

# **WHY DOES PENNSYLVANIA HAVE RETENTION ELECTIONS FOR JUDGES?**

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This paper seeks to briefly explore the history of Pennsylvania's judicial selection process and, in particular, nonpartisan "retention elections" for Pennsylvania jurists seeking second or subsequent terms in office.

## **I. History of judicial selection methods in Pennsylvania**

Since the founding of the United States, Pennsylvanians have utilized various methods for selecting jurists:

Under the 1776 Pennsylvania Constitution, judges were appointed by the Executive Council for seven year terms (The 1776 Constitution did not provide for the office of Governor). Judges were eligible for reappointment at the end of each term.<sup>1</sup>

Under the 1790 Constitution, judges were appointed by the Governor, and like the federal judiciary, they served during good behavior (so-called "life tenure").<sup>2</sup>

In 1838, service during good behavior was removed. Judicial appointments were still made by the Governor, although now with the consent of the Senate, and the terms of office were limited. Supreme Court Judges served fifteen year terms while Common Pleas Court Judges served ten year terms.<sup>3</sup>

In 1850, whether attributable to "Jacksonian Democracy"<sup>4</sup> or a desire "to increase judicial independence and stature,"<sup>5</sup> Pennsylvanians

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<sup>1</sup> Pennsylvania Constitution of 1776, Ch. II, § 23.

<sup>2</sup> Pennsylvania Constitution of 1790, art. II, § 8 and art. V, § 2.

<sup>3</sup> Pennsylvania Constitution of 1838, art. V, § 2.

<sup>4</sup> Committee of 70 Judicial Selection Governance Study ("Committee of 70 Study"), pp. 11-14 (1983), available at: <http://www.seventy.org/reform/judicial>.

<sup>5</sup> Roy A. Schotland, Selection of State Appellate Judges, Political Party Affiliation in Partisan and Nonpartisan Judicial Elections, 39 Willamette L.Rev. 1397, 1399-1400 (Fall 2003).

abandoned the appointment method for judicial selection and instituted popular elections.<sup>6</sup> Supreme Court Justices (called Judges at that time) were elected to fifteen year terms, while Common Pleas Court Judges were elected to ten year terms.

In 1874, the terms of office of Supreme Court Judges were increased to twenty-one years, but without the possibility for reelection, while the terms of Common Pleas Court Judges remained at ten years.<sup>7</sup>

Nonpartisan judicial elections first appeared in Pennsylvania in 1913 when Governor Tenor signed legislation requiring judicial candidates for courts of record to be elected through nonpartisan ballots.<sup>8</sup> However this law was repealed in 1921,<sup>9</sup> and partisan elections were reinstated.<sup>10</sup>

In 1968, Pennsylvanians adopted the current Constitution. Supreme Court Justices, appellate and common pleas court judges are elected to ten year terms. Philadelphia Municipal and Traffic Court Judges and Magisterial District Court Judges are elected to six year terms.<sup>11</sup> All of these jurists, except Magisterial District Court Judges, may seek reelection to office by running in nonpartisan "retention" elections.<sup>12</sup>

## **II. History of nonpartisan retention elections for judicial office**

Shortly after judicial elections became the law in Pennsylvania, efforts to reduce partisan political influences on the judiciary began.<sup>13</sup> Bar associations across the country advocated "taking judges out of politics."<sup>14</sup> The concept of nonpartisan judicial elections was first suggested in the

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<sup>6</sup> Pennsylvania Constitution of 1838, art. V, § 2 (*amended* 1850).

<sup>7</sup> Pennsylvania Constitution of 1874, art. V, § 2 and § 15.

<sup>8</sup> Act of July 24, 1913, No. 457, 1913 Pa. Laws 1001.

<sup>9</sup> Act of May 10, 1921, No. 199, 1921 Pa. Laws 426.

<sup>10</sup> Act of May 10, 1921, No. 198, 1921 Pa. Laws 423.

<sup>11</sup> Pa. Const. art. V, § 15(a).

<sup>12</sup> Pa. Const. art. V, § 15(b).

<sup>13</sup> Committee of 70 Study at 15.

<sup>14</sup> Committee of 70 Study at 15.

1870's, as a means of "forc[ing] voters to select judges based on merit rather than party affiliation", and to "take the judges out of politics."<sup>15</sup> As noted above, in the early 20<sup>th</sup> century, Pennsylvania, along with several other states, experimented with nonpartisan elections for judges.<sup>16</sup> However in Pennsylvania, this initiative was not popular and was repealed in 1921 after only eight years.<sup>17</sup>

The concept of nonpartisan ballots for judicial elections resurfaced in the 1940's and 1950's, mainly in connection with an appointive method for judicial selection. The 1959 Report of the Commission on Constitutional Revision ("Woodside Commission Report") supported the so-called "Pennsylvania Plan" which called for nonpartisan retention elections for appellate court jurists (who would initially be appointed to a brief term by the Governor).<sup>18</sup> The purpose of the recommendation was, in part, to remove judges from partisan politics.<sup>19</sup> Nonpartisan retention elections (after a brief appointive term by the Governor or Chief Justice) were also recommended by the Governor's Commission on Constitutional Revision in 1964<sup>20</sup> and by the Pennsylvania Bar Association in 1966.<sup>21</sup> In 1967, the President's Commission on Law Enforcement and Administration of Justice endorsed the principle of retention elections "as the best way to protect judges from 'undue political influence and to increase their independence.'"<sup>22</sup>

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<sup>15</sup> Committee of 70 Study at 15, citing Larry Berkson, Judicial Selection in the United States: Judicature 64 (1980), pgs. 176-77.

<sup>16</sup> Roy A. Schotland, Selection of State Appellate Judges: Political Party Affiliation in Partisan and Nonpartisan Judicial Elections, 39 *Willamette L.Rev.* 1397, 1413-14 (Fall 2003).

<sup>17</sup> Committee of 70 Study at 18.

<sup>18</sup> Report of the Commission on Constitutional Revision, Robert E. Woodside, Chairman, 1959, Art. V, § 25, (pp. 33-37).

<sup>19</sup> See *The Judiciary*, Reference Manual No. 5, prepared by the Preparatory Committee for the Constitutional Convention, ("Reference Manual No. 5"), pg. 379.

<sup>20</sup> Report of the Governor's Commission on Constitutional Revision, §7 (1964); Reference Manual No. 5, pgs 417-19.

<sup>21</sup> Pennsylvania Bar Association Proposed Judiciary Article, §7 (1966); Reference Manual No. 5, pgs. 383-85, 389-90 (alternate proposal).

<sup>22</sup> Committee of 70 Study at 19, *quoting* Susan B. Carbon and Larry C. Berkson, Judicial Retention in the United States (Chicago: American Judicature Society, 1980), pp. 1-2, *discussing* President's Commission on Law Enforcement and Administration of Justice, 1967.

Prior to the 1967-68 Pennsylvania Constitutional Convention, a preparatory committee was created "to compile alternative proposals for constitutional changes to be considered by the convention."<sup>23</sup>

In a 1967 Statement to the Preparatory Committee by the Pennsylvania League of Women Voters, nonpartisan retention elections (after a brief appointive term) would "help to keep the courts out of politics and politics out of the courts." <sup>24</sup>

Regarding a proposed selection process combining partisan elections for judges, followed by nonpartisan retention elections, the Preparatory Committee wrote:

[t]his system combines the direct election by the people with a nonpartisan, noncompetitive reelection, but it eliminates the rigors of a campaign for the incumbent judge, retains his skill and experience and permits the electorate to pass on his qualifications and fitness for office as demonstrated by his prior term of office. <sup>25</sup>

As noted above, the so-called "Pennsylvania Plan" proposed judicial appointments, followed by nonpartisan retention elections. On the retention election aspect of this plan, the Preparatory Committee wrote:

The proponents of the Pennsylvania Plan feel that the provision for an election to decide whether a judge is to be retained gives the electorate sufficient democratic control over the judiciary. The election contemplated does not follow the usual type of political campaign, since the judge who seeks to be retained for a regular term runs on his own record. He does not have to spend the time, physical and mental energy, nor the money required by a typical partisan, competitive campaign. His only investment in effort and money to be retained is in the work he has put into his judicial duties to gain a satisfactory record and in the cost of a postage stamp used to notify the election officials that he desires to be retained for another term.<sup>26</sup>

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<sup>23</sup> Reference Manual No. 5, pg. v.

<sup>24</sup> Pennsylvania League of Women Voters, Statement to the Pennsylvania Constitutional Convention Preparatory Committee, Task Force Hearing on the Judiciary Article, July 1967.

<sup>25</sup> Reference Manual No. 5, § 5.6.1, pg. 116.

<sup>26</sup> Reference Manual No. 5, § 7.3.9, pg. 132.

During the Convention numerous proposals were debated concerning judicial selection.<sup>27</sup> Most of these debates surrounded the method for initial judicial selection (appointment vs. election). Delegate (and former Governor) William Scranton said the question of judicial selection "was the most contentious and the most contested of all the portions of [the judiciary] article within the committee."<sup>28</sup> On the selection of judges, Delegate Stout wrote "we found this issue to be the 'hottest,' most controversial issue of this Convention."<sup>29</sup>

While delegates were bitterly divided on the method for initial selection to the bench, many agreed that nonpartisan retention elections were necessary to lessen the influence of partisan politics on sitting judges.<sup>30</sup> Delegate Burkholder stated that "yes-no" retention elections are the way to reduce political influences on judges in office.<sup>31</sup> Delegate Goldman said nonpartisan retention elections "keep [judges] out of politics, running solely and exclusively on their own background, on their own ability as they have proven it in their preceding term."<sup>32</sup>

On February 26, 1968, in the closing days of the Convention and after days of impasse, an amendment was introduced that would lead to the current Constitution's Article V. The amendment called for partisan elections, followed by nonpartisan "merit retention" elections for all common pleas and appellate court judges. It also called for the voters at the 1969 primary election to determine if the Commonwealth's appellate court judges should be selected by the Governor from a list of names submitted by a Judicial Nominating Commission.<sup>33</sup> This compromise position eventually led to the current Article V, §13 and §15. The 1969 ballot question on judicial

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<sup>27</sup> See *e.g.* Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. 1, pgs. 94-99, 122-27, 148-52, 161, 172-84, 207-08, 225-33, 288-95, 309-13, 315, 322-23, 444-49. See *also* Reference Manual No. 5, pgs. 101-116; Committee of 70 Study at 20.

<sup>28</sup> Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. 1, pg. 448.

<sup>29</sup> Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1235.

<sup>30</sup> See *e.g.* Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. 1, pgs. 94-99 (Proposal No. 1000), 122-27 (Proposal No. 1011), 147-52 (Proposal No. 1031), 172-78 (Proposal No. 1054), 207-08 (Proposal No. 1087) and 290-95 (Proposal No. 1174).

<sup>31</sup> Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1081.

<sup>32</sup> Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1242.

<sup>33</sup> Debates of the Pennsylvania Constitutional Convention of 1967-68, vol. II, pg. 1241-42.

appointments for appellate court judges failed by a vote of 643,960 to 624,453.<sup>34</sup>

While the debate continues to this day over the best method for the initial selection of Pennsylvania judges, recommendations to change judicial selection over the past 40 years have repeatedly advocated continuing "merit retention elections" as a way of limiting partisan political influences on judicial selection.<sup>35</sup>

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<sup>34</sup> Robert E. Woodside, Pennsylvania Constitutional Law, pg. 558 (1985).

<sup>35</sup> See *e.g.* The Committee to Study Pennsylvania's Unified Judicial System, Thomas W. Pomeroy, Jr., Chairman ("Pomeroy Report"), 1981 pgs. 81, 89-92; Governor's Judicial Reform Commission, Phyllis W. Beck, Chairperson ("Beck Commission Report"), 1988, pgs. 155-56; Pennsylvanians for Modern Courts, Core Concepts of Merit Selection, Pt. 5, available at: <http://www.pmconline.org/merintro.htm>; Pennsylvania League of Women Voters, Selection of Judges, available at: <http://pa.lwv.org/issues/judiciary.html>.