUPS

Seventy interviewed two groups of "judicial voters," defined as Pennsylvanians who had voted in the same county in at least three of the previous four general elections. Participants who qualified as "judicial voters" were asked their opinions on the judiciary as well as on the various sources of information available about judicial candidates.

The participants displayed a basic and solid understanding of the judiciary and judicial elections. They had a clear idea of the role and importance of judges within the overall structure of government. However, the participants collectively knew almost nothing about any of Pennsylvania's current judges. None of the participants could remember the name of the last person they voted for for any judgeship. Their lack of knowledge was

summed up by one participant who said, "I have too much going on in my life to remember a judge."

The participants expressed the desire to make intelligent and informed choices, but recognized that it is difficult to get the relevant information. All participants agreed that the candidates' positions on issues was the information they most wanted when voting for a judge. Several participants expressed frustration that this is precisely the information that is most difficult to obtain.

In lieu of this information, the participants said

they look to several sources of information about judicial candidates. However, they generally viewed these sources as biased and/or only marginally useful. The participants described voters' guides as somewhat helpful and political party endorsements as very helpful. The news media, committee leaders, campaigns, endorsements from such groups as the Fraternal Order of the Police, the Bar Association, and politicians were viewed negatively as biased sources.

Participants were also asked which factors were most important in voting for judges. Political party, geog-

raphy, and experience were listed as the most important factors, while ethnicity, gender, family, and education received mixed reviews.

## JUDICIAL VOTERS SURVEY

The Committee of Seventy surveyed Pennsylvania's fourteen largest counties with available data to find out what percentage of eligible voters regularly vote in judicial elections. As with the focus groups, "judicial voters" were defined as Pennsylvanians who had voted in the same county in at least three of the previous four general elections.

Approximately thirteen percent of the voters in the fourteen counties studied met the definition of



"judicial voters." The percentages varied widely from one region of the state to another. The most dramatic difference was that voters in Western Pennsylvania counties were about twice as likely to be "judicial voters" as voters in the southeastern portion of the state.

### PROBLEMS WITH THE CURRENT SYSTEM

Based on the information available, several problems can be identified with the current system of judicial election, including the lack of information available to voters, the random manner in which voters make their decisions, the tendency of voters to place a priority on geography and the current domination of the Pennsylvania appellate bench by judges living in or near Pittsburgh and Philadelphia, the lack of qualified judges, the need for more consistency and predictability within the judicial system, the influence of money and name recognition, and a loss of public faith in the system.

### IS THERE A BETTER WAY?

In order to address these problems, an appointive system is needed that will allow judicial elections to be decided on the basis of candidates' qualifications.

Under such a system, candidates would first be recruited and nominated by a bipartisan commission, after which a chief executive would appoint a candidate to a limited initial term. An appointed judge would then seek reelection in an uncontested, non-partisan retention election. Among other things, this would lead to a more responsible selection process, better quality judges, increased diversity (in terms of gender, ethnicity, and geography), the removal of any conflicts of interest, and built-in popular participation.

These components provide the basic structure of an appointive system, the details of which could be worked out later. What is important is not who chooses the judges, but how they are chosen, and an appointive system of merit selection is the only means to ensure that judges will be chosen based on their qualifications for the job.



# INTRODUCTION

Most people don't vote.

Those who don't vote say their vote doesn't matter, or the candidates don't excite them, or there's no difference between the candidates or parties.

Most of those who do vote don't look into the issues. They base their votes on irrelevant factors and half-remembered misinformation.

No one is completely happy with the process, and the public's faith in the system is eroding.

Sound familiar? As much as these generalizations might apply to the electoral process as a whole, they are particularly apt regarding judicial elections in Pennsylvania.

Pennsylvania is one of only seven states that elects all of its judges in partisan elections. The others are Alabama, Arkansas, Illinois, North Carolina, Texas and West Virginia. In most states,

appellate judges are chosen through some variation of an appointive system.

Judicial campaigns receive a fraction of the attention that races for executive and legislative offices do. In fact, many voters may not realize that judges are elected at all. Furthermore, the Code of Judicial Conduct prohibits candidates from discussing their opinions on any of the substantive issues on which they may have to rule.

So how do voters choose judges? The Committee of Seventy decided to go straight to the source. In August of 1999, we commissioned Keystone Research Group to conduct two focus groups in Southwestern Pennsylvania. The purpose of this research project was to obtain an understanding of voters' perceptions on matters of the judiciary and judicial elections in Pennsylvania.

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3

# FOCUS GROUP STUDY

## FOCUS GROUP METHODOLOGY

Focus group participants were required to meet the following criteria:

- each had to have voted in at least three out of the last four general elections
- each had to be currently registered as a Republican or Democrat
- each had to live in the East Hills suburbs of Allegheny County
- each had to indicate a willingness to vote in judicial elections

Keystone Research Group conducts separate groups for men and women because of the manner in which men and women generally communicate. As a rule, women usually are more cooperative in sharing information and supporting other group members' answers, while men tend to defer to group members who are viewed as "expert" on a given subject and allow that person to dominate the group. In addition, men usually express their opinions more forcefully. Women tend not to want to stick out as an "expert" or appear more knowledgeable than others in the group. Largely due to social conditioning,

many women do not feel comfortable expressing strong opinions in front of men. Therefore, Keystone usually obtains different information from female participants than from male participants.

The participants were offered and paid \$25 each for their participation. The two sessions were moderated by a member of Keystone Research Group and were videotaped for review by Keystone Research Group. Keystone also made transcriptions of the participants' comments.

It is important to remember that a focus group is not a survey and should not be treated as one. Focus

groups are conducted to gauge the depth of reaction to certain issues and themes and to obtain insight and answers not anticipated or predicted. Also, focus groups are conducted to obtain insight into the reasons why voters take the positions they do.

## BACKGROUND: GENERAL VIEWS ABOUT THE JUDICIARY

Almost all of the participants displayed a basic and solid understanding of the judicial system and judicial elections in Pennsylvania. The participants

had a concrete understanding that appellate judges in Pennsylvania are elected and not appointed. One participant said, "I know they are in for ten years and they are easily re-elected and have tremendous pensions so I am very careful of who I pick for judges if I can get information on them."

The participants had a clear idea of the role and importance of judges within the overall structure of government. Most participants viewed judges to be more important than the average elected official. This was based on the following factors:

- Judges are elected for longer terms
- Judges run for retention

rather than face another election

- Judges are limited in what they can say on a given issue
- Judges' decisions seem to have a greater air of permanency than those of the legislative or executive branch
- Judges are more distant than other elected officials

Specific comments reflecting these views included:

"They are more important because everything they decide sets a precedent. Councilmen you just



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vote out. Judges can stick around forever and once they make a decision, that decision is usually around forever."

"They do have a lot of power that can affect people for a long time. They [have] control over community kinds of things [and] I think you often don't realize that a judge made that decision."

The participants also felt that judges are more distant from the electorate than other elected officials. One woman commented, "You can't go to them." Another said, "You can't see them, not unless you are brought up before them."

The participants viewed the job of judge as different from that of other elected officials, but they also viewed it as political. The men had a much stronger impression that judges are political than the women. Comments from the men's focus group included:

"I think they're all politicians."

"It depends on who the judge is. There are some judges that come out of a very non-political background, run for office and do a very fine job and I tend not to think of them as politicians. But there are others who come directly through the political system and by their words, their actions and their associations, I would definitely consider them to be politicians."

"If they render an opinion based on what's going to get them re-elected then they are comparable to a politician."

"At least the elected ones locally, it's definitely political. Even the ones that have come up non-politically through the system, [it] ends up being a political job."

"They may be altruistic going in [to office] but they get a reality check [when they get there]."

"I would think that there are two types of people who go in, though idealistically speaking, one gets caught up in the system and becomes very political; the other retain their ideals and realize realistically that they have to work in that system but they don't get clubbed by the system - they don't allow themselves to be pulled into especially the worst aspects of the system and still attempt to get something done."

"A good many of them are [politicians,] in both parties."

"You can never use never, all, or most or anything like that. There is always the individual all the way through."

"You can't lump everyone in the same group, [but] in general it becomes a political situation."

### LIMITATIONS AND FRUSTRATION

Despite their working knowledge of the system and their view of the relative importance of judges, the participants knew almost nothing about any of Pennsylvania's current judges. No focus group participant could name a member of the Pennsylvania Superior or Commonwealth courts. Only one of the participants could name a Pennsylvania Supreme Court Justice. None of the participants could remember the name of the last person they voted for for Supreme, Superior, Commonwealth or Common Pleas courts. One participant put it this way: "I have too much going on in my life to remember a judge."

With the general election then less than three months away, none of the participants could name any of the four candidates then running for Superior Court. When the names of the candidates were given, only two participants in each group of ten said they recognized any of the names. One participant said, "I'll look into it before the election and make an informed choice."

The participants did express the desire to make intelligent and informed choices, but understood that it is difficult to get relevant information. "We are very limited in what we can find out," one participant said. The reasons for this were also clearly understood. "[J]udges are supposed to be impartial, so they are not allowed to give their opinions on certain things," said one participant. "Because of the judicial code you can't get any information," one explained. Another said, "They can't give you all their outlooks because they are not allowed to do that. They can't speak on abortion at all."

All participants seemed to agree that the candidates' positions on issues was the information they most wanted when voting for a judge. Several participants expressed frustration that this is precisely the information that is most difficult to obtain. "I think that there should be an independent release of information," said one. Another participant added,

# 6

"It's not necessarily the judges' fault. It's the judicial system itself and the laws."

"Honesty" was the key word given when participants were asked what qualities they looked for in a judge or judicial candidate. One participant said, "I would like to know their moral character. Sometimes you can pick that up, but I don't know where you would get that information."

## SOURCES THAT ARE AVAILABLE

The participants said they look to several sources for information about judicial candidates. However, they generally viewed these sources as biased, irrelevant and/or only marginally useful.

### *News Media*

The participants said that they obtained some information about judicial candidates from the news media, but they did not necessarily trust it. They generally viewed the electronic media as less objective than print media. However, they viewed all media outlets as biased. "You can read the [Pittsburgh Post-Gazette] and the [Pittsburgh Tribune-Review] and get two opposite stories," one participant said. "You can't trust what the media says," said another.

### *Voters' Guides*

The participants viewed voters' guides such as those published by the League of Women Voters as only moderately helpful. The participants understood that the amount and type of information available through these guides is very limited and does not convey the information necessary to make an informed choice. One participant said that about the only information a judicial candidate can give is, "Here's my children, here's my wife, and here's my car." Another said, "Very few [candidates] say something bad about themselves." Another added, "It makes [it] harder to pick a judge." Another said, "Somebody gets some information and derives something from it."

### *Committee Leaders, Campaigns, Surrogate Campaign Speakers*

The participants discounted reports from local committee leaders as "biased information."

Similarly, campaigns and surrogate campaign speakers were not viewed as credible sources. "I don't trust much of it at all from anybody," said one participant. Another said a campaign surrogate "is going to say what she feels in her heart is the way she wants to project it. It doesn't mean that she is going to tell us the truth." Another said, "Sometimes it's of value. It depends who the person is who's speaking and how much you value their credibility."

## ENDORSEMENTS

Endorsements in general were viewed with a great deal of skepticism. One participant said, "I think groups endorse because of something they are going to get back. Just because the firemen like somebody it's not going to do much for me."

### *Media*

Most participants said they would either disregard media endorsements or vote against the endorsed candidate. "Absolutely," said one. "I'll vote against the [Pittsburgh] Post-Gazette." Another said the same about the Pittsburgh Tribune Review. Another said, "I would not vote [for a given candidate] because [a newspaper] endorsed him."

Only one participant said he might vote for a candidate based on a media endorsement. "I would tend to go with the [Pittsburgh Tribune-Review], but I wouldn't take it as the Holy Bible," he said. Another participant explained, "I think [for] the younger people the newspaper endorsements don't mean much because they are not as attached to reading them and being part of their lives. Older people are more used to reading the newspapers and I think it means more to them."

### *Other Groups*

As was the case with newspapers, many participants said an endorsement from certain groups would actually cause them to view the endorsed candidate negatively. One participant said, "I would say that some of the more extreme groups with political agendas, I would use that as a negative endorsement. For instance this [Aryan] group in Idaho. If they would endorse somebody that would be a very negative type of endorsement." Another

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participant said that endorsements by certain groups "could sway me negatively also."

The participants were then asked whether they valued endorsements by a number of particular groups.

#### **Bar Association**

The Bar Association was considered a somewhat helpful source of endorsements by some participants, but was viewed extremely negatively by others. One participant said, "I would trust the Bar Association better than nothing." Another said he had read the Pennsylvania Bar Association's ratings of the judicial candidates and "I came down to the Highly Recommended category. Well I don't know any of these people personally but I read what [the Bar Association] had to say about certain things and I picked who I thought were the least worst." Two female participants said that the Bar Association ratings are important to "a lot of people" but did not say whether they relied on the ratings themselves. Another man said, "I do use them, especially when you have tons and tons of candidates, because you are at a loss to vote intelligently and what other group is there that can give you input? . . . [T]here has to be something when we have these growing numbers of slates, and that's why I think it's helpful. Although you raise a good question - how legitimate are their recommendations? Maybe there should be a better group, but if so, which?"

Some of the participants who said they did not rely on the Bar Association ratings focused on what they perceived as the political nature of the organization. One participant said, "It is very political, who's involved and who's not involved. . . I think for the most part, who[ever] spends the most money

gets elected. Some of the people are the absolute worst candidates." Another said, "It's a highly political process." Another said, "Statistically about fifty percent of the attorneys belong to the Bar Association, but the people involved tend to be a very small group of people who control the power." Another said, "They are an ultra-liberal organization, they're highly political in what they do. The fact that they elected this week to honor the President of the United States two days after he was fined \$91,000 for perjury and while he's fighting disbarment proceedings in Arkansas tells me that the organization doesn't have too much in the way of ethics. The Bar Association is the last organization I would go to for any recommendation on anything."

Another said, "In all due respect, I am very suspicious of anything that the [Bar Association] recommends." Another said, "Frankly, I am suspicious of any process that involves lawyers in the selection of judges."

Other participants questioned the composition of the organization. One said, "It's an old boys network. To me it would be like Kaufmann's [Department Store] rating their own sale. They probably went to law school together, or they golf together on

Saturdays. I would almost if they said he was an excellent judge, I wouldn't vote for him because, who are these people? They are rating their own." Another said, "Who are the Bar Association? Are they a clique of their own?" Another said, "They're just people."

When the participants were asked if they had any positive comments about lawyers, the only comment intended as a positive was actually a negative. "Some of them work very, very hard," said one participant. "Even if they are going to lie to us, they have to work their butts off to get the right way to say it."



**Most participants said they would either disregard media endorsements or vote against the endorsed candidate.**

Interestingly, at least some of the focus group participants indicated that information from individual lawyers might be helpful. One woman said, "I think that lawyers have to deal with these people and know something [more] about them and how they function in the world - the legal world - than just laymen." This was particularly true for participants who had family members or close friends who were lawyers. Another woman said, "I have a daughter who is a lawyer so if I have a question about local judges that she's dealt with I say, 'What do you think?' and she has an opinion based on what other lawyers and she have experienced directly with these people and I don't know how else. . . that's valid as far as I'm concerned."

#### ***Fraternal Order of Police***

The participants generally viewed endorsements from the FOP negatively. The one participant who said she might be swayed by a police endorsement drew a distinction between the officers as a group and the union as an organization. "I think the rank and file police are different than the FOP," she said. "They see the same crime over and over again. The same one percent of the population commits the same crimes over and over again. So if they think that this judge put so and so away frequently or [delivers] harsh sentences then I would take that recommendation more than I would [another endorsement]. They don't want to arrest the same people."

Most of the participants said they would not be influenced by an FOP endorsement. "I don't think they're honest, really," said one participant. "I think it's a very biased group of people," said another. Another said, "I think it's hard to judge the whole group. There are good and bad." Another said, "I don't think it would sway me in one direction or another."

#### ***National Rifle Association***

The male participants were asked about the value of endorsements by the NRA. Only two chose to comment:

"I check out their endorsements."

"They have an agenda and the agenda is well known. If you agree with that agenda, fine. If you disagree, you know what to do."

#### ***Political Parties***

Party support and party endorsements were generally important to the participants, but the extent varied among the participants. When asked whether party endorsements mattered, one participant said, "It does to me. If they endorse somebody, at least I know a platform they are coming from. They have to subscribe to some kind of beliefs for the party to [choose them]."

#### ***Politicians***

Endorsements by individual politicians were generally not important to the participants. When asked whether there were any elected officials in Allegheny County who were viewed as "credible," several of the female participants simply laughed. However, the women did mention several politicians whose endorsement of a judicial candidate might be important to them, including Mayor Murphy of Pittsburgh, several Pittsburgh City Commissioners, and two Allegheny County Executives. Several of the male participants mentioned late Allegheny County Commissioner Tom Foerster as someone whose endorsement would have been meaningful to them.

#### ***League of Women Voters***

The male participants had the following discussion about the value of an endorsement by the League of Women Voters:

"I would say that the League of Women Voters for me would carry some weight. I think they at least work very hard at being objective or trying to provide both sides of the information."

"They address the objectivity of the situation."

"They try to be neutral; I'll put it that way."

"No one is entirely neutral."

#### ***FACTORS IN JUDICIAL VOTING***

The participants realized that it is very difficult to obtain reliable, relevant information about judicial candidates. In the absence of such information, they said they look to a variety of factors in voting for judges.

#### ***Political Party***

Of all the factors available to voters in the absence of any knowledge of a candidate, political

party was given the greatest value. The participants had an understanding of their idea of a basic party philosophy for each major party.

One participant said, "It's very important. If I know nobody on the ballot, then I vote my party." Another said, "Party is very important to me." Another said, "It shouldn't be, but it is." One participant said, "Party is important in this county. It's such a large Democratic plurality that I think it's significant. People vote strictly Democratic regardless of who the candidates are." However, one participant said, "I would not take a chance on voting [straight party]," and another said, "The individual is more of a factor than the party perhaps."

#### **Geography**

In statewide races, geography means a great deal to many of the participants. The participants denied that geography as a generic or abstract concept influenced their choices. "There is a lot of other criteria," one participant explained. Another added that geography shouldn't matter because "judges are supposed to be impartial."

However, there was a tangible amount of bias in favor of statewide judicial candidates from western Pennsylvania.

This was particularly true when the participants considered a choice between a candidate from western Pennsylvania and one from eastern Pennsylvania. One participant said, "You don't want all the power in the state to be all in Philadelphia."

The participants generally made no distinction between candidates from Philadelphia and those from its suburban counties. "[There is a] traditional power struggle between [eastern Pennsylvania and western Pennsylvania]," one participant said. "Another said, "I think of [the division as being] east and west."

One participant did distinguish between Philadelphia and its suburban counties, but viewed

that distinction as less significant than the difference between the eastern and western regions of the state. "The suburban counties are very wealthy and very Republican and very arrogant. At least that's the impression I always get. So when I have a choice, that will probably sway me. I don't think that some rich person from Montgomery County is going to understand the situation in Allegheny County as well as a person from Allegheny County."

Almost all of the participants said geography influences their decisions in judicial races. "I think

you vote for the ones from this area because they are more familiar with whatever crimes are committed and problems," said one. "I think that the tendency is to vote for the people from your area. It is more because people from Allegheny County are more likely to be campaigning in this area so you are going to have more of a name recognition," said another. "If you don't know anybody, I would pick the one from western Pennsylvania," said another. "You have to worry about your own kind," said another.

#### **Ethnicity**

The participants denied that ethnicity played any part in their evaluation of judicial candidates.

However, a few participants said that it does seem to matter to others. "I'll say about two out of ten [vote along ethnic lines]," said one participant. "I'm sure it happens," said another. Other participants said they believe that ethnicity played a large role in the not too distant past. One said, "I don't think that it is as prevalent as it used to be, but I believe that it was an extremely prevalent situation up through the 1950s and possibly into the early 1960s. Quite honestly, this city was very [ethnically oriented]. That has only changed over the last 35 years maybe, if that. It's slowly changing and there are still pockets of it in the Pittsburgh area and the

*There was a tangible amount of bias in favor of statewide judicial candidates from western Pennsylvania.*

Allegheny County area." Another participant said, "I think that it has diminished a great deal. I think that there is a fair amount that is still around."

### **Gender**

Some members of the women's group said that gender played a part in their selection process for judge. "I have a tendency if I knew a woman was qualified, I think that it's good to support women," said one. "The family court judges I want to be women," said another. Another said, "I feel that women [are] not biased, but I think the men would want men judges."

Some of the men believed that gender influenced women, but denied that gender influenced their own decisions. "Truthfully, I think men are more liberal and vote for women more than women vot[e] for men," said one. Another said, "I think the women tend to vote for the women."

### **Family**

Information on a candidate's family and home life was not viewed as important. One participant gave an example of someone with a bad personal life but a good record as a judge. However, a few participants mentioned family as a possible factor in selecting a judge. One said, "More or less his lifestyle; if he has a family, is he a good father, does he care, because today's fathers don't care too much. You need a father in there. He has to be a good father to understand why I want my child back rather than give him to his father." Another said, "It matters to me when I read it. Not that it's the most important thing, but it says to me the issue of stability. It does say that there is stability there. That should help him be a better judge in making these decisions." Another noted, "But eventually when you're voting, you don't know these things, that type of background."

### **Education**

The participants were split regarding the value placed on education as a qualification for judge. One participant said, "It indicates that you might be a little smarter which would not hurt when you make a decision and better prepare you." Another said, "I don't think it's the most important factor by any means."

Some of the participants tended to equate a good education with well-known or prestigious schools. "Teachers may not be as good in lower priced schools," said one participant. "I don't think you get the quality of student in there," said another. Other participants disagreed. "There are so many colleges that are fairly equal," said one. Another said, "If it's a good college, it doesn't have to be Harvard. The books are the same. They don't have different books. You are still getting the education." Another said, "It doesn't matter where you go to school as long as you get the education." Another pointed out that class rank may matter more than what school a judge attended. Another indicated that education outside the legal field might be important, asking, "Do they have other degrees?"

### **Experience**

Many of the participants said they valued experience when considering judicial candidates. "If I am going to vote for a judge, I want relevant experience," said one. "I think also the judge should be one who's had experience if he is going to be a judge in a criminal court," said another. Another participant recited a list of important factors: "[Has he] had prior experience as a judge? What have his rulings been? Has he been lenient on crime? Has he had harsh penalties?" Another said, "With judges you can at least see how long they have been doing this." However, another participant cautioned against relying too heavily on length of service. "The problem I think with the system is you say that [you are] only going to vote for someone with experience," he said. "Well that's a good motivation but [it] eliminates everyone else. It kind of makes an old boys network."

Those participants who valued experience were split regarding what type of experience was important. "I think I respect the prosecutor's opinion a little bit more than an attorney who's never worked as a prosecutor," said one. Another said, "I would vote for a public defender." Another said, "I think there is good and bad in both." Another said, "I think that both are important." Another said, "If I knew that someone worked both sides, I think that it would be a lot more important."

## JUDICIAL VOTERS SURVEY

All of the focus group members qualified as “judicial voters,” meaning that they had voted in the same county in at least three of the previous four general elections. What percentage of eligible Pennsylvanians meets the same criteria? The Committee of Seventy surveyed the fourteen largest counties with available data to find out. Taken together, these counties contain more than half of the registered voters in Pennsylvania.

**TABLE 1. JUDICIAL VOTERS IN FOURTEEN PENNSYLVANIA COUNTIES**

County	All Voters	Judicial Voters	Percent
Allegheny	881,258	186,819	21.2%
Luzerne	188,025	36,041	19.2%
Beaver	112,553	19,844	17.6%
Butler	94,745	14,986	15.8%
Delaware	330,144	43,017	13.0%
Cumberland	125,276	16,126	12.9%
York	213,457	26,922	12.6%
Berks	201,191	23,701	11.8%
Northampton	156,311	17,281	11.1%
Lancaster	247,999	25,688	10.4%
Bucks	344,197	33,137	9.6%
Chester	269,114	25,748	9.6%
Philadelphia	968,065	87,826	9.1%
Montgomery	485,866	43,942	9.0%
<b>Total</b>	<b>4,618,201</b>	<b>601,078</b>	<b>13.0%</b>



The “Total” line in Table 1 shows that approximately thirteen percent of the voters in the fourteen counties studied voted in the same county in at least three of the previous four general judicial elections.

Even a quick look at Table 1 reveals that the top of the list is dominated by counties located in Western Pennsylvania, while the bottom of the list is full of counties located in the southeastern portion of the state.

Table 2 (on the next page) shows the percentage of judicial voters in each county arranged by geographic region of the state.

**TABLE 2. JUDICIAL VOTERS BY COUNTY AND REGION**

<b>Western PA</b>	<b>All Voters</b>	<b>Judicial Voters</b>	<b>Percent</b>
Allegheny	881,258	186,819	21.2%
Beaver	112,553	19,844	17.6%
Butler	94,745	14,986	15.8%
Subtotal	1,088,556	221,649	20.4%
<b>Lehigh Valley</b>			
Luzerne	188,025	36,041	19.2%
Berks	201,191	23,701	11.8%
Northampton	156,311	17,281	11.1%
Subtotal	545,527	77,023	14.1%
<b>Susquehanna Valley</b>			
Cumberland	125,276	16,126	12.9%
York	213,457	26,922	12.6%
Lancaster	247,999	25,688	10.4%
Subtotal	586,732	68,736	11.7%
<b>Southeastern PA</b>			
Delaware	330,144	43,017	13.0%
Bucks	344,197	33,137	9.6%
Chester	269,114	25,748	9.6%
Philadelphia	968,065	87,826	9.1%
Montgomery	485,866	43,942	9.0%
Subtotal	2,397,386	233,670	9.7%
<b>TOTAL</b>	<b>4,618,201</b>	<b>601,078</b>	<b>13.0%</b>

Table 2 shows that the percentage of voters who voted in the same county in at least three of the previous four general elections varies widely by region.

Note that because data is not available from all counties, the counties listed do not necessarily constitute the entirety of the regions under which they are grouped. Nevertheless, Table 2 shows that most of the counties in Southeastern Pennsylvania have significantly lower percentages of judicial voters than do most of the counties in the other heavily populated regions of the state. The same is true for the region as a whole compared to the other regions.

Note also that the regional groups are somewhat arbitrary in a few cases. For instance, Lancaster County could be listed under Southeastern Pennsylvania rather than the Susquehanna Valley. This would slightly increase the percentages in each of those regions, but would not change the basic regional patterns or the conclusions that can be drawn from the data.

# THE NEED FOR REFORM

## WHAT'S SO BAD ABOUT THE CURRENT SYSTEM?

Some might argue that the mere fact that the voters don't have sufficient information to make informed choices doesn't necessarily mean that the system doesn't work. After all, the goal is not to install a perfect selection process, but rather to produce an efficient judiciary. Measured on that basis, there are several fundamental problems with the current system:

1. **Serendipity.** There is no rhyme or reason that explains how and why voters select one judicial candidate over another. As highlighted by the focus group comments, voters rationalize their decisions on a variety of irrelevant and tangential factors - if they think about it at all.
2. **Geography.** The Pennsylvania appellate bench has long been dominated by judges who live in or near Philadelphia and Pittsburgh. As of January 2000, 26 of the Commonwealth's 31 appellate judges hailed from those two metropolitan regions, with 15 of them coming from Allegheny County alone. Recall that the focus group participants acknowledged that geography influences their decisions in judicial races, and that some regions of the state have much higher percentages of judicial voters than other regions, and the power of having the right county listed next to a judge's name on the ballot becomes obvious.
3. **Mediocrity on the bench.** Under the current system, virtually anyone can run for judge, no matter how unqualified. Add to that the haphazard way most voters make their decisions, and it becomes difficult to argue that the best and brightest candidates consistently ascend to the bench.
4. **Unsatisfactory jurisprudence.** The slipshod manner in which judges are elected, coupled with the lack of accountability to the public, leads to a loss of consistency and predictability throughout the judicial system.
5. **Money.** The facts show that name recognition alone can determine the outcome of a judicial election. Candidates know that a quick way to gain name recognition is to

advertise heavily. Of course, that costs money. In recent years, the amount of money raised and spent by judicial candidates has skyrocketed. Raising the money necessary often puts candidates in the position of taking money from lawyers and other people who might then appear before them in court.

6. **Public cynicism.** The judiciary should serve as a source of stability in an often turbulent society, but, due in large part to the factors listed above, the public's faith in the system has declined in recent years. One recent survey found that 88 percent of Pennsylvanians believed that judicial decisions are, at least sometimes, influenced by large contributions made to their election campaigns.<sup>1</sup>



## IS THERE A BETTER WAY?

Taken together, the two studies confirm what most observers have long suspected - that few people vote regularly in judicial elections, and those who do vote have little information about the issues or candidates. Although many voters would no doubt prefer to base their decisions on factors such as the candidates' experience, honesty and education, judicial elections too often end up being decided on the basis of party, geography, and name recognition. The question is, how can we increase the chances that judges will be chosen for their qualifications rather than for arbitrary reasons?

In considering that question, it is important to remember that the key is not who chooses judges, but how they are chosen. In other words, which qualities are considered most important.

Of course, under the current system, the voters can't get any information that would help them do that. So if we want judicial elections to be decided on the basis of the candidates' qualifications, we need to have them decided by some process that can take that information into account.

An appointive system would accomplish this.

An appointive system, sometimes called merit selection, has many advantages as compared to the

<sup>1</sup> Report of the Special Commission to Limit Campaign Expenditures (aka Mundy Commission), Pennsylvania Supreme Court, March 1998.

elective system currently in place in Pennsylvania. With an appointive system, the qualifications of the candidates are foremost considerations. Partisan labels and irrelevant characteristics take a back seat.

Once elected, judges are provided the measure of independence needed, particularly from political pressures. Judges who seek full terms in retention elections run on their records, not against an opponent.

Other problems associated with the elective system currently in place in Pennsylvania would be diminished under an appointive system. The problem of lack of information would be eliminated. As detailed in the focus group comments, the selection process has degenerated into a lottery largely because the voters simply do not know the candidates. An appointive system would solve this problem by putting the information in the hands of a nominating committee, which would have the resources and structure to make an informed decision. Furthermore, an appointive system would provide a much-needed screening mechanism to ensure that only qualified candidates are placed before the voters for retention.

A well-designed appointive system would give Pennsylvania an effective, democratic way of choosing appellate judges. Such a system would lead to:

- **A more responsible selection process.** An appointive system would establish a bona fide system of screening and selection.
- **Better quality judges.** An appointive system would encourage more qualified candidates to consider a career on the bench, and would increase the chances that the best candidates would be chosen as judges.
- **Increased diversity.** Women and minorities would have better chances of reaching the appellate courts under an appointive system, and unbalanced geographical distributions could be rectified. One study found that Pennsylvania appellate judges who ascended to the bench via interim gubernatorial appointment were more representative with respect to party affiliation and east-west geographic region than were judges who were elected.<sup>2</sup>
- **No conflicts of interest.** An appointive system

would assure greater judicial independence. Judges would not have to raise money for campaigns, so there would be an end to the conflicts of interest that currently arise when a judge presides over a case involving someone who has contributed to his campaign.

- **Built-in popular participation.** The public would have several opportunities to affect the process, both directly and indirectly, under an appointive system. Voters would have the opportunity to decide whether a judge should be given a full term on the bench during the retention election. They would also be able to pass judgment on the elected officials responsible for making judicial appointments, as well as those who select the nominating commission. Most importantly, they would have the information necessary to make intelligent, informed decisions about judges seeking retention.

## How Does It Work?

The three hallmarks of an appointive system are:

1. recruitment and nomination of candidates by a bipartisan commission
2. appointment from among the nominees by a chief executive to a limited initial term
3. retention through a nonpartisan election for a full term

This is the basic structure for selecting appellate judges in use in twenty-four states, and endorsed by groups like Pennsylvanians for Modern Courts, the American Judicature Society and the League of Women Voters. There are many variations, but there are a few important elements common to most appointive systems:

- In general, the commission is a permanent, bipartisan body consisting of lawyers and non-lawyers.
- The commission initially and independently generates, screens and submits a list of judicial nominees to the appointing executive, who is generally bound to make a final

<sup>2</sup> Jonathan P. Nase, *Pennsylvania's Appellate Judges*, 1969-1994, 33 Duquesne Law Review, Spring 1995, Number 3, at 449.

selection from that list.

- The appointment is made for a limited initial term, after which the judge may seek re-election in an uncontested, non-partisan retention election, with the only question being whether the judge should be retained for a fixed term of office.

There are many details which can be worked out, including the structure and composition of the nominating commission. A threshold question is who should appoint the nominating commission. Many observers favor dividing the appointive power among a number of sources, including the governor, the legislature and the judicial branch. There are benefits associated with including each of these groups in the appointing process.

**Legislature:** Legislative appointees, chosen by elected representatives of the public, would replace the expression of public will erased by the switch from popular elections. Furthermore, legislative appointers could be held partially responsible by their constituents for the quality of the bench.

**Governor:** Much like the legislature, the governor could be held partially responsible by the voters for the quality of the bench.

**Judiciary:** Members of the judiciary are well-suited to know which qualities are most important, and to recognize them in a particular judicial candidate.

**Bar:** Like judges, lawyers are especially qualified to recognize which candidates will make good judges. In addition, lawyers and their clients are the groups most affected by the composition and quality of the bench, and therefore it is logical to involve them in the process of selecting judicial candidates.

Other groups that could add valuable input to the process include community and civic organizations,

business and labor leaders, and the general public.

Once the nominating commission is set up, its job would be to submit the names of judicial candidates to the governor. The number of nominees submitted to the governor in most states now employing the commission plan is three to five per vacancy. A more crucial issue than pinpointing a particular number of nominees is whether the governor should have the right to reject all of the nominees and request additional panels of names. Supporters of the governor's right to do so believe

that the panel should act only as an advisory board and the governor - who will ultimately make the appointment and be held responsible by the voters - should be permitted to ask for a second list. Opponents believe that the right to demand a second list gives the governor too much political control of the process.

A second question is whether the names submitted to the governor should be made public. Supporters believe that keeping the proceedings guarded for too long may infringe the public's right to know and understand how their judges are selected.

Opponents believe that exposing the public to the commission's deliberations too early in the process may discourage some applicants from seeking seats on the bench.

Another detail is whether the governor's judicial appointees should be subject to confirmation by the state Senate, and, if so, whether confirmation should require a simple majority vote or a two-thirds majority. Some observers argue that an effective nominating commission forwarding qualified candidates to the governor eliminates the need for senatorial confirmation, especially where the legislature has a hand in choosing the nominating commission. Others say that senatorial confirmation adds to the legitimacy of the appointments by

## An appointive system has many advantages as compared to the elective system currently in place in Pennsylvania.

# 16

putting the candidates through a probing, public last step. The question then is whether a simple majority or a two-thirds majority is preferable. A two-thirds majority would insure that judicial appointees have the full support of both the executive and legislative branches, but would also raise the possibility that either major party could block appointments or otherwise politicize the process.

Although reasonable minds may disagree about the best structure or quibble over the details, there is ample common ground. The critical step is not to argue about how an appointive system should be set up in Pennsylvania, but to recognize why it should be implemented in the first place.

## WHY BOTHER?

It's true that the average citizen might pay little attention to the judicial system most of the time. But that's no reason to accept its inadequacies. Anyone who comes in direct contact with the judiciary, whether as a judge, lawyer, litigant, defendant or juror, has an interest in making sure that it is the best system possible. Those who have no palpable

contact with the judiciary must recognize that it is also in their interest to improve the system. Two centuries ago, Alexis de Tocqueville wrote in *Democracy in America*:

They [the Americans] have all a lively faith in the perfectibility of man, they judge that the diffusion of knowledge must necessarily be advantageous, and the consequences of ignorance fatal; they all consider society as a body in a state of improvement, humanity as a changing scene, in which nothing is, or ought to be, permanent; and they admit that what appears to them today to be good, may be superseded by something better tomorrow.

If we seek perfection in any of our social institutions, we do so in the judiciary. It is time we in Pennsylvania admitted that our system of electing judges - which at one time may have appeared to be good - has been superseded in most states by something better. An appointive system would be a big step toward a better tomorrow.

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