

ISSUE BRIEF

SENATE POLICY DEVELOPMENT AND RESEARCH OFFICE

PREPARED IN CONJUNCTION WITH THE SENATE REPUBLICAN POLICY COMMITTEE

Judicial Merit Selection

Background

At the present time, there are widely varying methods for selection of state court judges in the 50 states. In many states, most judges continue to reach the bench initially through direct appointment by the governor or the legislature. In some of these states, the judges are appointed after being nominated by a commission. In yet other states, judges come to office after successfully running in an election that may be either partisan or non-partisan. In a number of states, different selection methods are used for the trial and appellate judiciaries or for trial judges in different geographic areas. Additionally, a certain percentage of state judges initially reach the bench through an interim appointment process, even in states that elect judges.

A 2003 American Bar Association report provided the following breakdown of state judicial selection methods:

- 5 select judges by appointment without a nominating commission.
- 15 choose judges through merit selection with a nominating commission.
- 8 choose judges through partisan elections.
- 13 choose judges through non-partisan elections.
- 9 choose judges through merit selection combined with other methods.

The Pennsylvania Constitution currently provides, in Article V, Section 13, that “justices, judges and justices of the peace shall be elected in 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.” Additionally, that section provides that “a vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justice of the peace which shall be by a majority.”

The judicial selection process in Pennsylvania has evolved over the years. Pennsylvania’s first constitution in 1776 provided for a judiciary with seven-year terms, appointed by a twelve member Executive Council (whose members were elected by voters of the state’s twelve counties). Judges were eligible for reappointment at the end of each term. The Constitution of 1790 created the position of Governor to replace the Executive Council and the Governor was given the power to appoint judges. Judges served during good behavior (so-called “life tenure”).

In 1838, another change occurred. The Governor continued to make judicial appointments but with the consent of the State Senate. Additionally, the service of good behavior was removed and limited terms of office were imposed. In 1850, after passage by the General Assembly, the voters adopted a constitutional amendment providing for the partisan election of all judges (including sitting judges). Vacancies were to be filled by gubernatorial appointment until the next election. The Constitution Convention of 1872-73 produced another change in that interim vacancies would be filled by gubernatorial appointment but with two-thirds Senate confirmation.

Legislation adopted in 1913 changed appellate judicial elections from partisan to non-partisan. Candidates were prohibited from revealing party affiliations on the ballot or in their campaigns. However, this law was repealed in 1921 and partisan elections were reinstated.

The judicial selection debate erupted again during the 1967-1968 Constitutional Convention. As a result of the Convention, the 1968 primary election voters were presented with a new judicial Article (V) that retained partisan elections of judges, but with two key additions: (1) establishing non-partisan retention elections for sitting judges seeking to continue in office after their initial terms, and (2) allowing voters to decide separately on the issue of merit selection of appellate judges by voting on the issue during the 1969 primary election. The Article passed and the following spring, Pennsylvania voters were asked to decide whether to continue electing judges or to change to an appointive system. By a slim margin (50.77% to 49.23%), voters rejected changing the method of selecting judges.

Since the 1969 vote, several reports have been issued relative to the judicial selection process. In 1988, Governor Casey commissioned a Pennsylvania Judicial Reform Commission, chaired by Superior Court Judge Phyllis W. Beck, to review the subject. The Commission recommended retaining partisan elections for local trial courts, except where county voters specifically opted for an appointive system, and implementing an appointive method for appellate court judges. In 2000, another committee, appointed by Chief Justice Flaherty of the Pennsylvania Supreme Court and chaired by Evans Rose, Jr., a Pittsburgh attorney, recommended that an appointive system be created for appellate court judgeships.

To date, the current judicial selection process affirmed by the electorate in 1969 remains unchanged.

Legislative Proposals

The debate on the most appropriate method for selecting the Pennsylvania judiciary continued in the 2007-08 Legislative Session with the introduction of numerous proposals addressing the issue.

[Senate Bill 1324](#) (Earl) would have amended Articles IV and V of the Pennsylvania Constitution to provide for judicial selection for the Pennsylvania Supreme, Superior and Commonwealth Courts. The measure would have established a 14-member independent Appellate Court Nominating Commission. The Commission would be appointed as follows:

- 4 members by the Governor;
- 1 member by the President Pro Tempore of the Senate;
- 1 member by the Minority Leader of the Senate;
- 1 member by the Speaker of the House of Representatives;
- 1 member by the Minority Leader of the House of Representatives; and
- 6 public members selected as provided for by law.

Members of the Appellate Nominating Commission would serve for a term of 4 years and would not be permitted to serve consecutive terms unless originally appointed to fill a partial term vacancy. A member would have to be a resident of Pennsylvania for at least 1 year prior to appointment and at least 18 years of age. They could not be a party official or a public official, except that a part-time solicitor to a local municipality or school district could be a member. No member could be a justice, judge, magisterial district judge, employee of the unified judicial system or a lobbyist. A member appointed by a legislator could not be a member of the General Assembly or their staff, or a relative of a member of the General Assembly. Similarly, a member appointed by the Governor could not be a member of the Governor's staff or a relative of the Governor. No one holding elective or appointive public office, or designees or appointees of anyone holding elective or appointive office, could participate in the nomination or appointment of the public members. No fewer than two of the members appointed by the Governor and each of the members appointed by the General Assembly would have to be members of the bar of the Supreme Court. The members appointed by the Governor would have to be residents of at least 4 different counties and no more than two of the members appointed by the Governor could be registered in the same political party.

For each court vacancy the Commission would submit to the Governor a list of five recommended individuals. An affirmative vote of at least 8 members of the Commission would be necessary in order to submit the list. A nominee would have to be a licensed member of the bar of the Supreme Court; for an aggregate of at least 10 years preceding the person's selection, have either practiced law, served as a judge of court, or been

engaged in a law-related occupation; and, must also have demonstrated integrity, judicial temperament, professional competence and commitment to community.

The Governor would nominate a candidate for the appellate court vacancy from the list provided by the Commission. The Governor could not request additional lists from the Commission nor could the Governor request that certain names be added to the list. The Governor's nominee would require the advice and consent of a majority of the Senate. The Senate would act on a nominee within 15 legislative days or the appointment would be made final. If the Senate rejects a total of 3 nominations for the same vacancy, the Commission could make a final appointment without the involvement of the Governor or the Senate. Senate Bill 1324 was referred to the Senate Judiciary Committee on April 9, 2008 and no action was taken.

[House Bill 2488](#) (Steil) would have amended Articles IV and V of the Pennsylvania Constitution to provide for judicial selection for the Pennsylvania Supreme, Superior and Commonwealth Courts. The bill, identical to Senate Bill 1324 introduced by Senator Earll, was referred to the House Judiciary Committee on May 2, 2008 and no further action was taken.

[Senate Bill 1325](#) (Earll) would have amended Title 71 (State Government) of the Pennsylvania Consolidated Statutes to establish the Appellate Court Nominating Commission. The purpose of the Commission would be to nominate individuals for the office of justice of the Supreme Court and judge of the Superior Court and Commonwealth Court. The Commission would be appointed as follows:

- 4 members by the Governor;
- 1 member by the President Pro Tempore of the state Senate;
- 1 member by the Minority Leader of the Senate;
- 1 member by the Speaker of the House of Representatives;
- 1 member by the Minority Leader of the House of Representatives;
- 1 member would be a dean of one of the law schools located within the Commonwealth selected by the deans of the law schools; and
- 5 members, one each selected by business organizations, civic organizations, professional organizations, public safety organizations and unions. Organizations from each category would submit applications to be part of the process and then the 5 organizations chosen for each category would submit a recommended name. A lottery system would then be used to select the final name for each of the categories.

Members of the Appellate Nominating Commission would serve for a term of 4 years and would not be permitted to serve consecutive terms. A member would have to be a resident of Pennsylvania for at least 1 year prior to appointment and at least 18 years of age. They could not be a party official or a public official, except that a part-time solicitor to a local municipality or school district could be a member. No member could be a justice, judge, magisterial district judge, employee of the unified judicial system or a lobbyist. A member appointed by a legislator could not be a member of the General Assembly or their staff, or a relative of a member of the General Assembly. A member appointed by the Governor could not be a member of the Governor's staff or a relative of the Governor. No one holding elective or appointive public office, or designees or appointees of anyone holding elective or appointive office, could participate in the nomination or appointment of the public members. No fewer than two of the members appointed by the Governor and each of the members appointed by the General Assembly would have to be members of the bar of the Supreme Court. The members appointed by the Governor would have to be residents of at least 4 different counties and no more than two of the members appointed by the Governor could be registered in the same political party.

The Commission would select a chairman, a vice-chairman and other officers and establish its own rules governing conduct of members. Nine members would constitute a quorum and a majority of members present at any meeting would be required for all actions of the Commission. The Commission would evaluate applicants for vacancies and forward a list of 5 recommended individuals to the Governor. Only one list would be submitted per vacancy. If more than one vacancy occurs on the same court, separate lists would be submitted for each vacancy and the lists could contain no more than two names in common. After the list is submitted to the Governor it would be submitted to the Senate and made public. Senate Bill 1325 was referred to the Senate Judiciary Committee on April 9, 2008 and no further action was taken.

[House Bill 2386](#) (Steil) would have amended Title 71 (State Government) of the Pennsylvania Consolidated Statutes to establish the Appellate Court Nominating Commission. The bill, identical to Senate Bill 1325 introduced by Senator Earll, was referred to the House Judiciary Committee on May 2, 2008 and no further action was taken.