Volume 106
Issue 4 *Dickinson Law Review - Volume 106, 2001-2002*

3-1-2002

Commentary: Pennsylvanian's Should Adopt a Merit Selection System for State Appellate Court Judges

J. Andrew Crompton

Commentary: Pennsylvanian's Should Adopt a Merit Selection System for State Appellate Court Judges

J. Andrew Crompton*

I. Background

The Supreme Court of Pennsylvania was established on May 22, 1722 and is the oldest appellate court in the nation.[1] An 1850 constitutional amendment made the justice selection an elective statewide process for full terms, which continues today.[2] The Superior Court of Pennsylvania has existed since 1895 and was constitutionally mandated in 1968.[3] Each full-term member of the Superior Court is also elected on a statewide basis by the voters. The Commonwealth Court was established at the Constitutional Convention of 1968 and the judges began to sit on the court on January 1, 1970.[4] Since the Commonwealth Court's existence, the full-term members have also been elected statewide.[5]

Should the Pennsylvania Supreme, Superior and Commonwealth Courts' justices and judges continue to be elected by the voters or should a "merit selection" process be utilized which would mandate that full-term justices and judges be nominated by the governor and confirmed by the Senate of Pennsylvania?[6] This commentary will discuss the merits of

---

* Counsel for Pennsylvania State Senator Robert C. Jubelirer.

1. 115 PENNSYLVANIA MANUAL § 5-4 (2002).
2. *Id.*
3. *Id.* § 5-5.
4. *Id.*
5. The judiciary branch of Pennsylvania also consists of numerous other courts, including the Courts of Common Pleas, magisterial courts, Philadelphia courts, Pittsburgh magistrate court, as well as other judicial bodies, all of which elect its full-term members in the corresponding jurisdictions. This commentary will not focus on these courts.
6. *See generally* PA. CONST. art. V, § 13. Judicial vacancies for unexpired terms due to resignation, sickness or death are filled by appointment of the governor and confirmed by a two-thirds vote in the Senate, except in cases of the justices of the peace (district justices), which are by majority.

a selection process for Pennsylvania appellate judges. Before the merits of a selective process are analyzed, however, this commentary will focus on several deficiencies with the current judicial elective system.[7]

II. Three Fundamental Problems Associated with Electing Pennsylvania Appellate Judges

A. Anonymity of Judicial Candidates

How many justices comprise the Pennsylvania Supreme Court? If you knew the answer to be seven, then you are ready for the next question. How many judges comprise the Pennsylvania Superior Court and the Pennsylvania Commonwealth Court? If you knew the answers to be fifteen and nine respectively, go to the head of the class. Ready for the bonus question? Name the current nine Pennsylvania Commonwealth Court judges.

The appellate judiciary in Pennsylvania generally functions in obscurity. This lack of notoriety is a positive aspect of our judiciary; yet, it collides with the core concepts of the elective process. A legal scholar summarized the issue of judicial anonymity this way: "The simple fact of the matter is that most people in Pennsylvania do not even know that we elect all our judges in Primary and General elections . . . ."[8] Two political analysts wrote the following about judicial candidates: "'Who are these people anyway?' That question could be asked by almost any voter going into the voting booth on Election Day after viewing the names of the judicial candidates on the ballot. Hence, name recognition and not merit become the essential electoral ingredient."[9]

Although it is difficult to ascertain with reasonable certainty how much voters know about any particular statewide judicial candidate, polls strongly suggest that most voters have little idea who is running for statewide judgeships.[10] In May 1997, a survey of registered voters in Erie County suggested that only two percent of the 1966 voters interviewed were able to name two or more of the eight judicial

7. This author is in no way critical of the quality or intellect of the men and women who have served or are currently serving as Pennsylvania's appellate court justices or judges. This commentary focuses solely on whether the people of Pennsylvania should be given the opportunity to adopt a new system for the selection of justices and judges.

8. Carl S. Primavera, *You Be the Judge: Appoint Them or Elect Them?*, YORK DISPATCH, Feb. 22, 2001, at A13.

9. G. Terry Madonna and Michael Young, *Politically Uncorrected,* YORK DAILY REC., Jan. 21, 2001, at 3.

10. ELLEN MATTLEMAN KAPLAN, BLUEPRINT FOR THE FUTURE OF JUDICIAL SELECTION REFORM, 4, *at* http://www.pmconline.org (Apr. 16, 2001).

hopefuls.[11]

Proponents of the elective process argue that nothing should abridge an individual's right to select his or her judicial candidate of choice on Election Day. Victor M. Diaz, a civil trial attorney in Miami and the chairman of Citizens for an Open Judiciary wrote, "whatever imperfections may exist in the current system should be addressed through careful reform, not by taking away the most basic privilege of American citizenship—our right to vote—in favor of an unregulated and selective process of politically appointed judges."[12] The Shamokin News Item Editorial Board also voiced its criticism of a merit selection system when it opined, "Governor Ridge wants to take away one of your important rights, the right to decide who will serve as judges."[13]

Should not, however, the protected privilege of voting at least hinge in some small way on an informed electorate? J. Keath Fetter, the former president of the Chester County Bar Association, addressed this question when he stated, "I think it's very, very difficult for the voters to know much of anything about the people [judicial candidates] for whom they're voting. Even as a lawyer, I have trouble."[14] Pennsylvania appellate judges obviously serve the Commonwealth in means wholly different than those of legislators. In fact, Governor Ridge stated, "judges are not representatives. Their job is to interpret the law and the Constitution."[15] Merit selection is considered, and in many states embraced, because the roles in which judges serve are so dramatically different than the roles of those who serve as members of the executive or legislative branches.[16]

As noted above, this commentary focuses on merit selection for appellate judges only. A merit selection process would not likely affect the electorate voting on county judges or local district justices. Moving to a merit selection system would indeed prevent the electorate from exercising a core function of democracy: the right to vote, in this case, for statewide judges. Such loss must be weighed against the potential gains of a merit selection system. Before deciding whether to no longer allow the electorate to cast votes for appellate judges, two other systemic problems within the current elective process must be addressed.

---

11. Editorial, ERIE MORNING NEWS, May 22, 1997. This poll was conducted just days prior to the Pennsylvania primary election on May 20, 1997.

12. Victor M. Diaz, Jr., *Don't Take Away Public Vote: Potential for Corruption Greater in Secretive Appointment Process*, USA TODAY, Nov. 2, 2000, at A16.

13. Editorial, *"Merit Selection" Has No Merit*, SHAMOKIN NEWS ITEM, Apr. 11, 2001, at 4.

14. David Bernard, *Ridge Pushes Appointing Judges*, DAILY LOCAL NEWS, Feb. 8, 2001, at A3.

15. Albert J. Neri, *Ridge Pushes for Merit*, ERIE TIMES, April 11, 2001, at A10.

16. This issue is further addressed in Part II(C) of this commentary.

B. *The Negative Impact of Judicial Fundraising*

Although most Pennsylvanians have little idea who is running for appellate vacancies, this does not prevent judicial candidates from raising money, and lots of it. In January 1998, a poll was commissioned to ascertain the sentiments of Pennsylvania residents regarding the affects of judicial fundraising. The poll results were dramatic in that "88 percent of the respondents believed that decisions made by judges in their courtrooms are, at least sometimes, influenced by large contributions made to their election campaigns."[17] Seven appellate vacancies were filled in Pennsylvania on November 6, 2001.[18] Approximately $2.7 million was raised by the individual fourteen candidates.[19] Over fifty percent of those funds came from lawyers practicing in Pennsylvania.[20] Philadelphia Bar Chancellor, Allen Gordon, in response to judicial fundraising, recently stated, "We believe that judges taking money from lawyers who may appear in front of them creates the appearance of impropriety."[21] Unfortunately, the practice of judicial candidates raising money has been occurring in Pennsylvania for decades. According to James Eisenstein, Professor of Political Science at Pennsylvania State University, "over an 18-year period, from 1979 to 1997, a total of slightly greater than $17 million (in 1997 dollars) was contributed to thirty-five competitive Pennsylvania Supreme Court candidates."[22]

Pennsylvania is not the only state attracting substantial campaign contributions for state appellate judicial races. On March 25, 2002, *USA Today* reported that $45.6 million was raised for state supreme court

17. KAPLAN, *supra* note 10 (Poll conducted by Lake, Sosin, Snell & Associates and Deardorff/The Media Company.)

18. There was one vacancy in the Supreme Court and three vacancies in the Superior and Commonwealth Courts.

19. The total 2001 campaign contributions per candidate were as follows: Mike Eakin—$280,129; Kate Ford-Elliott—$881,460; Richard Klein—$146,350; Mary Jane Bowes—$196,963; John Bender—$20,444; David Wecht—$290,520; Stephanie Domitrovich—$31,200; Lydia Kirkland—$40,300; Mary Hannah Leavitt—$142,450; Renee Cohn—$108,660; Robin Simpson—$97,305; James Dodaro—$316,700; Jerry Langan—$93,000; Irwin Aronson—$20,000. These totals include only monies raised by the judicial candidates themselves and does not include substantial contributions from third parties and state committee groups.

20. This information is based upon a review of all individual campaign finance reports for 2001. The actual percentage was computed to be 53.14 percent. This percentage may not be absolutely precise due to the fact that the Pennsylvania law does not require contributors to note his or her profession if the contribution is less than $250.

21. Jill Porter, *Why Would Judges Take $$ from Lawyers?*, PHILA. DAILY NEWS, March 25, 2002, at 6.

22. James Eisenstein, *Pennsylvania Selects Judges in a Most Unjudicial Way*, YORK DAILY REC., October 15, 2000, at 3.

races across the country in 2000.[23] The report also noted that "approximately 60 percent of the $45.6 million raised in Supreme Court races in 2000 was raised in three states: Alabama, Illinois and Michigan."[24] No longer are interest groups focusing campaign contributions solely on the legislative and executive branches of government. For example, according to the *New York Times*, "[t]he measures, which often place a maximum on damage awards and otherwise limit recoveries by people claiming injury, have spawned challenges in many state courts, which, in turn, have spawned campaigns by trial lawyers and business groups to shift those courts their way."[25]

There are thirty-one appellate judges and justices in Pennsylvania. It follows that it may, for some interest groups, be more economical to attempt to influence a branch of government consisting of thirty-one members rather than the General Assembly in Pennsylvania, which has 253 participants. Judicial candidates are forced to raise hundreds of thousands, and, in some cases, millions of dollars. More than a majority of the money in Pennsylvania is coming from the same lawyers who will appear before the campaigning judges. And although the electorate does not know who is being elected to the judicial branch, voters seem certain of one thing: the money raised by the judges is affecting the judges' ability when making judicial decisions.

C. Judicial Canon 7

On June 27, 2002, the United States Supreme Court decided *Republican Party v. White*.[26] This decision will have a dramatic and direct impact on future judicial elections in Pennsylvania. The Court held in *Republican Party* that Canon 5 of Minnesota's Canon of Judicial Conduct,[27] which prohibits judicial candidates from announcing their views on disputed legal or political issues, violates the First Amendment to the United States Constitution.[28] The Eighth Circuit of Appeals held in *Republican Party* that the restriction on free speech was narrowly tailored and served a compelling state interest in maintaining the interdependence and impartiality of the Minnesota judiciary.[29] The

23. Richard Willing, *High Court To Weigh Limits on Judicial Races*, USA TODAY, March 25, 2002, at A4.

24. *Id.*

25. William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A22.

26. *Republican Party v. White*, 122 S. Ct. 2528 (2002).

27. MINN. CODE OF JUDICIAL CONDUCT Canon 5 (2002).

28. *Republican Party*, 122 S. Ct. at 2542.

29. *Republican Party v. White*, 247 F.3d 867, 868, 872 (2001), *rev'd*, 122 S. Ct. 2528 (2002).

Court disagreed, and, in a 5-4 decision, held that the restriction on judicial speech was not narrowly tailored and that impartiality should not necessarily be considered a compelling state interest.[30]

Pennsylvania, along with seven other states,[31] has a similar judicial speech prohibition to that of Minnesota. Pennsylvania Judicial Canon 7, in part, states:

> A candidate, including an incumbent judge for a judicial office, that is filled either by public election between competing candidates or on the basis of a merit system election. . .should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; *announce his views on disputed legal or political issues*; or misrepresent his identity, qualifications, present position, or other fact.[32]

Canon 7 has been strictly interpreted in Pennsylvania. In fact, one political commentator has stated that judicial candidates cannot give much more than "name, rank, and serial number."[33] The Court's holding in *Republican Party* has invalidated all or parts of the judicial speech restrictions in eight states, including Pennsylvania. It is important to note, however, that Justice Scalia, in his majority opinion in *Republican Party,* went to some length to state clearly that it was not the majority's intention to prohibit all types of restrictions for judicial candidates. Scalia wrote that the constitutionality of "pledges or promises" were not at issue in the decision.[34] Chief Justice Tom Phillips of the Texas Supreme Court stated after the release of the *Republican Party* decision:

> As with many court rulings, it is not absolutely clear how far the ruling goes . . . we're not clear if it affects the pledges or promises clause which covers at least the more egregious problems of a candidate promising to rule a certain way before considering the facts and the law.[35]

Certainly, any language concerning a state's announce clause violates the majority's decision in *Republican Party;* however, the language concerning pledges or promises may still be enforceable.

There had been considerable public discussion in Pennsylvania prior

30. *Republican Party,* 122 S. Ct. at 2542.

31. These states are Arizona, Colorado, Iowa, Maryland, Mississippi, Missouri and New Mexico.

32. PA. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (emphasis added) (stating that a judge should refrain from political activity inappropriate to his judicial office).

33. Jeff Miller, *High Court To Consider Judicial Campaign Restrictions,* ALLENTOWN MORNING CALL, Mar. 26, 2002, at A12.

34. *Republican Party,* 122 S. Ct. at 2532.

35. Marcia Coyle, *New Suits Foreseen on Judicial Elections,* NAT'L L.J., July 15, 2002, at A1.

to the Court's decision in *Republican Party* arguing for and against Canon 7. Retired Pennsylvania Superior Court Judge Edward Spaeth believes that the Eighth Circuit held correctly in *Republican Party* and that the Court should have affirmed the circuit court's holding. Spaeth stated, "If the public doesn't have confidence in the impartiality of judges, you just can't have the rule of law."[36]

Others, however, had argued that it was time to loosen the restrictions on judicial candidates speaking about issues. In an interview printed on March 19, 2001, a lobbyist for the Pennsylvania Trial Lawyers Association argued that one of the needed judicial reforms is to "give judicial candidates greater freedom to discuss issues without getting into specific cases."[37] The current president of the Pennsylvania Bar Association, H. Reginold Belden, Jr., disagreed. He wrote the following prior to the Court's holding in *Republican Party*:

> Some observers would like to see the "gag" order [Canon 7] lifted so that judicial candidates could talk about issues. But this isn't a good idea. Our justice system would not be well served by permitting judicial candidates to pander to the electorate with preconceived and publicly announced positions on disputed legal issues. This practice would necessarily hamper the successful candidates' ability as a judge to objectively apply the unique facts of a case to legal precedent in arriving at an impartial decision—the basic obligation of every judge.[38]

Some participants in the Pennsylvania political process have argued that regardless of restraints placed on judicial candidates because of Canon 7, the activity of campaigning by judicial candidates is worthwhile. Pennsylvania Senator Lisa Boscola opposes merit selection because of her support of the campaign process. Senator Boscola put her opposition this way: "I believe campaigns are good [for judges] because it gets the candidate out in the community and going to events like spaghetti dinners."[39] But do most Pennsylvanians really care if judicial candidates appear at spaghetti dinners? Is the campaigning experience so vital to the judicial process? The answer is simply "no." Arguing that

---

36. Jeff Miller, *High Court To Consider Judicial Campaign Restrictions*, ALLENTOWN MORNING CALL, Mar. 26, 2002, at A12. Judge Spaeth filed an amicus brief in support of the speech restriction in *Republican Party v. White* on behalf of Pennsylvanian's for Modern Courts.

37. *A Question and Answer with Mark Phenicie*, *at* http://www.capitolwire.com (Mar. 19, 2001).

38. H. Reginald Belden, Jr., *Judicial Races: As State Campaigns Become Nastier, Appointive Process Gains Credibility*, PATRIOT NEWS, Dec. 9, 2001, at B23.

39. Nicole Radzievich, *Morganelli Opposes Plan To Choose Judges on Merit*, EXPRESS-TIMES, Apr. 18, 2001, at B1.

judicial candidates need to partake in the "campaigning experience" is an attempt to make judicial candidates too similar to legislative or executive candidates. The roles performed by members of the judicial branch are vastly different than the members of the other branches, and, therefore, it should be acceptable to have judicial candidates selected in a manner unlike the other branches. An editorial aptly summarized the different branch responsibilities: "Legislators are supposed to represent the views of the voters; judges are not. They must follow the law, no matter what the voters think. It is hard to look impartial while carrying a campaign sign."[40]

It is difficult to ascertain the full impact of *Republican Party* since this commentary is being written so close in time to the Court's decision. However, the initial reaction by many scholars and commentators to the decision in *Republican Party* has been somewhat negative. Lynn A. Marks, Executive Director for Pennsylvania for Modern Courts, wrote,

> [M]ake no mistake about it, though, the Supreme Court's ruling is deeply troubling. Permitting judicial candidates to cast about for votes by stating their views on hot-button issues—and thereby signaling how they would rule in cases involving those issues—will only undermine the actual and perceived impartiality of the judiciary and encourage sound-bite campaigning. In our political system, impartiality is the hallmark of the judiciary. Judges are charged with applying the law impartially without prejudging the issues presented to them for decision.[41]

Georgetown University Law Center Professor Roy Schotland stated, "It [the Court's decision in *Republican Party*] is definitely going to make judicial elections worse than they are now."[42] Debra Goldberg of the Brennan Center for Justice added, "We will see increasing cost and decreasing civility."[43]

One political commentator, Larry Eichel, believes that, if a state is going to have judicial elections, the candidates should have no restrictions on speech. Eichel writes:

> [T]he high court has done something quite useful with this decision. It's told states that if they want to elect judges, the election has to be a full-fledged affair, in which candidates are free to behave like candidates. And if states don't like that, if they think it unseemly,

40. Editorial, *Judges Can Speak Their Minds*, PHILA. DAILY NEWS, July 5, 2002, at 17.

41. Lynn A. Marks, *Ruling Tears at Judiciary's Impartiality*, PATRIOT NEWS, July 14, 2002, at F1.

42. Tony Maur, *Rulings in Contentious Cases Mark End of High Court Term*, AM. LAW. MEDIA, June 26, 2002.

43. *Id.*

they can always scrap the electoral process all together.[44]

It is also difficult, if not impossible, to know the full effect *Republican Party* will have on future judicial elections. Judicial candidates may individually elect to follow some speech restrictions or they may, as many fear, attempt to attract constituencies by stating certain policy positions in an order to improve likelihood of election. Nevertheless, the simple truth is, with the voiding of some or most of Canon 7, campaign contributions and fundraising will have an even greater role in judicial elections in Pennsylvania. A lawyer representing the Brennan Center for Justice at New York University warned that "pressures to relax Canons of judicial conduct that safeguard important distinctions between judges and other elected officials interact dangerously with the increasing role of money on judicial campaigns."[45] A truly better solution is a merit-based selection process which will focus on an individual's qualifications rather than his or her comments or actions on the campaign trail.

III. Making the Case for Merit Selection

A. The Basic Principles of Merit Selection

> [Merit selection is best described as] a way of choosing judges that uses a nonpartisan commission of lawyers and non-lawyers to . . . evaluate applicants for judgeships. The commission then submits the names of the most qualified applicants . . . to the appointing authority (usually the Governor), who must make a final selection from the list. For subsequent terms of office, judges are evaluated for retention either by commission or by the voters in an uncontested election.[46]

Twenty-four states[47] and the District of Columbia currently utilize a merit selection system for state supreme court vacancies and in many cases other state courts as well. The remaining states rely on gubernatorial or legislative appointments, or nonpartisan or partisan

---

44. Larry Eichel, *Court Does the Right Thing: Ungags Judicial Candidates*, PHILA. INQUIRER, July 5, 2002, at A17.

45. Robert S. Greenberger, *Supreme Court To Decide on Judicial Candidates' Speech*, WALL STREET J., Mar. 12, 2002, at A28.

46. Am. Judicature Soc'y, *Merit Selection: The Best Way To Choose the Best Judges*, http://ajs.org/js/ms_descrip.pdt (last visited July 28, 2002).

47. These states are Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wyoming.

elections.[48]

State merit selection systems vary. Therefore, it is useful to set forth some fundamental elements of merit selection in order to discuss generally the advantages of such a system.

The following five elements are principles of most state judicial merit selection systems:

> 1. A nominating commission recommends to the Governor names of perspective appellate court appointees.
>
> 2. The nominating commission is composed of men and women, lawyers and non-lawyers from across the state.
>
> 3. The nominating commission is appointed by the Governor and legislative leaders.
>
> 4. The Governor submits to the General Assembly a judicial nominee selected from the nominating commission's list to which confirmation is generally required.
>
> 5. After an initial term, the appellate judge could seek additional terms of judicial office by reappointment or in nonpartisan retention elections.[49]

A merit selection system for judges could not be realized in Pennsylvania without an amendment to the Pennsylvania Constitution.[50] The constitutional amendment process requires both bodies of the General Assembly to pass an identical proposed change in two consecutive sessions and the proposed amendment must be approved by a majority of the electorate.[51] This, indeed, is a very important consideration. Merit selection could not become the law in Pennsylvania without a majority of Pennsylvania's electorate voting to make the change. Merit selection cannot come to fruition in Pennsylvania without a constitutional change, and a constitutional amendment is not adopted without legislative and voter approval. Nevertheless, there are those who

48. Gubernatorial appointment: California, Maine, New Hampshire, New Jersey; legislative appointment: Virginia; Nonpartisan election: Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin; partisan election: Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas and West Virginia.

49. *See* KAPLAN, *supra* note 10.

50. "Justices, judges, and justices of the peace shall be elected at the municipal election next proceeding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in where they are to serve." PA. CONST. art. V, § 13(a).

51. *Id.*

oppose a merit selection question being placed on the ballot. Representative Mark V. Cohen, the House Minority Caucus Chairman, stated, "We do not favor giving the public the right to take away its own rights."[52] Said another way, Representative Cohen does not even want to allow the electorate to decide whether to adopt a merit selection system. This seems to be contrary to the fundamental argument of those who oppose merit selection, which is to trust the voters to elect the best judges.

B. The Benefits of Merit Selection

The American Judicature Society (AJS), an organization devoted to promoting the benefits of merit selection for state judiciaries, cites the following five reasons why merit selection is superior to an elective process:

> [1.] Merit selection not only sifts out unqualified applicants, it searches out the most qualified.
>
> [2.] Judicial candidates are spared the potentially compromising process of party-slating, raising money, and campaigning.
>
> [3.] Professional qualifications are emphasized and political credentials are de-emphasized.
>
> [4.] Judges chosen through merit selection don't find themselves trying cases brought by attorneys who gave them campaign contributions.
>
> [5.] Highly qualified applicants will be more willing to be selected and to serve under merit selection because they will not have to compromise themselves to get elected.[53]

In addition to and in conjunction with the five reasons stated above, a merit selection process also avoids the three concerns of an elective system addressed earlier in this commentary. A merit selection system does not oblige the electorate to guess at the best candidates, would not require judicial candidates to raise money, and practically avoids the issues now confronting Pennsylvania's judiciary in light of the *Republican Party* decision. The effects of the Court's decision in *Republican Party* are substantially more apparent in an elective system

52. Reggie Sheffield, *State's Way of Selecting Judges*, PATRIOT NEWS, Oct. 17, 2001, at B14.

53. Am. Judicature Soc'y, *supra* note 46.

since candidates will be pressured to speak on issues when campaigning.

A merit selection process would also yield a more racially and geographically diverse court. The following are examples. In a national statistical analysis done by AJS, women and minorities were selected in greater percentages under an appointive, rather than an elective system. The 1998 analysis found that sixty-seven percent of the women jurists and seventy-two percent of the African-American jurists serving on state appellate courts were initially chosen by appointment.[54] In Pennsylvania, as of February 2001, twenty-six of the thirty-one appellate judges were residing in or near Philadelphia or Pittsburgh.[55] This trend, admittedly, may be beginning to wane. The seven judges elected in November 2001 were from several different geographic regions throughout the Commonwealth.[56] Nonetheless, a merit selection process would allow attorneys from remote areas in the Commonwealth to be considered. A merit selection process would also require the nominating commission to consider all individuals, regardless of gender, race or geographical considerations.

Merit selection has numerous advantages over an elective system. One of the most telling facts, however, was addressed by Jona Goldschmidt in her writing for the *University of Miami Law Review.* Goldsmith wrote:

> To date, not one state that has adopted a merit plan has opted to replace it with an elective system. This fact alone, notwithstanding the empirical studies and anecdotal evidence cited herein in support of merit selection, is the best evidence that it is the superior method of judicial selection.[57]

C. The Prospect of Merit Selection in Pennsylvania

Those who oppose merit selection consistently criticize the system for being potentially no less political than the elective process. John Morganelli, District Attorney from Northampton County, and a vocal critic of merit selection, wrote the following: "Merit selection is only

---

54. According to statistics published by the American Judicature Society in September 1998. *See* Am. Judicature Soc'y, *supra* note 46.

55. *Choosing Appellate Judges: Partisan Elections or Merit Selection? Myth vs. Reality, at* http://www.pmconline.org (last visited July 28, 2002).

56. Michael Eakin, Lancaster County; Richard Klein, Philadelphia County; Mary Jane Bowes, Allegheny County; John Bender, Allegheny County; Mary Hannah Levitt, Dauphin County; Robin Simpson, Northampton County; Renee Cohn, Lehigh County.

57. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994). This author knows of no evidence in the past eight years that suggests that any state has changed from a merit selection system to an elective system since the article was published.

politics at a different level—a level which excludes the public from the process and allows the position of judge to become a reward for loyal party service and big political contributions. Merit selection is politics pure and simple."[58] Two Pennsylvania senators, however, recently appeared at a merit selection forum and addressed the criticism that merit selection is as political as elections. Senator Robert C. Jubelirer, the president pro tempore of the Senate and current lieutenant governor of Pennsylvania, responded, "You will never take politics out of the system completely, but I think this [merit selection] is one of the ways to limit it."[59] Senator Mary Jo White, from Venango County, and a member of the Senate Judiciary Committee, added "I don't think you're taking politics out of the system. You're taking money out of the system, and that's the big corruptor."[60]

This commentary intentionally did not focus on the specifics of any certain merit selection plan. There have been numerous merit selection proposals introduced by different members of the Pennsylvania General Assembly over the years.[61] Although the issue of merit selection has not gained momentum in the legislature in recent years, renewed interest may be developed in light of the Court's holding in *Republican Party*. Governor Tom Ridge expressed strong interest in early 2001 to be the issue's advocate-in-chief.[62] However, this was short-lived after Ridge was selected to be the homeland security director by President George W. Bush on September 20, 2001. Neither the Pennsylvania Senate nor the Pennsylvania House of Representatives has voted on the issue during the past several years. Like most issues before the General Assembly, merit selection obviously has supporters and detractors. As outlined in this commentary, critics consistently argue that merit selection is just another form of politics, that the federal judiciary has a merit selection system that does not work effectively, that the nominating commission proposed will be biased, or that numerous other red herrings apply.

---

58. John Morganelli, *There Is Nothing Meritorious About Merit Selection*, PATRIOT NEWS, May 6, 2001, at B19.

59. Reggie Sheffield, *State's Way of Selecting Judges Argued,* PATRIOT NEWS, Oct. 17, 2001, at B14.

60. *Id.*

61. The following is a compilation of some of the merit selection bills introduced over the past ten years: Representative Dwight Evans and Representative Jeff Piccola, H.B. 2, 177th Gen. Assem., Reg. Sess. (Pa. 1993); Representative Dan Clark, H.B. 464, 178th Gen. Assem., Reg. Sess. (Pa. 1994); Senator Robert C. Jubelirer, S.B. 3, 179th Gen. Assem., Reg. Sess. (Pa. 1995); Senator D. Michael Fisher, S.B. 398, 179th Gen. Assem., Reg. Sess. (Pa. 1995). From 1996 to 2000, several of the bills mentioned above were reintroduced. Robert C. Jubelirer reintroduced Senate Bill 3 on March 27, 2001. S.B. 3, 185th Gen. Assem., Reg. Sess. (Pa. 2001).

62. William Glaberson, *States Taking Steps To Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.

Opposition to merit selection has been a constant in Pennsylvania, and a change to an appointive process will not be embraced unanimously.

Merit selection, nevertheless, is worth the fight. One must keep in mind that a merit selection system will not be adopted unless the electorate in Pennsylvania decides to do so. Justice Sandra Day O'Conner, who voted with the majority in *Republican Party*, offered the following advice to those states with judicial elections: "If [a] State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."[63] Adopting a merit selection system is long overdue and necessary for the reasons outlined in this commentary and such a change would be a true benefit to the people of Pennsylvania.

63. Republican Party v. White, 122 S. Ct. 2528, 2544 (2002) (O'Connor, J., concurring).