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Nearly everyone agrees that the judiciary plays a significant role in shaping the law and giving form to the very underpinnings of our democratic society. Few citizens would dispute the notion that the judicial system, particularly at the appellate level, should be relentless and untrammeled in its pursuit of justice. Yet persuading average men and women on the street that they should know and care personally about the judicial branch of government is not an easy task.

Beyond the common agreement on the importance of the judiciary, it is easy to find a consensus of opinion on the qualities which characterize a good appellate judge or justice: integrity, objectivity, common sense, distinguished legal scholarship, patience, and dedication. Devising a way to bring good judges to the appellate bench, however, is much more difficult. There is great disagreement concerning the best means of choosing judges, and nearly every state in the country employs a slightly different method of selection.

This is a study of judicial selection governance: the manner in which the governmental function of appellate judicial selection is now performed and ways it might be improved. The focus of this study is limited to the appellate courts only; that is, the way in which judges and justices are chosen to sit on the Pennsylvania Supreme Court, Superior Court, and Commonwealth Court. This discussion does not include the means by which trial judges are selected for the Courts of Common Pleas.

Over the past two years, the Committee of Seventy has examined appellate judicial selection in Pennsylvania and across the nation. The purpose of this comprehensive report, which presents information never before compiled in one source, is to help citizens of the Commonwealth to evaluate our present system of selecting judges and to determine whether change is necessary.

The methodology of this study featured an extensive series of confidential interviews which the Committee of Seventy conducted with a variety of experts on the subject of appellate judicial selection. These interviews consisted of two segments. Initially, interviewees were invited to respond to a working draft of the first three chapters of this book, which had been transmitted to them in advance. In this manner, original research was verified and points of emphasis confirmed. In the second phase of the interview, opinions were solicited on the many aspects of judicial selection which are discussed in Chapters Four and Five.

Experts all around the state were consulted, and they reflected a broad range of views. Among the interview participants were past and present appellate court judges and justices, aspirants to the appellate bench, veteran politicians of both parties, members of the organized bar, trial lawyers, past and present elected officials, lay and lawyer members of screening commissions, academicians, and civic leaders. It is the opinions of these experts and not the Committee of Seventy which are summarized in this preface and presented in Chapters Four and Five. In this book, the Committee of Seventy neither endorses nor opposes any of the proposals which are set forth.

The first three chapters of the book, which are not based on the interviews, set the context for consideration of reform. Chapter One charts the history of appellate judicial selection through the five state constitutional conventions. Chapter Two describes the Pennsylvania system for the selection, tenure, and removal of appellate judges and justices. The range of alternatives used in other states is also explored, with a detailed comparison of Pennsylvania's procedures to those in New York and New Jersey, two other Eastern states with strong partisan traditions. Critical issues in the debate over judicial selection are outlined in Chapter Three.
where arguments in favor of the two most popular methods of judicial selection — the merit commission plan and the elective system — are summarized.

In Pennsylvania, appellate judges and justices are selected through partisan elections. They compete in the spring primary and the November election along with candidates for other offices, and, once elected, serve for terms of ten years. At the end of that period, those who wish to remain on the bench may run for another ten-year term in a non-competitive, non-partisan “retention” election, and they may continue to run for successive terms until compulsory retirement at the age of seventy. (Any vacancies which occur are filled by appointment of the governor, with the confirmation of the state Senate. Generally, the governor’s appointee serves until the next municipal election, when he or she must compete in a partisan election for a first full term on the bench.)

Nearly all of the experts with whom Seventy spoke perceived problems in Pennsylvania’s current method of selecting appellate judges. These problems, they asserted, can be traced primarily to the decline in the power of the political parties to keep the partisan election system of judicial selection functioning well — though a few thought the parties had never done a very good job of picking judges. At their zenith, the parties had the muscle to recruit, screen, and endorse their favored candidates, and to deliver the votes on election day. Over the past ten to twenty years, however, that power has eroded. The result, in the view of almost all of the interview participants, is that the present system is tantamount to a “lottery” — no system at all.

In the wake of party control, no other filtering mechanism has arisen to stem the tide of judicial hopefuils onto the ballot; thus, the electorate is choosing from a pool that includes both qualified and unqualified candidates. Crowded ballots have escalated confusion among voters, who are more likely than ever to make choices in the voting booth based on a candidate’s ballot position, ethnicity, county of origin, gender, or other factors unrelated to judicial competence. Voters have also become more vulnerable to the use of flashy publicity gimmicks and aggressive media campaigns, it was contended. The effect, declared the interviewees, is clear: the quality of the appellate courts is rapidly deteriorating.

Consequently, change is needed. In the interviews, three different opinions were expressed concerning the extent of change necessary. The majority believed that sweeping change is warranted. The solution they advocated was the adoption of a “merit” or commission plan of selecting judges and justices of the appellate courts. In contrast, a minority of the interviewees felt that the elective system should be retained, but with some important modifications. Last, a small number supported a switch to a system in which the governor would directly appoint the state’s appellate judiciary.

**Majority View: Adopt the Commission Plan**

In the view of the majority, the “merit” or commission plan is the most effective selection format because it delegates the task of choosing appellate judges to a special commission and the governor, while also providing for popular participation in the selection. (Many interviewees rejected the name “merit” for this selection method, saying that the term is not descriptive of the plan, and that it conveys the false impression that any selection method is wholly based on merit. Therefore, the name used for this selection plan in Chapter Four is not “merit” but “commission.”)

Under such a plan, a nominating commission would be formed for the purpose of identifying and nominating candidates for the appellate courts. This commission would submit a list of nominees to the governor, who would be required to make an appointment from that list. The eventual appointee, after having served a short probationary term of office, would run in an uncontested, non-partisan retention election, giving voters the chance to decide who should be given full terms on the bench. Chapter Five presents an analysis of views concerning the major facets of the commission plan.

By eliminating the need for electioneering and fundraising (except on a smaller scale in a retention campaign), the commission plan would overcome two intrinsic problems in the current system, they felt. One is the pressure on judicial candidates to take sides on controversial issues, despite the prohibition of the Code of Judicial Conduct. The second is the need to raise a substantial campaign chest, often in the form of contributions from attorneys and potential litigants. These practices, the majority thought, are antithetical to the judicial function, which cherishes independence and impartiality.

The commission plan proposed by the majority would substitute a formal screening process for the “lottery” which now exists, thereby helping to assure a better quality of judges and justices in the appellate courts. It would enhance judicial independence by taking judges off the campaign trail, and it would help bring greater diversity to the appellate courts by tapping those who now entertain little hope of winning an election: minorities, women,
and residents outside the Pittsburgh and Philadelphia metropolitan areas.

Minority View: Retain the Elective System

In the opinion of a minority of the experts interviewed by Seventy, the present system should be retained. Their argument rested primarily on the belief that the democratic right of the people to elect their judges should not be curtailed in any way. The elective system, they felt, also allows the public to maintain greater accountability over the appellate judiciary. In addition, it fosters a more “open” selection of judges than a small commission, which would be likely to exercise “elitist” criteria for nomination to the bench.

The present system does have its faults, these interviewees acknowledged, but they can be ameliorated by a few timely reforms. Their proposals for “fine-tuning” the present system included: 1) eliminating the canon in the Code of Judicial Conduct which prohibits judges from airing their opinions on controversial political or legal issues; 2) eliminating the practice of cross-filing, which allows candidates to seek the nomination of both parties in the primary; 3) introducing the procedure of pre-screening by the bar prior to party endorsements; 4) rotating ballot position; 5) enacting a minimum requirement of years in legal practice; 6) removing county of origin from the ballot, where it is now listed under the candidate's name; 7) changing the rules of campaign financing; and 8) strengthening the powers of the Judicial Inquiry and Review Board in order to make disciplinary action and removal a more potent threat in cases of judicial misconduct.

A Third Option: Direct Gubernatorial Appointment

A small group of the experts advocated that Pennsylvania’s appellate judges and justices be appointed directly by the governor, without benefit of assistance from a legally-constituted commission. This preference was derived largely from their highly favorable view of the federal judiciary, which is chosen through direct appointment by the President and confirmation of the U.S. Senate, and then awarded tenure for life. In addition, they believed that selecting judges is an executive function which rightfully belongs to the governor, who is the state’s top elected representative of the people.

Proponents of the appointive method proposed duplicating the federal system in Pennsylvania. They discerned two major advantages in this system. First, it would boost the caliber of the state appellate bench to that of the federal bench, which was judged to be vastly superior. Second, it would grant a greater degree of independence to judges, who would no longer have to worry about pleasing the electorate. This method is totally consistent with the American form of democracy, they maintained, in which people elect representatives to make choices for them and then pass judgment on those choices at the ballot box. The governor must be conscientious in making judicial appointments, because any mistakes would be well publicized in the next election. It is a time-honored system which is simple and efficient.

As Chapter One of this study shows, the history of Pennsylvania’s appellate judicial selection is fraught with vacillation in public opinion concerning the best way to select judges. In the past, appellate judges and justices of this Commonwealth have been chosen through appointment (until 1850), non-partisan election (1913–1921) and partisan election (1851–1913, 1922–present). Term of office has also varied from seven years to life tenure.

Though far more states elect their appellate judges and justices than select them through a commission method, the modern trend favors the latter form. In recent years, many states have substituted a commission plan for an elective system, but none has converted from a commission format back to election. Reflecting this pattern, several of the interviewees who advocated the commission plan confided to Seventy that while they had previously championed the elective system, they had grown disillusioned with it in light of its apparent failures here in Pennsylvania. Trends are not hard and fast rules, though, and whether the voters of this Commonwealth will elect to become part of the trend or follow another route is the question for the future.

It is the hope of the Committee of Seventy, a non-partisan, nonprofit civic organization located in Philadelphia, that this study will assist all Pennsylvanians in seeking to resolve that very question. This document is a companion piece to Seventy’s earlier publications, *Ports Governance Study, Transportation Governance Study, Housing Governance Study,* and *Economic Development Governance Study.* These reports, as well as Seventy’s two election-related publications, *How to Run for Political Office* and *Guide to the Conduct of Polling Places,* are available to the public without charge.
Alone among the three branches of Pennsylvania’s government, the judiciary has undergone significant changes through the years. In 1790, it was decided that the executive branch of government would be administered by a governor, and this has remained so ever since; that same year, it was also decided that the state would have a bicameral legislature, and this, too, has endured through the passing years. The judiciary, however, has experienced no such constancy. As times and circumstances have changed, so, too, has the character of the state’s appellate bench. Since the eighteenth century, the courts have been expanded, new courts have been created, and judges have come to the bench through appointment and then through various means of election while judicial terms have been increased, decreased, increased, and then decreased again. Through it all, the status of these issues at any given time has been a reflection of prevailing attitudes regarding the most suitable role for the judiciary in society and the best means for assuring that this role is properly fulfilled as popular sentiment places its indelible signature on the courts.

In the post-colonial years, the desire to escape the oppressive rule of a royally-appointed judiciary led to judges appointed by committee to brief terms of office; when these tensions eased and judicial independence became the chief concern, a more traditional method, that of executive appointment to a term of life tenure, was adopted. When the accountability of judges to the public became an issue, tenure was again reduced and the power to select judges was shifted from the chief executive to the state’s voters. Considerable public discussion and debate have accompanied every one of these changes, and the arguments made on all sides have endured and maintained their vigor long after the decisions were made. In this manner, the state’s appellate courts have ridden a 200-year rollercoaster of popular sentiment, and in so doing, they have provided a greater reflection of such sentiment than any other aspect of popular government. Like no other branch of government, the judiciary has been molded by the state’s leaders and voters to reflect the times, with accession to the bench and length of term of office being the chief tools of this change. This chapter presents the history of these changes, tracing the development of state appellate courts in both Pennsylvania and the United States as a mirror of the times from the days when only the eastern coast of the North American continent was sparsely populated by colonies governed by the great European powers.

I. THE COLONIAL YEARS

A. The Status of the Judiciary

Like most of this nation's legal institutions, the American method of selecting judges owes much to British precedent. Originally, English judges served solely at the pleasure of their monarch. The Revolution of 1688 modified judicial tenure to a term of "good behavior" (a lifetime term predicated on satisfactory performance), and the Settlement Act of 1701 extended to parliament the exclusive right to remove judges from office. The final blow to the concept of judges as mere extensions of the Crown occurred in 1761, when new laws permitted judges to keep their offices after the death of their appointing monarch. These reforms, however, did not extend across the ocean to England's colonial protectorates. Efforts to provide for high courts in the colonies were customarily denied on the grounds that ultimate judicial authority rested in England, not in the New World. Consequently, colonial displeasure over the administration of justice mounted.

B. The Disposition of Justice in Colonial Pennsylvania

The Charter granted to William Penn in 1681 gave him "the power and authority to appoint and establish any judges and justices, magistrates and officers whatsoever." The following year, he delegated this responsibility to his provincial council, calling on it to "elect and present to the Governor . . . a double number of persons to serve for judges . . . for the next year ensuing . . ." In 1683, he amended his instructions so judges could "continue so long as they shall behave themselves." In 1684, in response to a confusing judicial system in which courts sat in a number of capacities and sometimes heard appeals of their own decisions, a Supreme Court was first created, but it fell at the hands of the Crown in 1693. Amid continuing confusion, a new judicial act re-established the Supreme Court in 1701, but it, too, was struck down. Thus began a series of attempts by Pennsylvanians to create a high court in their state. Blocking these efforts was a provision in Penn's original charter stipulating that all laws enacted in the state be subject to approval by the Crown. In 1722, "An Act for Establishing Courts of Judicature" was passed, calling for "three persons of known integrity and ability, commissioned by the governor . . . to be judges of the 'supreme court.'" This act, like its many predecessors, was quickly put into operation, but for some unknown rea-
son, never received consideration from the Crown. As a result, it became law, giving Pennsylvania the nation’s first appellate court.11

II. A NEW NATION

Like Pennsylvanians, residents of the other colonies found little to their liking in the judicial dictates of the British Crown. Throughout the colonies, frustrated citizens found the courts unresponsive to their desire for commercial freedom and a role in their own government. Judges, subservient to the desires of a distant monarch, showed little sympathy for the needs of a group whose aims did not always coincide with those of England—the mother country and the source of their power. The displeasure of the colonists ultimately found expression in the Declaration of Independence, where Jefferson wrote: "He [George III] has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Further, Jefferson noted that "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judicial Powers." The new nation had declared its independence, and it laid a generous measure of desire for a more equitable system of justice at its foundation.

A. Justice in Early America

The thirteen colonies, suddenly free and independent states, immediately faced the challenge of creating their own systems of justice absent the intervening authority of a power an ocean away. The framers of individual state constitutions had two contending attitudes to accommodate in developing thirteen separate judicial systems: a deep-seated distrust of the legal profession resulting from the unpopularity, pro-British actions of lawyers during the Revolution; and an unwillingness to vest too much authority for judicial appointments in any single official—a reaction to the repeated abuses of executive power by their former British rulers. These conditions resulted in judicial systems strongly reliant on legislative power. In eight states, the power to appoint judges was delegated to one or both houses of the legislature. Two states provided for appointment by the governor and his popularly-elected council. In the other three, the governor’s power to appoint judges was subject to the consent of his council.12 Tenure, too, was redefined. In eight states, tenure lasted during good behavior; in three states, it lasted for fixed terms; Rhode Island did not define tenure, and Georgia left the issue to the discretion of its legislature.13

B. Pennsylvania: The Constitution of 1776

Less than two weeks after the Liberty Bell tolled in celebration of the Declaration of Independence, delegates met in Philadelphia to frame a new government for the state. There, they devoted considerable portions of the convention to debates regarding the most desirable judicial system to establish in the state. One faction argued on behalf of a judiciary serving during good behavior, maintaining that anything less would endanger the independence and efficiency of the judicial system.14 Opponents, arguing that such tenure amounted to "life offices," disagreed, claiming that "this life tenure has a tendency, in every instance, to evil. It is productive of indolence, insolence, and an aggravated spirit of tyranny." In the end, opponents of life tenure won, and judicial terms were set at seven years.15

Another concern was the manner in which these judges would come to the bench. Though some hoped to have judges appointed by the governor, the distaste of others for executive power16 led them to decide that Pennsylvania would not have a governor. Instead, the Commonwealth would be governed by a twelve-member Executive Council elected by voters of the state’s twelve counties,17 and this Council would appoint judges,18 who could be removed before the end of their terms for "misbehavior" or "mal-administration."19

III. GROWING PAINS IN THE JUDICIARY

A. Establishing New Institutions

In the early years of the republic, a number of states tinkered with the structure of their appellate courts. Within a few years, critics charged that legislators granted judicial appointments to friends and political supporters, and that they selected judges in closed caucuses of the majority party.20 As a result, tenure was shortened in several states. Several states also experimented with popular election of judges, though cautiously restricting this practice to the lower courts. New states entering the Union employed hybrid combinations from the already-existing states.

The young country, meanwhile, strived actively to disassociate itself from English institutions, among them legal institutions.
With citations to British common law in disrepute in some states and outlawed in others, American courts plodded along hesitantly through virgin territories. When the United States Supreme Court introduced the principle of judicial review into American jurisprudence in the landmark case of Marbury v. Madison\(^{25}\) in 1803, an outraged Thomas Jefferson led an immediate call for reform of the courts. This practice of judicial review allowed the courts to pass judgment on the constitutionality of laws passed by legislative bodies. Inherent in this practice was the right to declare laws found unconstitutional to be invalid. The present courts, he maintained, acted freely and without any accountability to the people,\(^{25}\) with their invocation of judicial review and the resulting assumption of an interpretive role previously regarded as the exclusive domain of the legislative branch of government, he argued that the terms of judges should be shortened to increase their accountability. Jefferson's crusade for judicial reform contributed to the shortening of judicial terms in a number of states.\(^{25}\)

Politically, the United States remained in the hands of a small governing aristocracy. The judiciary, comprised largely of members of this aristocracy, guarded its own interests, often at the expense of those without representation on the bench. Resistance to this situation manifested itself in several forms. First, the requirement that voters be freeholders was relaxed and eventually eliminated.\(^{26}\) Second, property qualifications for public officeholders also declined, with many states eliminating such qualifications altogether.\(^{27}\) In addition, the novel practice of requiring state constitutions to be approved by the voters gave the people a greater voice in their government.\(^{28}\) Finally, the arrival of immigrants from countries with oppressive judiciaries added a new, strong voice to the rising demands for a judicial system which guarded the interests of all the people, not just a privileged few.

**B. Pennsylvania Adjusts: The Constitution of 1790**

Pennsylvania's Constitution of 1776 provided for a "Council of Censors" to review the constitution for defects, and it empowered this Council to call a constitutional convention to remedy such defects.\(^{29}\) The Council's first meeting, in 1783, criticized the seven-year terms of judges, maintaining that such brief tenure, coupled with the relative ease of removal of judges by a simple majority vote of the legislature, weakened the judiciary.\(^{30}\) Further, after just seven years of government by committee, the Council was convinced that a single executive power was needed to lead the state's government. The Council decided that the position of governor should be created, and that the governor should appoint judges, who would serve during good behavior. Removal of judges would be made more difficult by requiring a two-thirds vote from each house of a bicameral legislature. These and other proposals were adopted by a majority of the Council, but not by the two-thirds majority needed to call a new convention; consequently, no action was taken.

Agitation for change continued, however, and in 1789, the legislature circumvented the Council of Censors and called for a new constitutional convention. The convention began that November, and within two weeks, delegates had approved a general resolution calling for tenure of judges during good behavior.\(^{31}\) Before another two weeks had passed, delegates spoke of the state having a governor, with this governor having the power to appoint judges.\(^{32}\) For the next two months these issues were debated at great length, with a consensus strongly in favor of gubernatorial appointment to a term of good behavior.\(^{33}\) Opposing this position were the Jeffersonians, adamant in their belief that popular elections and limited tenure were the "touchstones"\(^{34}\) of American democracy, and Benjamin Franklin, who from his deathbed objected that tenure during good behavior aimed at "establishing a monarchy at least for life."\(^{35}\) Holding sway, however, was the opinion that the greatest need for the judiciary was independence.

In the end, forces seeking to reform the old constitution were victorious. The Constitution of 1790 gave Pennsylvania a new executive power—a governor. It gave to that governor the power to appoint judges\(^{36}\) and called for judges to serve during good behavior.\(^{37}\) The constitution also provided for impeachment, as well as removal of judges by the governor upon approval of two-thirds of both houses of the legislature.\(^{38}\) The power that had fallen from favor such a short time earlier—executive power—had returned to fashion, as had a strong, independent judiciary.

**IV. THE JACKSONIAN ERA**

**A. The Revolution of the "Common Man"**

The reforms initiated in the 1820s by the movement known as "Jacksonian Democracy" engendered significant changes in both American society and government. Greater participation by the people in their government helped bring about universal manhood suffrage and reduced property qualifications for office-
holders. In addition, the rapid formation of new states in the Louisiana Territory encouraged more and more citizens to take an active part in their government as opportunities for positions in government service became available for the first time to people outside the small ruling elites which had led the country through the Revolution and its first fifty years as an independent nation.

Further incentive for increased citizen participation arose as entrepreneurs, industrial laborers, and commercial farmers gradually discovered a great personal interest in matters of public policy. Compounding this interest were three events close in time: the Panic of 1819, the end of the Virginia Dynasty in 1825, and the development of a new two-party system of politics. The death of the Federalist Party, stalwart defenders of the old guard “establishment,” in particular, and the subsequent invigoration of the political process in the mid-1820s brought political interests and involvement to new heights. New, inexpensive, politically-oriented newspapers appeared, each espousing a particular political perspective; a new breed of stump-speaking, persuasive orator-politicians emerged; and the modern political organization was founded. The eighteenth century ideal of social harmony quietly dissipated as parties and conflict came to be viewed not only as acceptable, but desirable. Political contests took on new vigor, not only in the newly-emerging egalitarian West, but in the cities of the East as well, where businessmen, reformers, and small entrepreneurs sought leaders who would protect their own special interests. Debtors entered politics to defend themselves, state legislatures waged tax wars against the Bank of the United States, and relief laws were sought. As political life became inextricably intertwined with everyday life, the rate of voter participation at the polls soared.

Until this time, the appointed judiciary had largely escaped the wide swath of change being cut across the country, except for a few instances of tenure reduction and popular election of lower court judges. Increasingly, however, the public had difficulty accepting the interpretive functions performed by judges not of their own choosing. Laborers, in particular, took great issue with judges who commonly ruled that their efforts to combine in search of greater wages constituted a criminal conspiracy. One such decision, rendered by a New York court in 1835, precipitated a rally of 27,000 workers who burned the judge in effigy. The public’s will, as reflected by its votes, had already captured the executive and legislative branches of state and federal government, but the judiciary, being appointed and often with life tenure, was beyond its influence. Thus, the bench was occupied by the last remnants of the repudiated Federalists, and these judges showed little inclination to accommodate popular ideals despite the demise of their own party.

Out of these difficulties grew increased demands for the popular election of judges as part of an even greater movement to democratize all positions in government. This movement began in earnest with the election of Andrew Jackson, who repudiated the notion of a trained civil service by appointing loyal political supporters to state and party offices. In addition, more and more government positions became elective rather than appointive and the long ballot came into prominence. Terms of office were also shortened. A new era of public accountability had dawned. In the wake of these circumstances, many states paused to reconsider their method of selecting judges. Few were yet ready to act, but in 1832 Mississippi stepped forward to become the first state to elect all judges.

B. Pennsylvania in the Midst of the Storm: The Constitution of 1838

The notion of judicial tenure during good behavior brought into law by Pennsylvania’s Constitution of 1790 had never experienced great popularity in the Commonwealth, and through the first thirty years of the nineteenth century, opposition to the practice manifested itself in several armed insurrections (the Whiskey Rebellion of 1794 and the House-Tax or Fries’ Rebellion of 1799 were revolts against harsh Federalist doctrine), periodic attempts to institute impeachment proceedings against unpopular judges, and repeated petitioning of the legislature to revoke such tenure. Responding to such pressure, the state Senate formed a committee to study the issue in 1833. The committee, citing the lack of accountability of the judges to the public and the difficulty of removal, recommended that a constitutional convention be called to review these and other matters. The Senate, however, rejected this recommendation. Finally, the discontent created by the financial Panic of 1837 consolidated the forces agitating for change across the state, and the call for a constitutional convention was approved by the voters.

At the heart of the concern over the issues of judicial selection and tenure as the 1837 convention began was the prevailing public distrust of lawyers—a lingering vestige of the revolutionary era which time had failed to erase. Consequently, there was much sentiment on behalf of an elected judiciary. Proponents of this view, however, did not have enough influence at the convention
to bring about such a change. Another concern of the delegates was judicial tenure, and among the convention’s opening resolutions were proposals for reduced judicial terms of five, ten, twelve, and fifteen years, as well as the continuation of tenure during good behavior. Most proposals called for the appointment of judges by the governor with the consent of the Senate, though some proposed appointment by the legislature. The convention’s Judiciary Committee, however, recommended “that it is inexpedient to make any amendment in” the state’s current judicial system. When a minority report of the same committee called for a specified term of years, the debate began.

Lacking the numbers to bring about an elected judiciary, the Democrats concentrated on reducing judicial tenure as a means of improving the public accountability of judges. Their arguments began by noting that as a basic principle of the American republic, “all officers ... shall come back to the people; they will have no life offices ...” They also emphasized the need for accountability of all officials: “Let the people then have control of government, and let all their servants be accountable to them.” They dismissed judicial independence, a cornerstone in the argument on behalf of life tenure, as “irresponsibility to the people.” Moral courage and honesty produced good judges, they argued, not life tenure, and a judge with such qualities could maintain sufficient independence for even a one-year term. They also asserted that long-term power was a corrupting influence: “Power long continued in the hands of any man, however pure and upright when he first succeeds to it, makes him despotic, tyrannical, overbearing, and disgusting to the republican sense of the people.” The problems raised might not exist, they claimed, had it not become nearly impossible to remove undesirable or incompetent judges from office.

Advocates of tenure during good behavior countered by pointing to the past, arguing that “whenever a real, effectual judicial independence had been sought for, it has been found in the tenure of good behavior.” Only assured tenure, they maintained, could prevent judges from being at the mercy of the legislature for their office, since the legislature had the power to remove judges from office prior to the ends of their terms. Even the most honest judges, proponents of life tenure claimed, could be tempted to compromise their integrity in an effort to secure reappointment. Finally, they denied the existence of a popular reform movement: “... not a petition has been laid on our table; in no audible, distinct manner have the people spoken to us about it.”

Few minds were changed through the course of the seven-month debate. With both sides clinging tenaciously to their views, a compromise proposal calling for fifteen-year terms suddenly surfaced. Tired of the debate and fearful of the possibility of total defeat, both sides quickly, albeit reluctantly, agreed to the compromise, and lifetime tenure in Pennsylvania had come to an end; a term of fifteen years for Supreme Court judges was adopted by the convention.

The 1838 campaign for passage of the new constitution was greatly overshadowed by a heated gubernatorial contest and the controversial fiscal policies of President Van Buren. On the whole, organized opposition to the constitution was minimal, with only a small movement actively opposing it. The state’s voters overwhelmingly approved the new frame of government.

Overall, the Pennsylvania Constitution of 1838 was little more than a series of minor amendments to the 1790 charter. Perhaps this, along with the presence of several issues of far greater interest, accounts for the relatively little interest in the judicial article in the late 1830s in Pennsylvania. As a result, the dichotomy of opinion regarding the nature of the bench in the Commonwealth remained unresolved.

C. The Nation Plunges Head-First Into Jacksonian Democracy

The Jacksonians remained adamantly in favor of an elected judiciary, maintaining that only an elected judge could be truly accountable to the public. Though the Federalists had faded badly in the passing years, many still adhered to that party’s belief that only tenure during good behavior and appointed judges could assure judicial independence, and that such independence was far more important than accountability.

Though the principles of Jacksonian Democracy failed to take hold of Pennsylvania’s judiciary in 1838, sentiment in favor of the democratization of the country’s institutions continued to grow. Actual reform was limited, however, until 1846, when a constitutional convention gathering in New York took an important and decisive stand: it converted New York’s judiciary from an appointed to an elected one.

New York’s shift opened the floodgates of reform. A number of states followed the example set by this influential leader, and in 1850 alone, seven states changed to an elected judiciary. By 1861, twenty-four of the country’s thirty-four states had made such a
move, and every state entering the Union thereafter until Alaska in 1959 did so with a constitution providing for the popular election of judges.\(^6\)

D. **Pennsylvania Relents: The Amendment of 1850**

Voter approval of the Constitution of 1838 reducing the Supreme Court term to fifteen years failed to silence the voices of those crying loudest for the election of judges. Continued abuses—the exploitation by the state’s governors of this appointive power for patronage purposes, attacks by judges on the new constitution, and political trickery by judges to extend their terms of office\(^7\)—rekindled many of the complaints directed at the judiciary at the convention. In January of 1848, a resolution introduced in the Senate called for a constitutional amendment to take the power to appoint judges away from the governor and give it to the people. The amendment also called for the immediate expiration of all current judicial terms and for all sitting judges to face elective contests for their seats at the very next election.\(^8\) After brief discussion and the presentation of petitions from citizens in favor of such a measure, the Senate voted in favor of the amendment, which also proposed that tenure for Supreme Court judges remain at fifteen years.\(^9\) The following year, the House also passed the bill.\(^10\) At the time, it was noted that the bill\(^11\)

... was rapidly growing in popular favor, as indicated by the resolutions of the public meetings of both parties, by toasts and sentiments at public dinners, and by the expressions of the public press.

As an issue before the voters, the amendment did not excite considerable public interest, perhaps ironically because the measure enjoyed such popularity around the state. Both major political parties supported the move: the Democrats, because they believed in popular elections for all public offices; and the Whigs, who hoped it might allow them to elect judges in areas where they were traditionally excluded.\(^2\) The amendment also received the endorsement of the Democratic City and County Conferences.\(^3\) With such formidable support, the amendment passed easily, with observers noting that, “We have never known a more quiet election than that of today. There is little or no excitement.”\(^4\)

Whether or not the people of Pennsylvania truly desired this change has been the subject of considerable debate. Newspaper accounts and editorials, campaigning politicians, and a number of petitions presented to the state legislature\(^5\) suggest a great deal of support for this change. Some observers disagree, finding little evidence of any widespread call for reform.\(^7\) One observer noted that the amendment “was never called for by the people, was not debated or considered as so grave a matter should have been ...”\(^7\) Finally, the quiet of the campaign suggests that the issue was of minimal interest to most people. Regardless of the circumstances surrounding passage of the amendment, its effect, then and now, is clear: in 1850, the amendment providing for the popular election of judges ushered Pennsylvania fully into the Age of Jackson. It also satisfied the public’s desire to rebuke the current judiciary by abruptly terminating the tenure of all sitting judges and forcing them to face the people if they wished to retain their seats on the bench. Today, the same basic elective system remains at the heart of the process through which the state’s judges come to the bench.

E. **Perspective On An Era**

The unique nature of the American judiciary and the turbulent changes it was undergoing failed to escape the keen eye of Alexis de Tocqueville, the French traveler whose observations have characterized American society for so much of the world. First, he observed the unusual power of the federal constitution: “In America, the Constitution rules both legislators and simple citizens. It is therefore the primary law and cannot be modified by a law. Hence it is right that the courts should obey the Constitution rather than all the laws.”\(^8\) He goes on to note the political ramifications of this power: “Therefore, if anyone invokes in an American court a law which the judge considers contrary to the Constitution, he can refuse to apply it. That is the only power peculiar to an American judge; but great political influence derives from it.”\(^7\) De Tocqueville fully understood the overriding importance of this practice: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”\(^9\) In the midst of the turning tide, he also sought to analyze the situation and look into the future.\(^8\)

I am aware of a hidden tendency in the United States leading the people to diminish judicial power; under most of the state constitutions the governor can, at the request of both houses, remove a judge from office. Under some constitutions the judges are elected and subject to frequent re-election. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates’ independence, not judicial power only but the democratic republic has been attacked.
De Tocqueville’s feelings aside, the people had chosen just such a democratic reform. Only time could tell if their choice had been a wise one.

V. THE NEW ELECTIVE SYSTEM IN OPERATION

A. CHARGES OF POLITICAL ABUSES TARNISH THE JUDICIARY

As a result of Jacksonian reforms, many states quickly converted to an elected judiciary. By the 1850s, however, early indications pointed to disappointing results. As opponents of an elected judiciary feared, the selection of judicial candidates had become a political issue decided behind closed doors. One of the primary objectives in the fight for an elected judiciary had been the hope that such a system would produce judges independent of special interests. Instead, elected judges were found to represent a different set of interests — those of the political parties, which had secured their election. Political “machines” of thenerefore unimaginable power, influence, and size gained control over the election process in many areas, especially cities. They did so by tapping into the concerns of frightened, newly-arrived immigrants, obtaining municipal franchises, and dispensing jobs and financial assistance to those who performed political favors, delivered votes, or promised future political support. In addition, the country’s fast rate of population growth decreased voter familiarity with political candidates, particularly candidates for obscure judicial positions, thereby reinforcing the power of the political organizations.

By the time most states had elected judiciaries, efforts had already begun to change the system once again. The popular, partisan election of judges came under increasing fire to those who sought to reduce partisan political influences. As early as 1873, the notion of judicial elections on non-partisan ballots arose as a potential means of ameliorating undue political influences. Non-partisan elections placed judicial candidates on ballots that did not list the candidates’ political party. This lack of a key voting cue, it was felt, would force voters to select judges on the basis of merit rather than party affiliation. This idea quickly grew in popularity, and by 1927, twelve states selected judges on a non-partisan basis.

Beginning in the 1870s, bar associations sprang up throughout the country hoping “to take the judges out of politics.” These groups attacked political practices with reform alternatives such as non-partisan ballots, direct primaries (in which the voters of a particular party selected their party’s candidate for a given office), and separate judicial nominating conventions and elections. They established screening procedures, conducted polls on the fitness of nominees, published the results of these polls, and issued recommendations. In spite of these efforts, however, political leaders maintained tight controls on the judiciary.

B. A REFORM EFFORT FAILS:
Pennsylvania’s Constitution of 1874

Great changes occurred in Pennsylvania in the years following the passage of the Constitution of 1838. Urbanization occurred amid increasing industrialization, and political corruption of previously unimaginable proportions arose as special interests vied for power. The aging constitution was inadequate to cope with the complexities of a new era, and the call for a new constitutional convention was issued in 1872.

As before, the judicial article was the subject of heated debate. The center of the controversy at this conclave was not tenure but the question: who should judges be appointed by the governor or elected by the people? Initial resolutions on the judiciary covered a wide range of views. Some called for elected judges and others for judges appointed by the governor with varying degrees of consent from one or both houses of the legislature. On the issue of tenure, still a matter of great, if not central, interest, some called for tenure during good behavior, some proposed adherence to the current term of fifteen years, and others proposed increasing tenure to twenty or twenty-one years. Finally, some called for dividing the state into judicial districts and electing high court judges by region.

The convention’s Judiciary Committee, after considering all the many proposals offered, officially recommended that judges be appointed by the governor, with the consent of two-thirds of the Senate, for twenty-one-year terms. Several dissenters filed their own reports, calling for judges to be appointed by the governor for a term of good behavior, judges elected by the people for terms of fifteen or twenty-one years, and gubernatorial appointment of judges to fifteen-year terms.

With so many proposals before the convention, debate began anew. Those in favor of an elected judiciary claimed that their system had improved the quality of the judiciary, that “we have had more able judges on that bench since 1851 than before that time.” Though opponents of elected judges frequently cited the
problem of election corruption, defenders of the system found little merit in this claim, arguing that it was “worse than charlatanism to propose ... that because through the machinery of their elections they [the citizens] have been defrauded of their rights, their rights themselves should be surrendered.” They also pointed out that the same supposedly evil politicians who controlled the nomination and election of judges did likewise for the state’s governor. Further, they maintained that the choice should remain with the people, because “if the people of Pennsylvania have a right to say who shall be their Governor, they have a right to say who shall be their Chief Justice.” They also dismissed the notion that the people were not qualified to make such a choice, claiming that 

... if it be true that for any reason, for want of virtue, or for want of judgment, the people of Pennsylvania are unable to select one class of their officers, then, it must follow that they have become unfit to select the officers of the other two branches...

Opponents of the elected judiciary asserted that forcing judges to stand for election made them politicians and subject to political dealings which did not have a quality judiciary as their goal.

When a general nominating convention meets the practice is ... for the delegates to canvass among the friends of the respective candidates to make favor for their own. Votes for one candidate are exchanged or traded for votes of another. The choice which may, at any time, happen to be made under such circumstances will, of course, be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting suffrages of the party will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interest equivalent: “Give us the man we wish for this office, and you shall have the one you wish for that.” This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.

Another delegate found fault with the citizenry selecting judges: 

... the mass of voters are incompetent to judge the judges; they cannot select intelligently. It is an utter absurdity to submit a comparison of judicial attainments and qualifica-

tions to masses of men who know not the candidates, who know not the duties to be performed, nor the training and education essential to a right discharge of these duties.

In the face of these arguments, the Judiciary Committee retired to reconsider its report. The committee returned with a compromise—that Supreme Court judges continue to be elected by the people but for terms of twenty-one years, an increase over the fifteen-year term which had been in effect since the passage of the Constitution of 1838. After additional debate, this proposal won the approval of the delegates, who decided that with just twenty-three years of experience, they could not declare the Amendment of 1850 a complete failure.

Although the new constitution as a whole provoked great public discussion among the voters, the judicial article itself created little interest, becoming a secondary concern to such issues as changes proposed for special legislation, the railroads, legislative reapportionment, and election procedures. Newspapers across the state adopted positions, with 201 of 216 papers supporting constitutional ratification in one survey. Of the seventeen newspapers opposing ratification, six were from Philadelphia, two were from Pittsburgh, and all but one were Republican papers. In addition, rallies of support for the new constitution were held across the state. In Philadelphia, ward organizations and reform clubs endorsed the new charter, and throughout the state, Republican and Democratic committees joined forces to work on behalf of constitutional reform. With the assistance of such prominent and influential supporters, the new constitution received the electoral approval of the state’s voters.

VI. THE TWENTIETH CENTURY

A. Progressivism and Reform

Around the turn of the century, the Progressive movement, a populist reform effort, swept the nation. New means were sought to end the abuses of political machines and institute greater accountability to the public among officeholders. The mechanisms that emerged during this period included direct primaries, direct election of senators, the short ballot, recall, referendum, initiative, and women’s suffrage. The selection of judges was also among the concerns of the Progressives. Generally, it was felt that judges should be appointed to the bench and retained for lengthy terms, but that the public must be given a role in their selection and retention. Dissatisfaction, moreover, had arisen over non-partisan judicial elections, especially in the feverishly Jacksonian Midwest.
<table>
<thead>
<tr>
<th>Method of Selection</th>
<th>Term</th>
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<tbody>
<tr>
<td>Constitution of 1776: Appointed by the president and 5 members of the</td>
<td>7 years</td>
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<tr>
<td>12-member Executive Council</td>
<td></td>
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<tr>
<td>Constitution of 1790: Appointed by the governor</td>
<td>Life (during good behavior)</td>
</tr>
<tr>
<td>Constitution of 1838: Appointed by the governor, with the advice and consent of</td>
<td>15 years</td>
</tr>
<tr>
<td>the Senate</td>
<td></td>
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<tr>
<td>1850 Amendment to the Constitution of 1838: Elected; vacancies filled by</td>
<td>15 years</td>
</tr>
<tr>
<td>appointment of the governor</td>
<td></td>
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<tr>
<td>Constitution of 1874: Elected; vacancies filled by appointment of the governor,</td>
<td>21 years (ineligible for</td>
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<td>with the advice and consent of 2/3 of the Senate (if in session)</td>
<td>second term)</td>
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<tr>
<td>1968 Amendment to the Constitution of 1874: Elected, with subsequent retention</td>
<td>10 years</td>
</tr>
<tr>
<td>election; vacancies filled by appointment of the governor, with the advice and</td>
<td></td>
</tr>
<tr>
<td>consent of 2/3 of the Senate (if in session)*</td>
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*A 1975 amendment revised the Pennsylvania Constitution to require Senate approval on all appointments to fill judicial appellate vacancies.

The Superior Court was created by the General Assembly in 1895, as authorized by the Constitution of 1874. The Commonwealth Court, which came into existence in 1970, was established by the 1968 amendments to the Constitution of 1874. Superior Court and Commonwealth Court judges are elected to 10-year terms and may seek additional terms through retention elections. Vacancies are filled by appointment of the governor, with the advice and consent of 2/3 of the Senate.
and by 1927, a number of states which tried the plan had already abandoned it. Opponents maintained that non-partisan elections offered the public no genuine choice of candidates, with nominees being selected and supported by party officials who thrust their candidates on an unknowing public without even the party label to help them make their choice.

While reformers pondered their alternatives, pressure for reform grew. In a speech entitled “Causes of Popular Dissatisfaction with the Administration of Justice” before the American Bar Association in 1906, University of Nebraska law professor Roscoe E. Pound blasted the popular election system of judicial selection, complaining that “putting courts into politics, and compelling judges to become politicians in many jurisdictions . . . had almost destroyed the traditional respect for the bench.” This attack was echoed in 1913 by William Howard Taft, the former President and future Supreme Court Chief Justice, who, at another bar association convention, expressed similar contempt for the spectacle of the campaigning judicial candidate. Taft termed it “disgraceful” that judges promised decisions based on class considerations and declared it “so shocking, and so out of keeping with the fixedness of moral principles” that it should be “condemned.”

B. Pennsylvania Experiments: Non-Partisan Judicial Elections

The selection of candidates for the judiciary in Pennsylvania had been a partisan political matter ever since popular election became law in 1850, with the success of individual candidates dependent more on the strength of their political party across the state than their own merits. Following the example set by a number of other states, the legislature passed a measure instituting non-partisan judicial balloting in 1913 in response to this problem. This procedure applied to the Supreme Court and the Superior Court, a new appellate court created in 1895 (initially through the appointment of seven judges) to ease the burden on the state’s high court. Under this new law, judicial ballots would not reveal a candidate’s party affiliation and candidates were theoretically prohibited from using party affiliation in their campaigns. The two candidates receiving the greatest number of votes in a primary election would then face each other in a non-partisan general election. This change made it impossible for voters to rely solely on the straight party ticket voting traditionally advocated by party leaders.

The non-partisan judicial balloting was immediately lauded as “the most revolutionary measure that has been enacted in this State in recent years.” Observers agreed that the bill was an experiment whose continuation depended on its effectiveness, and though the bill was heralded as theoretically ideal, it was unclear “whether or not the ideal can be made practical, and how.” These doubts proved well founded, for in many states where non-partisan balloting for judges was tried, the new system failed to remove judicial candidates from politics. Political leaders continued to select and support candidates; those candidates without such support responded by developing their own political organizations. Encouraged by the theoretical ban on party participation, swarms of ambitious, publicity-seeking hopefuls became candidates, crowding the ballot and making informed voting difficult. The state’s voters, accustomed to using party designations to help them make their choices, found themselves confused in the absence of party labels. The experiment, a failure, was quietly repealed in 1921 after just a brief existence.

C. The Merit Selection Plan

At the same time that Pennsylvania was experimenting with the non-partisan election system for judges as a cure for its electoral woes, Northwestern University law professor Albert M. Kales was developing an altogether different approach to the problem: the commission, or panel, plan for selecting judges. This plan, developed in 1913, incorporated three central considerations: the nomination of judicial candidates, based solely on merit, by a commission of presiding judges; the selection of judges from among these nominees by the state’s chief justice, who would continue to be elected by the state’s voters; and the retention of judges for subsequent terms on the basis of a non-competitive election. Kales hoped that this “merit plan” would allow the appointing commission of judges to cast aside all extraneous considerations and select the most highly qualified candidates for judicial positions. Public accountability would occur through the retention election, which gave voters an opportunity to turn out of office any judge they found undesirable. Voters could also pass judgment on the elected official who made the selection for each post.

The plan underwent a number of revisions, most notably one in which a state’s governor was called upon to make the final selection instead of the chief justice. This change quickly became part of a plan which received little attention over the next twenty-five years except for a number of unsuccessful attempts to introduce it into state legislatures in a variety of modified forms. Then, in 1937, a major breakthrough occurred: the American Bar Associa-
tion gave the plan its official endorsement. Three years later, the plan became law for appellate courts in Missouri, and the merit plan of judicial selection, quickly termed the "Missouri Plan," faced its first practical application.

D. The Nation in the Post-War Years

Following 1940, the country faced national and international problems far more pressing than the selection of judges, and by 1950, Missouri remained the only state to employ any form of the Kales plan. Interest in merit selection and retention increased markedly in the 1960s and 1970s. In 1962, the House of Delegates of the American Bar Association devised a model judicial article for state constitutions that provided for merit selection and retention of judges. 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." Other government commissions also took an interest in what was becoming an important issue as a number of states adopted merit selection and retention plans and others considered doing so.

In addition, research on the means of judicial accession revealed that nationally, as many as one-half to three-quarters of judges sitting in states with an elected judiciary first came to their posts through appointment due to the death or retirement of their predecessors prior to the end of their terms of office. Armed with this information, the governors of several states voluntarily established merit nominating commissions to assist them with the critical task of selecting new appellate judges.

E. Reform Efforts in Pennsylvania

The successful incorporation of merit selection into Missouri's constitution sparked new interest in judicial reform, and in 1947, the Pennsylvania Bar Association endorsed its own version of the merit selection plan, which it dubbed the "Pennsylvania Plan," for both the state's Supreme Court and Superior Court. The plan called for the governor to fill all court vacancies, regardless of how they occurred, by appointment from a list submitted by a non-partisan judicial nominating commission representative of the bench, the bar, and the lay public. After a brief period of service, those appointees would run in a retention election, with the only question being whether they should be retained for a fixed term of office. Judges would run on their records, not against an opponent, and they would be eligible for additional terms of office.

Despite considerable support, the plan went nowhere. Opposing merit selection were powerful Democrats in Philadelphia and Pittsburgh and rural and small city Republicans. These political leaders, firmly in power and successfully handpicking their judges, had no desire to forfeit this valuable prerogative. Supporting the plan were the politically powerless—big-city Republicans and rural Democrats.

In 1957, the General Assembly created the Pennsylvania Commission on Constitutional Revision, popularly known as the Woodside Commission. Two years later, the Commission concluded that adoption of the Pennsylvania Plan for the selection of appellate judges was "critically needed." In its report, the Commission found that political considerations far outweighed judicial qualifications in the slating of candidates by the political parties. It also feared for judicial independence due to the need for judges to seek political support, and it noted that few of the actual reasons for which a judge might be defeated at the polls had anything to do with that judge's ability to adjudicate a matter fairly and properly. While some constitutional revision eventually resulted from the Commission's report, none of it pertained to judicial selection.

Though judicial reform was again rejected, another constitutional examination had already begun. A new Governor's Commission on Constitutional Revision was engaged in 1963 to examine all current proposals to amend the constitution. The Commission again recommended that the governor seek to revise the constitution to provide for the merit selection of the state's judges. In 1964, without benefit of constitutional change, the governor issued an executive order binding his administration to the voluntary use of judicial nominating commissions to provide him with nominees to fill vacancies on the bench.

Meanwhile, twelve of this commission's proposals dealing with subjects outside of judicial reform were introduced, one by one, into the legislature; nine of them received legislative and statewide voter approval. With public fear of wholesale change now dissipated, the issue of a constitutional convention again came before the public in 1967, accompanied by a promise that the much-loathed issue of a state income tax would not be raised at such a convention. With this promise and widespread bi-partisan support, the call for a convention was finally approved by the state's voters.

F. No Change: The Constitution of 1968

The latest of Pennsylvania's constitutional conventions began in
December of 1967. A host of different proposals were offered for the selection of judges. Among them:

- appointment of appellate court judges by the governor, retention elections, and ten year terms
- popular election of judges for ten year terms
- non-partisan popular election of judges for a term of good behavior
- joint appointment by the governor and Chief Justice of the Supreme Court for a twenty-one year term (ten years for Superior Court)
- appointment by the governor for a term of good behavior
- popular election for good behavior
- popular election for a term of years

Many of these resolutions proposed a judicial nominating commission to provide the governor with nominees for vacancies.

The convention’s Judiciary Committee recommended that appellate court judges be appointed by the governor from nominees submitted by a non-partisan judicial nominating commission—that is, Kales’ merit plan, commonly referred to as the “Missouri Plan.” After a brief trial period, appellate judges would face a retention election for a ten-year term of office—a considerable reduction from the twenty-one year term enjoyed by Supreme Court justices since 1874. This proposal sounded the opening bell for debate.

Defenders of the committee’s recommendations argued that “it has been found ... that the political system of selecting judges cannot be depended upon to get the wisest and best people we have for judges,” and that what was needed was a system “that blinds itself to their partisan labels, that considers only their qualifications, their ability as practitioners, and their ability to serve the people of this state.” Merit selection, they claimed, would provide judges the measure of independence they needed, especially from political pressures. Further, as candidates for public office, “their chance of success or failure depended on whether the ticket as a whole was successful or unsuccessful,” and as a result, “it is also very possible under the present situation for a judge to be swept out of office in a strong national election,” regardless of that particular judge’s ability.

Defenders of popular elections mounted a formidable argument charged with equal amounts of emotion and logic. Few delegates expressed themselves more emotionally than one who claimed that... under the guise of reform on the judiciary comes a Trojan horse for the people designed to subvert their will ... The human cry which is responsible for calling this Convention I am sure did not involve the merit selection of our judges by panel ... I am certain that not one man in a thousand knows and understands this issue ...

This supposed reform of the judiciary is a phony issue designed to force upon the people a royal commission for the selection of judicial candidates ...

Another argument appealed to one of the nation’s most virulent sentiments—anti-Communism—holding that with the proposed retention election, ... we are proceeding closer and closer to the Russian philosophy: do not permit the people to vote for two candidates, or three, or four; do not permit them to have a choice but listen to them. You either vote for the man on the ballot or you do not vote at all ...

Others maintained that such selection effectively disenfranchised the people: “The [merit] selection process — as opposed to free elections — would replace the judgment and wisdom of a few men for the judgment and wisdom of thousands of voters.” And again, the patriotic argument: “I believe that the further we remove the process of government from the people, the greater the risk to democracy.”

Others wondered how the nominating commission could operate effectively and still be accountable to the people: “Who will watch this panel? Who will determine whether or not the panel is standing up to its responsibility? Who will know how they select the people whose names they send to the Governor?” Finally, they argued that merit selection did not remove the selection of judges from politics—it merely changed the background for the political battle.

It involves Bar Association politics and gives priority to the select few who have the ear or the rear of the appointing power, whether it be the Governor or the panel. In other words, palace politics or house of lords politics, and merit be hanged.
They also suggested that another form of politics might emerge.\textsuperscript{144}

Many would be eliminated because they graduated from the "wrong school," many would be eliminated because their names may end in the "wrong syllable," many would be eliminated because their skin may not be of the "right color."

The debate had little effect; both sides held fast. Then, a compromise emerged when it was proposed that the people be allowed to choose which method of selection they preferred. The Judiciary Committee rejected this compromise but devised an alternative: it would write the new judicial article to maintain the popular election of judges and add judicial retention elections, but with a clause calling for the state's voters to decide separately on the issue of merit selection at the primary election of 1969—a year after the new constitution's ratification election. The committee's merit plan of selection included the nomination of judicial candidates by a specially-constituted judicial nominating commission and the selection of the (presumably) best nominee by the governor. The committee presented its new proposals to the delegates and succeeded in capturing enough votes for passage.

The proposed judicial article earned the opposition of, among others, two Pennsylvania Supreme Court justices and the Philadelphia Board of Judges of Common Pleas. Far outweighing this opposition, however, was the support the article received from a vast array of Pennsylvania's political luminaries. These supporters tirelessly stumped across the state, making countless public appearances at which they urged voters to ratify the entire product of the convention. On election day, voter turnout was light, but the judicial article passed by a margin of nearly 170,000 votes statewide.\textsuperscript{145} Thus, the judicial article, with its provision for the state's voters to decide on the issue of merit selection of judges at an upcoming election, became law.

The voters' turn to decide on merit selection came in the spring election of 1969. The measure had staunch opposition from the state's political leaders, who exercised far greater influence during primary campaigns than they did in general elections. Though the proposal had the support of state governors, past and present, as well as bar associations and countless reform groups, it was opposed by most of the state's Republican Party county leaders and the mayor of Philadelphia, a Democrat; the head of Philadelphia's Democratic Party took no public position.\textsuperscript{146}

Despite the substantial number of prestigious and seemingly influential supporters, merit selection of appellate judges in Pennsylvania narrowly lost. The \textit{Inquirer} reported that "the judicial reform question...was crippled in Philadelphia." It also noted that only twenty-eight of sixty-seven counties approved the measure. The state's governor blamed the defeat on light voter turnout and the opposition of political leaders.\textsuperscript{147} The result was termed a victory for "party pros in Pennsylvania politics, the boys in the back room."\textsuperscript{148}

Thus, the state's voters left Pennsylvania with a hybrid approach to judicial selection: popular, partisan election of judges and merit retention, traditionally a component of the Missouri Plan. None of the delegates who proposed judicial reform at the convention apparently envisioned this final product, yet as a result, judges who serve on the Supreme, Superior, and Commonwealth (a third appellate court created by the convention) Courts do so through a curious course which reflects none of the contemporary philosophies regarding judicial selection.

G. The Battle Rages On: Pennsylvania, 1969 to the Present

The decision of the electorate to retain popular election of their appellate judges failed to stem the ardor of those seeking change. Outside studies, gubernatorial executive actions, proposed legislation, and special interest groups refused to let the issue die.

In 1970, the American Judicature Society, reporting to the "Philadelphia Justice Consortium on Philadelphia's Criminal Justice System" on a series of controversial court appointments by the state's governor, concluded that political affiliation took precedence over professional ability in the slating of judicial candidates.\textsuperscript{149} These and other issues were the topics of the "Pennsylvania Citizens Conference on the Judiciary" sponsored in 1975 by the American Judicature Society. In 1978, after a comprehensive study of the state's courts, the American Judicature Society concluded that:\textsuperscript{150}

\ldots selection of appellate judges by statewide popular election... is a farce. The voters do not know the candidates nor their records. Irrelevant factors such as common surname or short and flashy TV ads are likely to influence a majority vote.

Due to premature vacancies, the majority of members on most elective benches come to their posts through gubernatorial ap-
pointment. In recognition of this situation, Pennsylvania's last four governors have been assisted in their efforts by voluntary judicial nominating commissions established by executive order; such nominations, however, require the approval of two-thirds of the Senate.¹²¹

Legislators who oppose the popular election of judges continue to press for change, and nary a year passes when both houses of the legislature are not called upon to consider amending the constitution to provide for the merit selection of judges. These efforts are invariably backed by bar, civic, and governmental reform groups. Despite much agitation for change, these bills seldom report out of committee; moreover, countless efforts have not returned the issue to the ballot for voter consideration since its 1969 defeat.

VII. JUDICIAL SELECTION IN THE UNITED STATES TODAY

At the heart of the issue of judicial selection lies the question of the best means to an end. Though agreement exists that objectivity, independence, intellectual ability, and accountability are desirable qualities in a judge, no such agreement has been reached over how a candidate with such qualities can best be found and brought to the bench. This country's fifty states employ a remarkable variety of means in search of this end. Generally, two primary methods are used: appointment and election. In addition, a number of states have voluntary judicial nominating commissions to advise governors on nominations to fill vacancies.¹²² The importance of these voluntary commissions in states which elect their judges has increased with the realization that even in states with elected judiciaries, the majority of appellate judges first reach the bench through appointment.¹²³

The elective judiciary may be the single most unique contribution of the United States to judicial administration.¹²⁴ Other than in the Soviet Union, only a few small, isolated villages in Argentina and Switzerland elect their judges; elsewhere, they are appointed.¹²⁵ Whether the United States has developed the best system or gotten bogged down in the worst has been a matter of public debate throughout this country's history, and the debate promises to continue in the foreseeable future. This debate, naturally, will have a great impact on Pennsylvania and how citizens of this state select their judges. The following chapter will examine more closely the various methods of bringing judges to the bench and compare the method used in Pennsylvania to those employed in New Jersey and New York.

NOTES to Chapter One


4. William Penn, "Charter of Privileges or Proprietary Frame of Government," Article XVII.

5. Ibid.


7. Ibid.

8. Ibid.


10. Ibid.


15. Ibid.

25. Ibid., pp. 99-100.
26. Ibid., pp. 88-89.
27. Ibid.
28. Ibid.
32. Ibid., p. 158.
33. Ibid., passim.
42. Ibid.
43. Ibid., p. 90.
44. Ibid.
49. Ibid., p. 176.
53. Ibid.
56. Ibid., p. 322.
57. Ibid., p. 382.
58. Ibid., p. 335.
59. Ibid., p. 320.
60. Ibid., p. 285.
61. Ibid., pp. 301-302.
65. Ibid.
66. Ibid.
71. The Public Ledger (Philadelphia), 4 April 1849, p. 1.
72. The Public Ledger, 7 April 1849, p. 1.
73. The Public Ledger, 6 September 1850, p. 2.
79. Ibid, p. 102.
80. Ibid, p. 269.
81. Ibid, p. 270.
83. Ibid, p. 177.
84. Ashman and Alfini, The Key to Judicial Merit Selection, p. 10.
86. Ibid, p. 422.
91. Ibid.
92. Ibid, p. 746.
96. The Press (Philadelphia), December 1, 1873, p. 4.
109. Ibid.
110. Ibid.
111. Ibid.
117. Ibid.


124. Ibid., pp. 32-33.


126. Ibid., pp. 196, 208.

127. Ibid., p. 289.

128. Ibid., pp. 292-293.

129. Ibid., pp. 309-311.

130. Ibid., p. 316.

131. Ibid., p. 322.

132. Ibid., pp. 94-922, passim.

133. Ibid., pp. 444-449.


135. Ibid., p. 1234.

136. Ibid., p. 981.

137. Ibid., p. 984.

138. Ibid., p. 1232.

139. Ibid., p. 984.

140. Ibid., p. 980.

141. Ibid., p. 1233.

142. Ibid., p. 1235.

143. Ibid., p. 982.

144. Ibid., p. 980.


153. Ibid., pp. 11-12.


Pennsylvania has three appellate courts. The state's highest court, the Supreme Court, consists of seven justices and is the repository of the supreme judicial power of the state. The next tier of the unified Pennsylvania court system consists of two intermediate appellate courts, the Superior Court (created in 1895) and the Commonwealth Court (created in 1968). The Superior Court consists of fifteen judges, who sit in three-judge panels in deciding most cases. Nine judges serve on the Commonwealth Court.

The jurisdiction of each of these three courts has been set by the state legislature. Over time, the Supreme Court's far-reaching jurisdiction requires it to consider virtually every issue of importance to Pennsylvania. Although in certain cases, the Supreme Court has original jurisdiction—the authority to hear matters that have not been presented first to other courts—the court's jurisdiction is primarily appellate. Depending upon the issue involved, the court either must or may hear an appeal that is taken from the appropriate "inferior" court—the Superior Court, the Commonwealth Court, or the Court of Common Pleas (trial court). The Supreme Court also may assume jurisdiction of a case pending before any other court if the case involves an issue of immediate public importance. Every case that enters the state's judicial system may ultimately come before the Pennsylvania Supreme Court.

The Superior and Commonwealth Courts are known as intermediate appellate courts because, in most cases, a plaintiff or defendant wishing to appeal the decision of a trial court or administrative agency files the appeal with the Superior or Commonwealth Court, not directly with the Supreme Court. The Superior and Commonwealth Court have distinct jurisdictions. The Superior Court's appellate jurisdiction includes, for example, most criminal cases and tort, contract, and domestic relations matters. The Commonwealth Court's appellate jurisdiction includes actions in which the Commonwealth is a party, appeals from the orders of Commonwealth agencies, and local government cases. Both of these courts have some original jurisdiction as well, though that of the Superior Court is extremely limited.

The justices and judges who make up these three appellate courts are selected for their first full terms on the bench by the state's voters in competitive, partisan elections. When a mid-term vacancy occurs in one of the appellate courts, however, it is filled by the governor, who—according to current procedure—must choose every new appointee from a list of persons nominated to the bench by a specially-constituted judicial nominating body called the Appellate Court Nominating Commission. All of the governor's vacancy appointees must be confirmed by a two-thirds vote of the state Senate, and they serve only for an interim period until coming before the voters to seek a full term on the bench in a contested, partisan election.

At the present time, the term of office for all appellate judges and justices is ten years. At the end of the term, the judges may seek re-election by the voters. Unlike original election, re-election involves running in an uncontested, non-partisan election known as a retention election. Pennsylvania's appellate judges generally leave office by one of three routes: by not seeking re-election or losing their re-election bids; by voluntarily choosing to step down from the bench to resume private practice, to pursue another career, or for any other reason; by involuntary removal on account of disability or misconduct; or because of mandatory retirement at the age of seventy years, or by death.

I. THE PENNSYLVANIA SYSTEM

A. Election to the Bench

The Constitution of Pennsylvania stipulates that judges and justices of statewide courts shall be citizens of the Commonwealth, shall be residents of the Commonwealth for at least one year preceding election or appointment to the bench (and during their term of office), and shall be members of the bar of the Supreme Court. They are elected to office in partisan contests (a spring primary and November final election) held in the year preceding the start of their terms of office. Appellate judicial elections generally occur in odd-numbered years—that is, at a time when all other regularly scheduled contests on the ballot are for local offices.

The formal selection procedure is initiated when those who wish to seek the nomination of a political party (or parties) for judicial office in the spring primary file nominating petitions with the Secretary of the Commonwealth prior to the filing deadline. These petitions must include the signatures of at least one hundred voters in each of at least five counties of the state. The signatures
must be collected only during a three-week period of time well in advance of the spring primary. Along with these nominating petitions, a prospective judicial candidate must submit an affidavit which vouches for the candidate's legal eligibility for office. Those candidates who win the primary election capture the party nomination, and their names will appear on the November ballot. Candidates for appellate judicial office generally receive the first position on the ballot (ahead of other offices), but this is not required by law.

A judicial candidate, like other candidates for public office in Pennsylvania, may choose to bypass the primary (and political party nominations) by appearing only on the final election ballot in November. In order to run as an independent in the November election, the candidate must file nominating papers. Similar to petitions, they are a collection of signatures of registered voters which must be gathered only during a specified period; unlike petitions, however, they may be signed by voters from any party — as well as by voters who are registered non-partisan — and the number of signatures required is determined by a formula based on voter turnout in the last statewide election. Finally, judicial candidates whose names do not appear on either the primary or final election ballots may also seek office through a write-in campaign.

It should be noted that the election of judges differs significantly from the election of other public officials in Pennsylvania. First, the Code of Judicial Conduct seeks to impose severe restrictions on the conduct of judges during the election campaign. A judicial candidate for office may identify himself or herself as a member of a political party, may attend political gatherings, and may speak to such gatherings during the campaign. A candidate for election to judicial office should not, however, act as a leader or hold any office in a political organization; in addition, he or she should not make speeches for a political organization or publicly endorse a candidate for office. During the campaign, the judicial candidate may not personally solicit or accept financial support, nor are any public officials or employees subject to the candidate’s control permitted to do so, but the candidate may establish campaign committees for this task (within a limited period of time). The canon also prohibits the making of campaign pledges or promises of certain conduct in office, other than the faithful and impartial performance of the duties of the office, as well as taking a public position on legal or political issues. The canon is largely self-enforcing, however, and there is a broad range of opinion among candidates concerning what constitutes acceptable campaign practices in judicial races (see Chapter Four).

A second important distinction of judicial elections is the allowance of cross-filing for Pennsylvania’s judicial candidates, or seeking the nomination of more than one political party. Except for candidates for elected school boards or justice of the peace, all other candidates for public office may only file petitions to run in one party’s primary. The provision for judicial cross-filing greatly changes the nature of elections for the bench, as opposed to elections for other public office. The real battle is often fought in the primary to gain the Democratic and Republican Party nominations, since winning both party nominations is tantamount to winning the election. While the sponsorship of a political party was vital to a winning judicial candidacy in the past, in recent years some candidates have won primaries and subsequent seats on the bench without party endorsement.

B. Appointment to the Bench

When a judge leaves the bench before his or her term of office has expired, a vacancy is created. Since there are many reasons that may cause a judge to leave — e.g., return to more lucrative private practice, death, retirement, disability, or removal through disciplinary action — vacancies may frequently arise. In Pennsylvania, it is the responsibility of the governor to fill vacant judgeships by appointing a replacement, with the advice and consent of two-thirds of the members of the state Senate. Both the governor and Senate must perform their respective duties within prescribed time limits. The governor must nominate a “proper person” within ninety days of the first day of the vacancy. The Senate must in turn act on each nomination within twenty-five legislative (not calendar) days of its submission. (In certain cases, the Senate has even fewer than twenty-five legislative days within which to act: if it has not voted upon a nomination within fifteen legislative days, five Senators may request that the Senate’s presiding officer place the nomination before the Senate. The nomination must then be voted upon either within five legislative days or before the original twenty-five days limit has lapsed, whichever occurs first.) If the Senate is in recess or indefinite adjournment at the time of a nomination, it nevertheless is entitled to pass upon that nomination: it must act within twenty-five legislative days after returning or reconvening. If the Senate votes to approve a nomination or fails to act within the allotted time period, the nominee is entitled to assume office. Of course, if the Senate votes not to approve the nomination, the governor must submit another “proper
person." A successful appointee serves an abbreviated term until a candidate is elected to fill the position. In that election, if the appointee wishes to remain on the bench, he or she must run against other candidates in a partisan contest for a regular ten-year term of office.

Since 1964, Pennsylvania's governors have shared responsibility for filling judicial vacancies not only with the state Senate, but also with a judicial nominating commission. This body was established by Governor William W. Scranton in 1964 in an historic action creating a voluntary merit system; it has been continued in slightly different form by each successive chief executive of the state since that time. Under the present voluntary merit plan — so-called because it does not carry the formal authority of statute or the Constitution but rather depends on the informal continuation by the governor—the governor names an appointee from a list of nominations submitted to him by the judicial nominating commission, which is known as the Appellate Court Nominating Commission. The purpose of this system is to seek out highly qualified candidates for appointment to these prestigious and important judgeships.

The current Appellate Court Nominating Commission is comprised of seven members, all of whom (including a chairman) are appointed by the governor to two-year terms and may be reappointed for one additional two-year term. Four of the members must be members of the Bar of the Pennsylvania Supreme Court who reside and practice law in the Commonwealth. The remaining three members of the Nominating Commission are non-lawyer citizens of the state. None of the members is permitted to hold office in a political party or organization, and no member is eligible to fill a judicial office over which the Commission has jurisdiction during his or her tenure with the Nominating Commission. The members of the Commission are not compensated for their services but do receive reimbursement for their expenses.

Within ten days after learning of any vacancy on one of the state's appellate courts (Supreme Court, Superior Court, or Commonwealth Court), the Nominating Commission gives public notification of the vacancy through newspapers, citizens' organizations, and the bar. Persons who wish to be identified for appointment, along with individuals who are identified as potential candidates by members of the Nominating Commission, undergo a confidential investigation, including the completion of a Personal Data Questionnaire Form. Within forty-five days of learning of any vacancy, the Nominating Commission must draw up a list, without indication of preference, of five nominees whom it considers well-qualified; the list must be transmitted to the governor within two days of its designation. As soon as possible following the receipt of the Commission's panel of nominations, the governor appoints one of the nominees and submits that individual's name to the Senate for its approval or, alternatively, advises the Commission that all of its nominees are rejected. In the latter case, the Commission then submits a new list of nominations. All of the Commission's proceedings and recommendations to the governor are kept confidential.

C. Retention Election
Judges who have served full ten-year elective terms of office—regardless of whether they initially came to the bench through partisan election or by a vacancy appointment and then election—are permitted to seek re-election. They must do so in a non-partisan, uncontested race called a retention election. These incumbent judges present themselves to the voters strictly on the basis of their records while in office; they are not opposed by other candidates. A declaration of retention candidacy must be filed with the Secretary of the Commonwealth on or before the first Monday in January of the year preceding the expiration of a judge's term of office. If no declaration is filed, candidates for the soon-to-be-vacant judgeshipCompete for the position in the appropriate primary and final elections. The retention candidate's name does not appear on the primary ballot, since there is no partisan run-off for retention candidates. The retention candidate's name appears on the November ballot, separate from the names of judicial candidates who are seeking to reach the bench in a partisan, contested election. (Usually, the names of retention candidates appear adjacent to the space reserved for constitutional questions or issues.) The voters express their wishes by responding either "yes" or "no" to the question, "Shall Judge X be retained in office?" If a majority of voters respond affirmatively, then that judge is entitled to serve another ten-year term. If the majority of voters say "no," then the judge serves only to the expiration of his or her current term, and then a vacancy is created to be filled by gubernatorial appointment (with the aid of the Appellate Court Nominating Commission and the state Senate).

D. Bar Polls
In the partisan elections for initial selection and, to a lesser degree, in the later retention elections, the state and local bar associations
seek to play a role by evaluating the judicial candidates. (The bar associations may also determine a preference for a candidate to fill a judicial vacancy and refer the names of potential appointees to the nominating commission.) Traditionally, bar associations have assigned special committees (such as the Pennsylvania Bar Association's Judiciary Committee) to investigate the qualifications of candidates or, in the case of incumbents, the performance of retention candidates during their tenure of service on the bench. A referendum may be conducted among all the members to poll their assessments, often using an extensive questionnaire for rating judges. None of these practices is required under the law, and the procedures of the bar associations vary, including the extent to which candidates for the statewide appellate courts are evaluated.

These bar polls are intended to serve a two-fold purpose. First, they are a device to inform the public about the candidates' qualifications, thereby helping to overcome the lack of public interest in many judicial campaigns, particularly in retention elections. Second, as instruments of information they provide support for those candidates whom the bar association endorses. In addition, political parties have on occasion agreed not to endorse formally any candidate who is found unqualified by these evaluations.

E. Removal of Judges

According to the Constitution of Pennsylvania, any judge or justice may be removed from office, suspended, or otherwise disciplined for violating the canons of legal or judicial ethics prescribed by the Supreme Court. Reasons for disciplinary action include engaging in political and other prohibited activities, misconduct in office, neglect of duty, failure to perform the duties of the bench, or conduct which impedes the proper administration of justice or which brings the judicial office into disrepute.

In order to implement these stipulations, a Judicial Inquiry and Review Board was created in 1968 by constitutional amendment to receive complaints and reports concerning alleged judicial misconduct. The board is composed of nine members. Three are judges from the Courts of Common Pleas from different judicial districts and two are judges from the Superior Court. All five are selected by the Supreme Court. In addition, two lawyers and two lay (non-lawyer) electors are chosen by the governor to sit on the board. Judges, therefore, make up the majority of the board. All of the members serve four-year terms, and although they may be reappointed, a lapse of one year must first occur. No member is permitted to hold office in a political party or organization while serving on the board. The members (with the exception of the judges) are compensated as prescribed by the Supreme Court, and each member is reimbursed for expenses incurred in the course of his or her duties. The board is staffed by a part-time executive director.

On its own initiative or upon receiving a formal or informal complaint concerning a judge, the Board undertakes a preliminary investigation of the charge. If further inquiry appears due, the judge must be notified of the investigation, the nature of the charge, and the identity of the complainant (if any), and must be provided an opportunity to respond. As part of the preliminary investigation, a two-person investigating committee of the Board may use the Board's power to compel the attendance and testimony of witnesses and the production of documents. If the Board then determines that formal proceedings are appropriate, the judge is notified and provided an opportunity to answer, a different committee of the Board then holds a formal hearing, reporting its findings to the full Board. The Board then adopts its own findings, permitting the judge to file objections and have another hearing. Finally, the Board, if a majority of its members find good cause, must recommend to the Supreme Court the suspension, removal, discipline, or compulsory retirement of the judge. The Supreme Court, after reviewing the record and, if it wishes, accepting additional evidence, can adopt the Board's recommendation, wholly reject it, or refer the matter back to the Board, as the Court deems appropriate. All papers and proceedings before the Board are confidential.

The volume of complaints lodged with the Judicial Inquiry and Review Board increased steadily through the first ten years of its existence to a total of 379 complaints received in 1979 and 328 complaints received in 1980 concerning judges in all courts of the Commonwealth. The disposition of these complaints has, in fact, resulted in the utilization of all available disciplinary measures, though statistics do not reveal the specific number of appellate court judges affected.

Beyond the procedures for removal of judges from office which are applicable only to the judiciary, judges are also subject to the provisions for impeachment which pertain to all public officials. Under this proceeding, a charge of misbehavior in office is brought by the state House of Representatives and is tried by the state Senate. Conviction requires action by two-thirds of the members of the Senate present. Only a total of twelve judges in both the trial and appellate courts have been impeached in the history of Pennsylvania, with the last one in 1825. These impeachment pro-
ceedings resulted in three convictions, including the conviction of a Chief Justice of the Supreme Court in 1685. No impeachment charges have been considered since 1936. 59

Finally, Pennsylvania's appellate judges are subject to the state's compulsory retirement provisions, which require all judges to step down from the bench when they reach seventy years of age. 60 A retired judge may be assigned by the Supreme Court to temporary judicial service in the capacity of senior judge. 61 Many senior judges have continued to serve in Pennsylvania's appellate courts.

II. ALTERNATIVE METHODS OF JUDICIAL SELECTION

No single system of appellate judicial selection exists today in the United States. As shown in Chapter One, history has witnessed three major developments in methods of choosing judges: first, appointment by the governor or legislature in most of the colonial states, then a move to popular election in the mid-nineteenth century, followed by a more recent trend toward the merit nominating plan. The result today is a "patchwork" of state court selection methods among the states. 62 At present, ten other states 63 elect their judges to their first full terms in essentially the same manner as Pennsylvania. In contrast to the partisan election system employed here, however, there are four alternative methods of appellate judicial selection currently in use in other states across the country: non-partisan election, gubernatorial appointment, legislative election or appointment, and the merit nominating format.

A. Non-partisan Election

A non-partisan elective system of appellate judicial selection is in effect in fourteen states. 64 (Thus, some form of the elective method—either partisan or non-partisan—is utilized by half of the states.) Under the non-partisan system, the names of judicial candidates are placed on the ballot without a listing of party affiliation. Nonetheless, candidates generally compete in both the primary and general elections; the purpose of the primary in this case is not to determine party nominations but to serve as an elimination runoff, with the top vote-getters competing in the general election. (A judge who is unopposed for office in the primary is declared the winner and will not appear on the final election ballot.) In some jurisdictions, this format is used in conjunction with a separate place on the ballot or with an entirely separate ballot for judges. 65 In other places, the scheduling of the non-partisan judicial election does not coincide with the election of other public officials. 66

B. Gubernatorial or Legislative Action

In eight states, appellate judges are selected by the governor or the state legislature. Appointments are made by the governor in four states, but always with the approval of some other body. Consent of the Senate, 67 a special elected body known as the executive council, 68 or a Commission on Judicial Appointments is variously required. 69 In one state, the governor "nominates" judges, who must then be "appointed" by the full legislature. 70 Finally, the legislatures of three states directly elect their state judges 71—a carryover from the colonial era.

C. The Merit Selection Plan

The major alternative to the popular elective system or the pure appointive system is the merit selection plan. The merit plan features appointment by the governor (with or without legislative approval), but with an all-important distinction: under the merit plan, the governor is obliged to select a judge only from a limited number of candidates who are recommended as best qualified by a judicial nominating commission. In other appointive systems, either the governor or the legislature is constrained in the appointive decision only by any minimum eligibility requirements that may have been enacted, such as citizenship or number of years since admission to the bar, or by the corroborative action of a confirming body.

As noted in Chapter One, the merit plan was first proposed by Professor Albert M. Kales of Northwestern University 2 and has been championed by the American Judicature Society, which was founded in 1913. In 1934, California adopted some aspects of the merit plan, but in 1940, Missouri became the first state to embrace the plan (with modifications) in it entirety; hence, it came to be known popularly as the "Missouri Plan". By 1970, six states in addition to Missouri had adopted the merit plan, 73 and by 1982, sixteen states had adopted it in their constitutions or by statute as a means of initial selection to the appellate bench, 74 and three states had implemented this method by executive order. 75 Further, twenty-nine states use merit procedures to fill vacancies in the appellate bench—twenty-two by constitutional or statutory requirement 76 and seven by executive order. 77

In actuality, to speak of "the merit plan" for judicial selection is an oversimplification, since a wide variety of "merit" judicial selec-
tion methods have been devised. As noted, while some merit plans are based on constitutional or statutory provision, others are in force only through the directive of an executive order. In some states, the merit procedures apply to all courts, and in others either to appellate or trial courts.\textsuperscript{99} Merit procedures are used in some states both in the selection of judges to full terms and to fill unforeseen vacancies;\textsuperscript{99} other states use the merit plan only to fill vacancies.\textsuperscript{99} Finally, while most states treat a particular level of court uniformly throughout the state, in a few instances, individual municipalities apply merit procedures to local judges while the remainder of the state does not.\textsuperscript{101}

The three hallmarks of a merit plan of judicial selection are 1) recruitment and nomination of candidates by a commission, 2) appointment from among the nominees by a chief executive to a short initial term, and 3) retention through a non-competitive, popular election for a full term. In general, the commission is a permanent, non-partisan body consisting of lawyers, non-lawyers, and judges, and it is chaired in some states by a judge. The commission initially and independently generates, screens, and submits a list of judicial nominees to the appointing executive who is legally bound to make a final selection from that list.\textsuperscript{102} In some states, the appointment must be confirmed by a legislative body. The appointment is made for a relatively brief probationary period, after which the judge may seek re-election in an uncontested, non-partisan "retention election." In the retention election, the electorate votes "yes" or "no" in response to the question, "Shall Judge X be retained in office?" A simple majority of affirmative responses grants the judge a full term of service on the bench.

These features of the merit plan comprise the basic theme, but there are many variations on the theme among the individual state merit systems now in operation, especially regarding the function of the nominating commission. Differences in the plans include:

- **length of tenure, limitation on terms** — in some states, commissioners serve undefined terms, while commissioners in other states are restricted to terms of specific duration and to the number of terms they may serve.

- **time deadline** — some commissions must present their panel of nominees to the governor within a specific length of time, though others are not so bound.

- **number of nominees** — requirements vary on the number of names which the commission must submit to the governor (the standard range is three to five names) and whether or not the governor may request additional lists of names.

- **staff** — some commissions are served by a full-time or permanent staff, while others are dependent strictly on the work of the commissioners themselves.

- **confidentiality** — some commissions release the names of all potential candidates for appointment; some publish the list of final nominees submitted to the governor; and in some states only the name of the appointee is made known.

As noted, the legal basis of a merit plan may be constitutional, statutory, or by executive order. Although Missouri was the first state to adopt a constitutional merit system of selection, one of the first voluntary merit plans was established by executive action alone in Pennsylvania. On January 23, 1964, Governor William W. Scranton\textsuperscript{103} established a judicial nominating commission. This body has been continued by action of three successive administrations\textsuperscript{104} to the present day.

III. ALTERNATIVE PROVISIONS FOR TENURE

A. **Term of Office**

The divergence in length of term and other limitations for service on the bench is indicative of a fundamental inconsistency in public expectation. Popular opinion supports the notion of independent judges, whose terms of office are long enough both to attract top-notch lawyers to judicial careers and to protect judges from political pressure. Yet, at the same time, the public wants judges who are sympathetic to the will of the electorate and whose terms of office are short enough to enforce the will of the people through the threat of removal.\textsuperscript{105} Life tenure is thought by many to be the best guarantee of judicial freedom and neutrality, but only four states\textsuperscript{106} award judgeships for life based on good behavior (and
those states do not have the same means of selecting appellate judges). Most states do, however, provide judges with terms of office considerably longer than executive or legislative terms of office, reflecting the two powerful strains in American thought which value both judicial independence and periodic evaluation by the electorate.

Practice in the Commonwealth of Pennsylvania reflects this duality. Justices of the Supreme Court and judges of the Superior Court and Commonwealth Court are all granted initial terms of ten years when they reach the bench through partisan election, and they may continue to win ten-year terms as long as they are approved for retention by the electorate. (Until 1969, however, Supreme Court justices had been granted a single twenty-one year term rather than renewable ten-year terms.) In most states, the standard term of office for appellate court judges who are chosen by election, gubernatorial appointment, or legislative action ranges from six to twelve years, with the same term of office subsequently granted through re-election or reappointment, though, for example, the judges of New York's state court of last resort serve fourteen-year terms, and intermediate appellate court judges in Kansas are granted terms of only four years upon re-election.

B. Retention Elections

The subject of judicial tenure is most controversial in the states which practice merit selection procedures, where objection is sometimes raised concerning the retention election format which merit plans entail. (It should be noted, however, that merit retention is not always used in conjunction with the merit nominating system. California, Illinois, and Pennsylvania all use merit retention elections in combination either with gubernatorial appointment or, as is the case in Pennsylvania, in combination with the direct popular election of judges.)

A retention election is one in which a judge who seeks to remain in office runs in an uncontested, non-partisan race strictly on the basis of his or her record on the bench. The ballot which is presented to the voters does not list a slate of candidates for judgeships from which the voter must make a choice. Rather, the voter is simply asked to respond either “yes” or “no” to the question, “Shall Judge X be retained in office?” This format was developed as part of the merit plan in the interest of combining the benefits of popular election with the advantages of the nominating commission, thus diminishing the pressures of campaigning for incumbent judges while still permitting the electorate to pass judgment on judicial performance.

IV. ALTERNATIVE MODES OF JUDICIAL DISCIPLINE AND REMOVAL

The subject of the selection of judges has traditionally received much more attention than the discipline and removal of judges. The premise is that the initial selection of highly-qualified judges precludes the eventuality of misconduct or incompetence thereafter. This assumption has shown itself to be well-founded, since only a small segment of the judiciary has required correction or termination. Nevertheless, since even a small number of corrupt, incompetent, or disabled judges can do great harm to the operation and reputation of the bench, it is essential that effective disciplinary and removal procedures be in place and that a suitable mechanism for implementation exist.

A good system of discipline and removal is dependent upon three things. First, there must be a clear standard of conduct to which judges must adhere. Second, a viable and visible enforcement body is necessary to oversee compliance with that code of judicial behavior. Third, an arsenal of punitive measures which is applicable to a variety of particular problems must be available. These measures must address a wide range of infractions from occasional corruption and major felonies at one extreme to tardiness and discourtesy at the other. In addition, an effective disciplinary and removal system requires the commitment of high caliber personnel to the investigation and hearing process, strong community expectations of proper judicial behavior, and a shared will to enforce those expectations.

Some contend that judicial disciplinary procedures are unwarranted. The maintenance of ethical standards should rest completely with the individual judge, they believe, and apart from conviction or disbarment for which a judge is automatically removed from office, judicial derelictions should not be subject to sanctions. Other means — bar opinions, higher court decisions, good court administration, and the influence of colleagues — are sufficient to keep the judiciary in line. Moreover, it is purported, disciplinary procedures may interfere with judicial independence and may harm innocent people by giving license for unfounded attacks made by selfish interests seeking to avenge a decision or to gain personal advantage. On the other hand, supporters of disciplinary procedures insist that a satisfactory system of judicial discipline and removal allows for speedy action in the rare but critical instances of wrongdoing and can actually help to deter misconduct. Serving as a "lightning rod" for grievances and unsupported complaints, it can provide assurance to the public that
questionable conduct, including a mental or physical disability which impairs performance, will be duly investigated.95

One obvious measure of discipline and removal is available in the majority of states: either re-election or retention, depending on the state. Requiring a judge or justice to appear again on the ballot in order to remain on the bench provides voters with an opportunity to review his or her judicial performance and, if it is found unsatisfactory, to turn the judge out of office. Since elections are not a very economical or efficient way of removing judges,96 however, this measure has long been augmented by other methods of removing judges (and other public officials) such as recall and impeachment.96 Under recall, which is now available as a disciplinary procedure in only a few states,96 a special election is called after a required number of voters sign a recall petition. Impeachment is a legislative step which requires a charge of misconduct brought by the state House and a hearing and conviction by the Senate. Impeachment, while still a provision of most states, including Pennsylvania,97 had been attempted only fifty-two times in seventeen states by 1960, resulting in nineteen removal actions and three resignations, with the outcome of one case unknown.96 As demonstrated by the rarity of its use, impeachment can be a cumbersome procedure which is generally thought to be ineffective as a judicial disciplinary or removal procedure.99

In 1948, New York instituted the first successful effort to provide a judicial substitute for legislative impeachment. The New York Court on the Judiciary98 was established as a special court to address instances of alleged judicial misconduct. Three other states99 now have their own separate judicial courts. A new type of disciplinary body was devised in California in 1960 with the formation by constitutional amendments of the California Commission on Judicial Qualifications,100 a precedent which has been followed by nearly every state, including New York.105 (whose commission on judicial conduct replaced its court on the judiciary) and Pennsylvania. The purpose of these state judicial disciplinary boards and commissions is to conduct investigations and hear charges against a judge and make a recommendation to the state Supreme Court or top appellate court (or in Tennessee, to the legislature; and in Connecticut, to the governor) if disciplinary action is deemed appropriate. A wealth of new disciplinary methods has also been developed to increase the options available to the state commissions. Many commissions may now recommend suspension, public or private censure, and retirement for disability.

As with the merit nominating commissions, the legal basis of the disciplinary boards and commissions varies; some have been established legislatively and others through constitutional provision. (As noted, Pennsylvania’s Judicial Inquiry and Review Board was formed through constitutional amendment in 1968.) There is also variation in the composition of the membership on these disciplinary bodies, though a “typical” commission has five to nine members who are a mixture of judges, lawyers, and non-lawyers.104 Often, the judicial members are appointed by the Supreme Court (or the Chief Justice). The lawyers are named by the bar, and the governor selects the lay members. Almost all of the state disciplinary commissions prescribe a fixed-length term for their members, and many states do not allow commissioners to serve successive terms.

It has been argued that a disciplinary commission must be served by a permanent staff if it is to be effective,105 but not all state disciplinary bodies are staffed, where there is a staff, some are full-time and some are part-time. Their procedures differ widely, especially in their provisions for confidentiality; though most tend to make a complaint public only when a recommendation for action is filed with the Supreme Court or other enforcing authority. Finally, the complaints which are made to the commissions tend to originate from different sources in different states. In some places the majority of complaints are reported by citizen groups, but in most states it is the litigants and counsel to litigants who tend to file the greatest number of complaints. Though the complaints are dispatched differently by the various commissions, very few disciplinary actions are subsequently recommended, and only a small number of sanctions are imposed across the country.

V. JUDICIAL SELECTION, TENURE, AND REMOVAL
IN NEW YORK AND NEW JERSEY

In order to illuminate the many facets of Pennsylvania’s system for bringing judges to the bench and ousting them, the methods of judicial selection, tenure, and removal in the states of New York and New Jersey will be examined. Both states are of comparable size and in close geographical proximity to Pennsylvania, but their court systems are markedly dissimilar. For example, though New York’s appellate judges are chosen through merit nominating procedures, at the lower appellate level they must be selected only from among a group of trial court judges who have been elected by the voters in partisan elections. This is in contrast to the “open”
nominating process in Pennsylvania. In New Jersey, appellate judges are appointed by the governor. After serving an initial term of seven years, they may be reappointed for life, in contrast to Pennsylvania’s insistence on retention every ten years. A more complete comparison of the New York and New Jersey systems will reveal other differences.

A. **New York**

1. **Appellate Selection and Tenure in New York**

   a. **Court of Appeals**

   New York’s highest court is known as the Court of Appeals, rather than as the Supreme Court, the name of its equivalent in Pennsylvania and most other states. The qualifications for one of the seven seats on this court include residency in the state and at least ten years of experience in the practice of law. Persons selected for these judgeships are chosen by the governor from a list of nominations recommended by the Judicial Nominating Commission, which was established by constitutional amendment and by statute to consider and evaluate the qualifications of candidates for appointment to the Court of Appeals. The advice and consent of a majority of the state Senate is also required. If the Senate is in session when the governor makes an appointment, it must be confirmed or rejected no later than thirty days after receipt of the nomination from the governor. (If the appointee is rejected, a vacancy is declared.) If the Senate is not in session to give its advice and consent, the governor appoints, on an interim basis, one of the candidates recommended by the nominating commission, and the interim appointment continues until the Senate acts on the selection. If the Senate confirms, the judge’s term of office begins on the date of the interim appointment. If the Senate rejects the appointment, a vacancy occurs sixty days after the rejection. The governor may notify the Senate on the day an interim appointment is made, and the Senate must take steps either to confirm or reject the appointment within a specified period of time.

As noted, the governor’s appointee is first recommended by the Judicial Nominating Commission, comprised of twelve members. Four of the members are appointed by the governor; four are chosen by the chief judge of the Court of Appeals, and one each by the speaker of the Assembly, the temporary president of the Senate, the minority leader of the Senate, and the minority leader of the Assembly. The bi-partisan nature of the commission is assured; of the four members (eight total) appointed each by the governor and the chief judge, no more than two (four in all) may be registered in the same party. Moreover, the commission is not to be dominated by attorneys; the governor and the chief judge are also required each to appoint two lawyers and two non-lawyers. Pennsylvania’s merit nominating commission consists of seven members, all of whom are appointed by the governor. No constraints on the party affiliation have been placed on the governor’s appointments here.

The term of office for members of the commission are staggered, with each member serving for four years. The restrictions on eligibility for service on the nominating commission are similar to those in Pennsylvania. All the members of the commission must be state residents. They must not have held judicial office previously, and for the duration of their service on the commission, members may not hold judicial office or any public office for which compensation is received, with one exception: the governor and chief judge may each appoint one former judge. The commissioners are also prohibited from holding office in any political party. Finally, members of the commission are not eligible for appointment to the bench while serving on the commission or for one year after leaving the commission.

In Pennsylvania, the Appellate Court Nominating Commission functions to assist the governor only in filling “vacancies,” that is, in making appointments primarily to judgeships which have been vacated prematurely before the expiration of a full term. In New York, the nominating commission also operates to fill vacancies, but in this state a “vacancy” encompasses judgeships vacant in mid-term and at the end of a term. Thus, the New York merit nominating commission plays a more prominent role than the Pennsylvania commission. Their procedures also differ, but far less dramatically.

The New York merit nominating commissions must present a slate of seven nominees to the governor for a vacancy in the office of chief judge. If the vacancy occurs in the office of associate judge, the commission recommends at least three and not more than seven candidates; if there are multiple vacancies, the commission must recommend an additional person for each vacancy. (The Appellate Court Nominating Commission of Pennsylvania submits a panel of five names for every vacancy.) All nominees presented by the commission are required to participate in a personal interview and must give their consent to the nomination. Further, each nominee must file a financial statement of assets, liabilities, and sources of income. Only the financial statement of the governor’s subsequent appointee is made available to the public.
The powers of New York’s Judicial Nominating Commission far surpass those of the Pennsylvania Appellate Court Nominating Commission. Lawmakers have enabled the New York commission to conduct investigations, administer oaths, and subpoena witnesses or documentary evidence relevant to the evaluation of candidates. In addition, it can require assistance and information from other agencies, and it can retain a counsel and other staff. The commission can also require candidates to appear before it.

Two-thirds of the members of the commission must concur to recommend a candidate to the governor. All of the commission’s recommendations are released to the public when the list is submitted to the governor, including the reports of the commission’s findings concerning the qualifications of each recommended candidate. The judges of the New York Court of Appeals are initially appointed, through these merit nominating procedures, to terms of fourteen years. They may be reappointed to additional fourteen-year terms.

b. Appellate Divisions of the Supreme Court

The Supreme Court of New York (which is not the highest court) is divided into two parts: the trial and special terms on the one hand, and the Appellate Divisions on the other. The Appellate Divisions—one for each of the four judicial departments of the state, which are comprised, in turn, by one or more of the state’s twelve judicial districts—constitute the second highest tier of courts in the state.

To be a Supreme Court justice (and thus to be eligible to serve in the Appellate Division), a candidate must have been admitted to practice law in New York for at least ten years. A residency requirement also applies to justices in the Appellate Division: the presiding judge and a majority of other judges of the Appellate Division in each judicial department must be residents of that department. Further, a judge of any New York appellate court may not be a member of a national political committee, an officer or member of a state political committee, or a county chairperson of any political party.

In order to be selected for the Appellate Division, a candidate must first be elected to the Supreme Court. For election purposes and for convenience, the state is divided into twelve judicial districts, with a branch of the Supreme Court in each district. The justices of the Supreme Court, then, are chosen by the voters in their respective judicial districts. The judicial candidates for the Supreme Court do not run in the state’s regular primary. Rather, the candidates are selected by the various political parties at judicial district conventions, which are held in September preceding the November general election. The delegates to each party’s convention are generally party members who were elected in the preceding primary. Once nominated at the convention, judicial candidates appear on the November ballot. The candidates who are chosen to run do not have to be party members, and different parties may nominate the same candidates.

The Supreme Court justices who serve in the Appellate Divisions are chosen by the governor, as is the presiding judge of each Appellate Division. As a result of executive orders (and not the constitutional amendment which directed a merit plan for selection of judges to the Court of Appeals), governors have agreed to designate only those justices who are recommended by a judicial nominating commission.

The term of office of every Supreme Court justice is fourteen years. A justice who is appointed to an Appellate Division and who is designated presiding justice of that division serves as such for the remainder of his or her fourteen-year term. Other justices appointed to the Appellate Division serve for five years, or for the unexpired portion of their respective term of office, if less than five years. As terms expire or vacancies occur—a vacancy other than by the expiration of a term—new Appellate Division justices are selected by means of the voluntary merit plan. Also, upon request of an Appellate Division, the governor may make temporary appointments in the case of the absence or disability of any justice in the Appellate Division.

2. Removal of New York’s Appellate Judges

As in Pennsylvania, removal of appellate judges in New York can occur in three ways. First, judges must comply with compulsory retirement regulations. The law requires judges to retire on the last day of the year in which they reach seventy years of age. Second, judges, like other public officials, are also subject to impeachment by the legislature. Legislative removal of Court of Appeals and Supreme Court judges may also take place by concurrent resolution of both houses of the legislature if two-thirds of all the members elected to each house concur. Third, the state’s Commission on Judicial Conduct may take disciplinary action which is followed, in some cases, by an order of removal by the Court of Appeals.
The Commission on Judicial Conduct is comprised of eleven members. Four of the members are appointed by the governor, three are appointed by the chief judge of the Court of Appeals, and one each by the temporary president of the Senate, the speaker of the Assembly, the minority leader of the Assembly, and the minority leader of the Senate. Therefore, in New York the courts do not hold such extensive leverage over the judicial disciplinary commission as in Pennsylvania. The governor is required to appoint the commission one member of the state bar who is not a judge, one judge, and two lay members who must not be attorneys, judges, or retired judges. Of the three members appointed by the chief judge, one must be a justice of the Supreme Court’s Appellate Division and two must be judges of a court or courts other than the Court of Appeals or Appellate Divisions. None of the persons appointed by the legislative leaders may be judges or retired judges.

The term of office for each appointee is four years, and there is no prohibition against serving successive terms. In addition to reimbursement for expenses, commission members other than judges receive compensation for each day they are engaged in commission business. The commission must appoint an administrator, and the administrator may appoint a full-time staff.

The task of the commission is to investigate, initiate, and hear complaints regarding the conduct, qualifications, or performance of any judges. The commission may also initiate an investigation of a judge on its own. If the commission determines after investigation of a complaint that a hearing is warranted, it may direct that a hearing be held. The hearing will not be public unless the judge under investigation so requests in writing; in general, all of the proceedings of the commission are confidential. If the complaint is founded, the disciplinary avenues open to the commission are admonishment, censure, removal, or retirement of the judge under investigation. The imposition of any of these sanctions is made public. The judge involved may request a review of the commission’s findings by the Court of Appeals, which may accept or reject the sanction of the commission, impose a different sanction, or impose no sanction at all.

**B. New Jersey**

1. Appellate Selection and Tenure in New Jersey

Appointment is the method of selection employed in New Jersey for judges and justices of the state’s two appellate courts, the Supreme Court and the Appellate Division of the Superior Court. The appointing authority in both cases is the governor. It is the chief justice of the Supreme Court, however, who appoints to the particular divisions of the Supreme Court those judges who have been named to the Supreme Court by the governor. All appellate judges and justices are appointed to an initial fixed-length term and, upon reappointment, are granted life tenure during good behavior.

a. Supreme Court

The New Jersey Supreme Court consists of a chief justice and six associate justices. Their qualifications for the appellate bench include admission to the practice of law in the state for at least ten years. All of the justices are nominated and appointed to the Supreme Court by the governor, with the advice and consent of a majority of the Senate. The governor must make public notice of a nomination seven days before it is sent to the Senate for consideration. Any vacancy which occurs on the bench, whether in mid-term or at the expiration of a term, is filled through the same procedure.

The governor is aided in the recruitment of nominees by the Judicial Selection Committee of the New Jersey State Bar Association, though it is not required that the governor’s nominations be limited to those whom the Judicial Selection Committee may suggest. In addition, the governor’s nominees are evaluated prior to their submission to the Senate by a self-designated “nominating commission.” Called the Judicial and County Prosecutor Appointments Committee, this commission is also a committee of the State Bar Association.

After the governor has determined the names of prospective nominees, or when incumbent judges come up for reappointment, this committee screens and rates the potential appointees in conjunction with the appropriate county bar association, and then advises the governor of its findings. In the event that one of the governor’s nominees is discerned to be “not qualified” by the Judicial and County Prosecutor Appointments Committee, that committee may notify the Senate Judiciary Committee. The investigation process and the judiciary committee’s report to the governor are kept confidential, except in the case noted, and the committee has a minimum of twenty days in which to conduct its work.

The provisions for the tenure of New Jersey’s appellate judges once on the bench also differ from Pennsylvania’s system. In Pennsylvania, it will be remembered, the full term for appellate judges is ten years, and continued service on the bench is contingent upon retention every ten years thereafter. New Jersey’s justices of the Supreme Court—as well as judges of the Superior
Court—each serve initial terms of seven years. Upon reappointment, however, they hold their offices during good behavior.\textsuperscript{167} Their tenure is not indefinite; all appellate judges are subject to the state's prescription of compulsory retirement at seventy years of age.\textsuperscript{168}

b. Appellate Division of the Superior Court

As noted, the judges of the Superior Court are also nominated and appointed by the governor, with the advice and consent of the Senate. The initial term of service is seven years, and upon reappointment, they may remain in office during good behavior, subject to compulsory retirement at the age of seventy.\textsuperscript{169} There is no recruiting or screening process analogous to that conducted for Supreme Court nominees.\textsuperscript{170} Once on the Superior Court, the judges are assigned to the various appellate and trial divisions of that court by the chief justice, who also designates the presiding judge of each division.\textsuperscript{171} These assignments are made annually, and while the term of assignment is not fixed but rather based on the discretion of the chief justice, in general a judge may enjoy a lengthy tenure in a particular division once assigned.\textsuperscript{172}

2. Removal of Appellate Judges in New Jersey

Two avenues leading to the removal of Supreme Court justices, and three leading to the removal of Superior Court judges, are available in New Jersey. First, the Supreme Court may certify to the governor that any justice of the Supreme Court or judge of the Superior Court appears to be so incapacitated that the performance of his or her judicial duties is substantially prevented. Following such certification, the governor appoints a commission of three persons to inquire into the circumstances, and on their recommendation, the governor may retire the justice or judge from office.\textsuperscript{173}

Alternatively, judges and justices—like the governor and all other state officers—are liable to removal from office upon impeachment.\textsuperscript{174} The General Assembly has sole power of impeachment by vote of the majority of all members. All impeachments are tried by the Senate, and a conviction requires the vote of two-thirds of the members.\textsuperscript{175}

Finally, Superior Court judges (but not Supreme Court justices) may be removed by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence.\textsuperscript{176} The proceedings for removal may be instituted by a majority of either house of the legislature or the governor by the filing of a complaint with the clerk of the Supreme Court, or by the Supreme Court on its own motion.\textsuperscript{177} The Supreme Court, empowered to adopt rules to govern removal procedures, provided in 1974 for the creation of the Advisory Committee on Judicial Conduct to investigate allegations of judicial misconduct.\textsuperscript{178}

The Advisory Committee on Judicial Conduct is composed of nine members, all of whom are appointed by the Supreme Court.\textsuperscript{179} (This is in contrast to Pennsylvania, where four out of nine members are appointed by the governor.) The chairman of the committee is also designated by the Supreme Court. At least two of the members must be retired judges of the Supreme, Superior, or County Court. Not less than three of the commissioners may be members of the bar, and not more than four are to be lay members holding no public office. The commissioners are appointed to terms of two years and may be reappointed as the Supreme Court may determine. A commissioner’s membership terminates with appointment or election to public office.\textsuperscript{180}

The Supreme Court rule establishing the advisory committee provides (in great detail) for the investigation of alleged judicial misconduct in a manner similar to the procedure for investigating ethical complaints against members of the bar, and extends to the committee the same investigative functions, powers, responsibilities, and procedural guidelines that apply to ethics committees.\textsuperscript{181} The committee conducts preliminary investigations upon its own motion or upon receiving a written statement, criticism, or complaint which alleges facts indicating misconduct in office, willful failure to perform duties, incompetence, habitual intemperance, engagement in partisan politics, prejudicial conduct, or mental or physical disability.\textsuperscript{182} If further inquiry is found to be warranted, the committee must notify the judge under scrutiny of the charge and provide him or her with the opportunity to respond.\textsuperscript{183} If it is deemed appropriate, the committee may recommend censure, suspension, or removal of the judge to the Supreme Court. If the court concludes that the committee’s recommendations should be adopted, it may issue an appropriate complaint, triggering formal proceedings against the judge, to be conducted before the Supreme Court or three justices or judges designated by the chief justice.\textsuperscript{184} If the court thereafter finds beyond a reasonable doubt that there is cause for removal, it must remove the judge from office.\textsuperscript{185}
VI. CONCLUSION

As this chapter illustrates, the means of judicial selection to the appellate bench in the United States varies significantly from state to state. From gubernatorial and legislative appointment to judicial nominating commissions, and from partisan elections to non-partisan contests, virtually no two states choose their judges in an identical manner. The vast differences between states as seemingly similar as Pennsylvania, New Jersey, and New York are indicative of the unsettled state of judicial selection in this country today. As surely as each of these approaches has earned its share of supporters, it has garnered the criticism of others; the arguments on either side refuse to die. Chapter Three will examine some of the critical issues which have arisen in the search for the “best” method of judicial selection across the nation and for the Commonwealth of Pennsylvania.

NOTES to Chapter Two


3. Pa. Const. art. V, § 13(a); art. VII, § 3; Pa. Stat. Ann. tit. 25, § 2752 (Purdon Supp. 1982-1983). Elections held in odd numbered years are known as municipal elections; elections in even numbered years are general elections. Pa. Const. art. VII, §§ 2, 3. Art. V, § 13(a) provides that justices and judges “shall be elected at the municipal election next succeeding the commencement of their respective terms of office . . . .” On the other hand, art. VII, § 3 provides in part that “all judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require.” Construing these provisions together, the Pennsylvania Supreme Court has held that although state wide judges are ordinarily to be chosen at municipal elections, an exception is provided for election at a general election “as circumstances require.” Cavanaugh v. Davis, 497 Pa. 351, 440 A. 2d 1380 (1982). In Cavanaugh v. Davis, since it was known well in advance that a term for a Supreme Court seat was scheduled to expire in January 1983, “circumstances required” that the succeeding justice be chosen in the 1982 general election, rather than have the governor appoint an interim justice to fill the seat during 1983. In reaching this result, the court noted a constitutional preference for election over appointment of judges.


16. Candidacies for judicial office differ in a third way from many candidacies for other public office in Pennsylvania. In general, a candidate for public office must file a statement of Financial Interests providing detailed information concerning the candidate and the candidate’s spouse and detailed minor children. The statement is part of the Public Official and Employee Ethics Law (known as the Ethics Act) and is intended to reveal any potential conflicts which the candidate may bring to the office he or she seeks. It has been held, however, that candidates


19. Pa. Const. art. IV, §§ 8; art. V, § 13(b). Generally, a person appointed to fill a judicial vacancy "shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less..." Pa. Const. art. V, § 13(b). In Barberry v. Shapp, 476 Pa. 513, 383 A.2d 218 (1978), the Pennsylvania Supreme Court rejected the argument that the seats of four Common Pleas judges who reached mandatory retirement age in the summer and fall of 1977 should be filled by gubernatorial appointment pursuant to § 13(b). Since judges of the Court of Common Pleas can only be elected at municipal (odd-numbered year) elections, the Supreme Court was concerned that if permanent successors were not elected in 1977, the choice would be deferred until 1979. In the extended interim, the seats would be filled by gubernatorial appointees. Recognizing an intent of the people to elect judges whenever possible, the court held that the ten-month provision of § 13(b) does not apply where the end of a fixed term—expiration of a judge's elected term or attainment of mandatory retirement age—produces the vacancy. Since the date of mandatory retirement is known well in advance, there is sufficient time to prepare for an election in the year of retirement. Accordingly, elections for the four positions could be held in 1977 and the term of office of any interim gubernatorial appointees was reduced by two years to several months in 1977. See also note 3, above.


21. Governor William Scranton, Statement issued by Governor's Office, January 23, 1964. Extensive research failed to disclose any more formal order than this statement, which was contained in a news release.


34. Executive Order No. 1979-1, 4 Pa. Admin. Code § 7.117(a); Appellate Court Nominating Commission, Rules of Procedure, art. III.


49. Pa. Const. art. V, § 18(e), (f); Judicial Inquiry and Review Board, Rule of Procedure 1(c).


60. Pa. Const. art. V, § 16(b).


62. Some of the information in Section II of this chapter is drawn from Larry Berkson, Scott Beller, and Michele Grimaldi. Judicial Selection in the United States: A Compendium of Procedures (Chicago: American Judicature Society, 1981). The currency of state provisions cited herein has been confirmed through 1982, with the exception of executive orders.


68. N.H. Const. pt. 2, arts. 45, 60.

69. Cal. Const. art. VI, § 16(d).


78. The merit nominating plan is used in the selection of all judgeships in Iowa and Minnesota, for example, in Florida, appellate judges are initially chosen through the merit nominating plan while other judges are initially elected (all judicial vacancies are filled through a merit procedure); and in Utah, the Juvenile Court is the only state court which is subject to merit plan provisions for the initial selection of judges. (Vacancies in Utah's appellate, district, and circuit courts are filled through a merit plan.) See Iowa Const. art. V, § 15; Iowa Code Ann. §§ 46.15, 602.37 (West Supp. 1982-1983); Mass. Const. pt. 2, ch. 2, § 1, art. IX; Mass. Exec. Order No. 114; Fla. Const. art. V, §§ 10(b), 11(a); Utah Code Ann. §§ 20-1-7.6, 78-3/8 (Interim Supp. 1982).


81. In Arizona, Superior (trial) Court judges in counties with a population of at least 150,000 are selected through a merit plan; any county of less than 150,000 may choose to employ merit procedures, but otherwise selects its Superior Court judges in a nonpartisan election. In Georgia, most of whose judges are chosen to full terms in partisan elections, Atlanta's municipal judges are selected by merit procedures. See Ariz. Const. art. VI, §§ 12, 30; Ga. Const. art. VI, § 2, paras. 3, 8 and § 3, para. 2; Ga. Code Ann. §§ 15-9-1, 10-1 (1982); Atlanta City Code § 4-104 (1974).


87. Dubois, From Ballot to Bench, p. 27.


93. Ibid., pp. 1130-1131.


96. For example, states in which recall is available include Arizona, California, and Wisconsin. See Ariz. Const. art. VIII, pt. I, § 1; Cal. Const. art. II, § 13; Wis. Const. art. XIII, § 12.


101. The states which now have a special judicial court are Alabama, Delaware, and Oklahoma. See Ala. Const. amend. 328, art. VI, § 6-A; Del. Const. art. IV, § 37; Okla. Const. art. VII-A, § 2.

102. Cal. Const. art. VI, § 8. The commission is now named the Commission on Judicial Performance.

103. NY Const. art. VI, § 22. For Pennsylvania, see note 42, above.


106. NY Const. art. VI, § 2.


108. NY Const. art. VI, § 2(c).


110. NY Const. art. VI, § 2(f); NY Jud. Law § 68(3); see NY Const. art. II, § 2(2).

111. NY Const. art. VI, § 2(f); NY Jud. Law § 68(3).

112. NY Jud. Law § 68(4)(b).

113. NY Const. art. VI, § 2(d)(1); NY Jud. Law § 62(1).

114. NY Const. art. VI, § 2(d)(2); NY Jud. Law § 62(2).

115. NY Jud. Law § 62(1).

116. NY Const. art. VI, § 2(d)(1); NY Jud. Law § 62(1).

117. NY Jud. Law § 63(2)(a).

118. NY Jud. Law § 63(2)(b).

119. NY Jud. Law § 63(4).

120. NY Jud. Law § 64(2).

121. NY Jud. Law § 64(3).

122. NY Jud. Law § 64(4).

123. NY Jud. Law § 64(4).

124. NY Jud. Law § 63(3).

125. NY Jud. Law § 63(3).

126. NY Jud. Law § 63(3).

127. NY Const. art. VI, § 2(a), (c).

128. NY Const. art. VI, § 4; NY Jud. Law § 70.

129. NY Jud. Law § 70.

130. NY Const. art. VI, § 20(a).

131. NY Const. art. VI, § 4(c), (f).


133. NY Jud. Law § 140.

134. NY Const. art. VI, § 6(c).


136. NY Elec. Law § 6-158(5).

137. NY Elec. Law § 6-120(4).

138. NY Const. art. VI, § 4(c); NY Jud. Law § 71.

139. NY Exec. Order No. 5 (February 24, 1975), revoked and superseded by NY Exec. Order No. 9 (March 4, 1983).

140. NY Exec. Order No. 9 (March 4, 1983) establishes four committees (one for each of the state's judicial departments) to screen candidates for the Appellate Divisions of the Supreme Court. Each committee consists of nine members. Four members are selected by the governor, two by the chief judge of the Court of Appeals, one by the presiding justice of the Appellate Division of the appropriate department, and two by joint action of the speaker of the Assembly, the temporary president of the Senate, the minority leader of the Senate, and the minority leader of the Assembly.

141. NY Const. art. VI, § 6(c).

142. NY Const. art. VI, § 4(c); NY Jud. Law § 71.

143. NY Const. art. VI, § 4(d); NY Jud. Law § 71.

144. NY Const. art. VI, § 4(d); NY Jud. Law § 71.
145. N.Y. Const. art. VI, § 25(b).
146. N.Y. Const. art. VI, § 24.
147. N.Y. Const. art. VI, § 23(a).
148. N.Y. Const. art. VI, § 22(b)(1); N.Y. Jud. Law § 41(1).
149. N.Y. Const. art. VI, § 22(b)(1); N.Y. Jud. Law § 41(1).
150. N.Y. Const. art. VI, § 22(b)(1); N.Y. Jud. Law § 41(1).
151. N.Y. Const. art. VI, § 22(b)(2); N.Y. Jud. Law § 41(3).
152. N.Y. Jud. Law § 41(5).
154. N.Y. Const. art. VI, § 22(a); N.Y. Jud. Law § 44(1).
155. N.Y. Jud. Law § 44(2).
156. N.Y. Jud. Law § 45.
157. N.Y. Const. art. VI, § 22(a); N.Y. Jud. Law § 44(7).
158. N.Y. Jud. Law § 44(7).
159. N.Y. Const. art. VI, § 22(c); N.Y. Jud. Law § 44(9).
160. N.J. Const. art. VI, § 2, para. 1.
161. N.J. Const. art. VI, § 6, para. 2.
162. N.J. Const. art. VI, § 6, para. 1.
163. N.J. Const. art. VI, § 6, para. 1.
165. New Jersey State Bar Association, "Procedures for Liaison With the Governor on Judicial Selection and Appointments, Exhibit A," 1969. (Typewritten.)
166. New Jersey State Bar Association, "Procedures for Liaison With the Governor on Judicial Selection and Appointments, Exhibit B," 1969. (Typewritten.)
167. N.J. Const. art. VI, § 6, para. 3.
168. N.J. Const. art. VI, § 6, para. 3.
169. N.J. Const. art. VI, § 6, para. 3.
170. Olken, New Jersey State Court Profile, p. 46.
171. N.J. Const. art. VI, § 7, para. 2; N.J. Court Rule 2:13-1(b).
172. Olken, New Jersey State Court Profile, p. 46.
173. N.J. Const. art. VI, § 6, para. 5.
174. N.J. Const. art. VI, § 6, para. 4; art. VII, § 3, paras. 1, 3.
175. N.J. Const. art. VII, § 3, para. 2.
178. N.J. Court Rule 2:15. N.J. Const. art. VI, § 6, para. 4 provides for the removal of judges "in such manner as shall be provided by law." In 1970, the legislature enacted a removal statute, codified at N.J. Stat. Ann. §§ 2A:1B-1 through 2A:1B-11. § 2A:1B-9 provides that "Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court." There are now two such rules, Rule 2:14 adopted in 1971, and Rule 2:15 adopted July 23, 1974. Rule 2:15 largely supersedes the far less detailed Rule 2:14, which was apparently intended as an interim measure. Pressler, Current N.J. Court Rules, Comment RR 2:14, 2:15.
181. Pressler, Current N.J. Court Rules, Comment R 2:15.
The politics of choosing judges is not simply limited to partisan politics—that is, to party officials and their organizational aspirations. Judicial selection can be said to have four other distinct and readily identifiable constituencies.1 First, judicial selection is of special interest to the bar, many of whose members have a personal stake in the choice of every new judge. Some attorneys may themselves entertain the hope of acceding to the bench, and others have ambitious friends eager to don the judicial robe. Still other lawyers who must go before the bench on behalf of clients hope for even-handed and highly knowledgeable jurists.

Second, perhaps even more than the bar, the sitting bench has a vested interest in who rises to join the judicial ranks. Those already on the court share a concern that new judges possess the capacity to absorb their rightful share of the caseload and that they be of amiable temperament. In addition, sitting judges hope that selection procedures will produce new judges with impressive credentials and competence that will enhance the prestige of the court.

Third, the composition of the judiciary is also highly important to the governor, the chief political leader in the state. Often, a sound judiciary may be significant to the governor as a means of leaving behind a personal legacy, since the judges who are picked by the governor may remain on the bench long after the governor has left office. In more practical terms, the selection of a new judge also offers the governor an opportunity to place someone of congenial philosophy on the bench or, in a few instances, provides a political bargaining chip for a favored legislative program.

Finally, the general public has an enormous stake in judicial selection, though it is generally less attentive to judicial matters than the other three constituencies. Except for special-issue groups, the interest of the general public is typically aroused only when prompted by publicity surrounding a judicial vacancy, dramatic litigation, or a controversial decision.

That judgeships are visible seats of power and prestige ensures the attention of all four of these constituencies to judicial selection, even when partisan factors are reduced. The judicial selection process, then, can be viewed as a dynamic one which reflects the varying degrees of participation by the bar, the bench, the governor, and the public. It may be assumed that these four interests will maneuver to influence who will be chosen as judges; in other words, it may be assumed that these four groups will engage in the “politics” of judicial selection. A sound method of judicial selection, then, must necessarily provide balanced representation for all four constituencies in the selection process. To ask whether or not any selection method eliminates politics is to beg the question. Instead, the key issue is whether the kind of politics which evolves under a particular selection method adequately includes the legal, judicial, political, and public perspectives which may be important in determining who will sit on the bench.2

I. PENNSYLVANIA’S HYBRID SYSTEM

There are three pivotal junctures at which some means of choosing judges must be exercised: the initial selection of a judge, the subsequent continuation of a judge on the bench, and the filling of judicial vacancies in the courts. These situations can be addressed in a variety of ways. Under a pure elective system, judges are both selected initially and kept on the bench by the voters in competitive partisan elections. Alternatively, under the pure merit format, judges are initially selected by the governor from a list of nominees drawn up by a nominating commission, then subsequently continued by a vote of the electorate in a noncompetitive retention election. In the case of judicial vacancies, the third instance of judicial selection, both the elective and merit methods call for temporary gubernatorial appointments.

Pennsylvania is considered to have an elective system of appellate judicial selection, since its judges are initially selected (i.e., given their first full terms on the bench) by the voters in competitive partisan elections. One anomalous feature of the Pennsylvania system, however, significantly alters the character of the elective system here: the manner in which judges vie for subsequent terms on the bench. Rather than run against other judicial candidates in contested races, incumbent judges in Pennsylvania run in noncompetitive retention elections, which are traditionally a component of the merit plan. In these retention elections, voters do not choose among candidates but are asked simply to vote in response to the question, “Shall Judge X be retained in office?”

Thus, Pennsylvania’s system of judicial selection is not a genuine elective system at all but a hybrid of the elective and merit procedures for choosing judges. If changes were to be made in Pennsylvania’s method of judicial selection, the thrust of the change
could be in the direction of either a pure elective system or a genuine merit plan. The current historical trend does show a marked pattern of change in the direction of the merit plan for appellate judicial selection. Over the past three decades, nineteen states (including some previously non-partisan elective states) have adopted merit appellate judicial selection.5

At present, a shift from partisan to non-partisan elections is rarely contemplated. The non-partisan elective method of judicial selection has lost favor in recent decades largely because of its lack of success in living up to its name by producing a system of judicial selection uncontrolled by special interests. The concept of non-partisan elections emerged at the end of the nineteenth century in response to the control by political machines of the selection process, particularly in urban areas, and many states — including Pennsylvania in 1913 (see Chapter One) — adopted the non-partisan elective method. Like Pennsylvania, which repealed its non-partisan plan in 1921, several states abandoned that method quickly, though it had still been retained in fourteen states by 1983.6

The non-partisan elective method has been found unsatisfactory first because it provides for little or no screening of candidates. Unqualified as well as qualified candidates can easily gain access to the ballot in non-partisan elective states simply by procuring the requisite number of signatures on judicial nominating petitions. A more persuasive objection to non-partisan elections, however, is its effect of lowering voter turnout.7 It has been difficult to arouse voter interest in partisan judicial contests, but it has proven even harder to bring voters to the polls in non-partisan elections. Moreover, since the non-partisan ballot itself deprives the electorate of meaningful voting cues, those who do vote are more likely to make their decisions based on other less relevant criteria such as ethnicity or length of surname, ballot position, or gender. Last, non-partisan elections have failed to yield their intended result. Because the political parties frequently do make endorsements of the "non-partisan" judicial candidates, these elections tend to take on a highly partisan cast anyway. 5

The central question is whether Pennsylvania should change its method of selecting appellate judges or retain its current system for choosing who will sit on the state's highest courts. As noted, a change could be in one of two directions: either to a purer elective system, or to a full-fledged, formal merit system. Seven critical issues which must be considered in contemplating a revision of Pennsylvania's current judicial selection format are presented below: political considerations, judicial accountability, judicial independence, accession to the bench, the quality of the judiciary, the representativeness of the judiciary, and the democratic right of the people to vote.

For the sake of clarity, the discussion of these issues is ordered so that arguments in favor of changing to a merit plan are presented first in every case, followed by arguments in favor of the elective system — or retaining Pennsylvania's unusual derivative of the elective system. This manner of organization should not be understood as an indication of preference by the Committee of Seventy.

II. ISSUES IN JUDICIAL SELECTION

A. Political Considerations

1. Arguments in favor of the merit plan

Critics of the elective plan of judicial selection, from the time of Albert M. Kales and the founding of the American Judicature Society to the present, have argued that it is an "absurd bit of political hypocrisy" to talk and act as if our judges were genuinely chosen by the people. These critics contend that the "elective" system of selection is a myth; in their view, the elective system amounts to de facto appointment by political leaders. What is needed is a system in which judges are chosen on the basis of merit, without undue regard for political influence or powerful friends.

Although many of its proponents have repeatedly claimed that the merit plan can succeed in eliminating politics from judicial selection, other advocates of the merit plan concede that this, too, may be illusory. They postulate instead that the merit plan has the effect of changing the nature of the politics to include not only partisan forces but also those related to the interests of the bar, the sitting bench, and the public. Under the merit plan, they argue, the politics of judicial selection is more complex and pluralistic, since it takes into account a broader range of interests than those in an elective system of choosing judges. At the same time, however, it also elevates partisanship by wresting control of the selection process out of the hands of parochially-minded party officials and placing it in the hands of the top political leader in the state — the governor. The partisan aspects of Senate confirmation of nominees, where the practice is continued, remain largely unchanged.
The very phenomenon of judicial campaigns is viewed by many as an empty and useless exercise whose outcome owes "more to chance than to merit." At the very least, critics of the elective system say, the enormous amount of time and money devoted to funding and operating a campaign is a poor expenditure of resources. For sitting judges, extensive campaigning diverts attention from already demanding caseloads. Others view the pressures to become partisan politicians which are exerted on top-notch attorneys who wish to become judges as a deterrent to many qualified lawyers who might otherwise seek judgeships.

Perhaps the most damning evidence marshalled against judicial elections, according to critics, is their own lackluster nature. Usually bereft of controversial issues, judicial campaigns often draw little voter interest. Judicial contenders, unlike other candidates, are prohibited by the Code of Judicial Conduct from making campaign promises of conduct in office — other than the faithful performance of their duties — or giving their opinions on disputed legal or political issues. Further, judicial candidates may not themselves solicit or accept campaign funds or public support but must establish campaign committees to do so for them. These restrictions curtail campaign activities to such a degree that one judicial candidate lamented, "About all we could do was show the voters our faces." Despite these limitations, however, it is believed by some that campaign contributions speak louder than words. Those who criticize the elective system believe that fundraising itself — not to mention the pressure inherent in campaigning to take sides on issues — forces judicial candidates to compromise the high ethical standards expected of the profession.

2. Arguments in favor of the elective system

In the minds of those who support the partisan elective system, the 1969 defeat by the voters of a proposed constitutional amendment to give Pennsylvania a merit selection plan for choosing judges, and the subsequent defeat in the state legislature of several similar measures, should be ample evidence that the partisan election is the widely-favored method of judicial selection in Pennsylvania. The 1969 decision by the electorate and repeated action by the legislators, it is argued, should demonstrate that any problems of partisan politics in the selection of judges have not proven in themselves to be sufficient reason for change. The foundation of these actions, as interpreted by opponents of change, is the common belief that any system other than popular election concentrates too much power in the office of the governor, as well as in the organized bar. Statewide partisan forces, they maintain, work on behalf of the populace to diffuse some of that power.

Two facets of the merit plan which strengthen the role of the governor in the nominating process give pause to the plan's critics. First, the commission which recruits and nominates prospective judges is not actually impartial or non-political at all, argue advocates of the elective system. The members of this commission are appointed through a political process by the governor or other appointing authorities; consequently, it is inevitable that every nominee presented to the governor will be chosen to a greater or lesser degree on the basis of political considerations. Second, in some variations of the merit plan, successive lists of names must be submitted to the governor indefinitely until one is deemed suitable, thus permitting political considerations to come into play. Yet even in places where this is not true, the critics charge that "the guy the governor wants is always on the list." The influence of the governor in merit nominating procedures — as evidenced in Missouri — is seen as so strong by its detractors that they believe the plan amounts to little more than a process of gubernatorial selection with only the barest of outer limits set on the governor's appointing authority.

Critics of the merit plan find no consolation in the general tendency of governors to make appointments "in their own image" when filling judicial vacancies. In the history of Pennsylvania's Supreme and Superior Courts, there have been only eleven appellate appointments made by a governor under his own party. Of thirty-one vacancy appointments to the Supreme Court, one Republican justice was appointed by a Democratic governor, one Democratic justice was appointed by a Republican governor, and one Democratic justice was appointed by a Whig governor. On the Superior Court, of a total of forty vacancy appointments, only eight have been cross-party, and all were Democrats appointed by a Republican governor. (In some instances, this was required by law.) Nationally, governors have tended to use their power to fill vacancies on the judiciary as an opportunity to "pack the courts" with fellow partisans. In partisan elective states, over 95 percent of vacancy appointments have been along party lines, and in non-partisan elective states, 93 percent match the governor's own party. This high degree of partisanship exercised by governors is bound to persist under the merit plan, conclude opponents. The strong party traditions of this Commonwealth
and elsewhere will continue to pervade the appointment process.

It is argued that aside from the influence it allows the governor, the merit plan also affords the organized bar an opportunity for greater sway in recruiting nominees and in evaluating judicial candidates at the time of their retention campaigns. Nomination by commission tends to vest control in the hands of those who are represented on the commission—a heavy sprinkling of lawyers, often with a predominance from large metropolitan firms. In some places, judges sit on the nominating commission, and critics of the merit plan question the propriety of commission members in choosing their own colleagues.25

Political considerations may also enter judicial selection in a different way. Supporters of the partisan elective process assert the benefit of previous political experience in shaping a suitable judicial temperament. Politicians are subjected constantly to competing interests in every phase of decision-making, it is argued. In addition, politicians must be responsive to the broadest interests of their constituents in order to survive. Thus, the pressures of the political campaign can serve candidates for the bench as an effective training ground.26

Overall, supporters of the elective system believe that it offers the best insurance of a check on gubernatorial power—and a corrective to gubernatorial mistakes in filling vacancies—since the electorate can exercise its own strings of control at the ballot box. They concede that this method may endanger other political officials with more sway over the selection of judges than the average voter, but the role of political officials is not seen as problematic by supporters of the elective system. Since political leaders must be sympathetic to social trends and change to maintain their following, they are likely to be more amenable to popular will than members of judicial nominating commissions.27

Certainly, elections require judicial candidates to strike a delicate balance between principle and necessity in judicial electorate- ing. The ethical risks posed by such aspects of campaigning as fundraising, however, are not seen as sufficient to warrant abolition of the elective system of judicial selection. Certain reform measures, such as the formation of a judicial trust fund as a way to ameliorate the conflicts that arise when lawyers contribute to judicial campaigns, can be instituted to better the election process. Many believe that despite room for improvement in elective procedures, the present system should be continued.28

B. Judicial Accountability

1. Arguments in favor of the merit plan

Advocates of the merit nominating plan do not view elections as a credible mechanism for judicial accountability, either as a means of fixing responsibility for the choice of judges or for overseeing judicial conduct and decision-making. In reality, the critics of elections say, people don't really care much about who the judges are or what they do, especially at a statewide level. A disinterested public, they contend, should not be entrusted with a choice as critical as the composition of the state's highest courts.

Observers suggest that anywhere from 20 percent to 50 percent of those who visit the polls fail regularly to vote in judicial balloting.29 Voters who cast ballots in major federal and state executive or legislative races often choose to leave their ballots blank for the choice of judges, both in races where judicial candidates are vying for an initial full term on the bench and in merit retention elections.30 In Philadelphia County, the number of votes cast for judges relative to the total number of votes tallied for the office at the top of the ticket (e.g., President, Governor, Mayor) has fallen off markedly in the past thirty years in spring primaries.31 This trend is viewed as significant by supporters of the merit plan, since primaries may be the best indicator of interest in judicial candidates alone; without the party label to guide them (and without a single party lever to pull for all offices), many voters are apparently either indifferent or feel too uninformed to make a choice, according to the interpretation of merit plan proponents.

Several surveys from around the country have demonstrated that voters are generally unfamiliar with candidates for the bench. Studies conducted in New York,32 Arizona,33 Wisconsin,34 Wyoming,35 Texas,36 Oklahoma,37 and California38 over the last three decades have shown variously that the vast majority of voters cannot recall how they voted in judicial races when asked as they left the polling place. They were unable to name a single judicial candidate or the state's chief justice, and some were unaware even that the state's judges were elected. It has been well documented that, in the absence of well-considered information, people tend to vote according to simple cues they see while standing in the booth; the place of the candidate's name on the ballot, the ethnic origin of the candidate's surname, the use of a nickname, gender, religion, and the number of letters in the candidate's first and last names.39 Critics of the elective system ask, "Is this any way to select judges to sit on the highest court of our state?"40
Judicial elections do not typically attract the attention of voters, proponents of the merit plan point out. There is little incentive to learn about a candidate who is running unopposed in a supposedly competitive race or with the endorsement of both parties. In re-election races, often the simple fact of incumbency is enough to sway a vote. Yet even where an election is contested and provokes moderate interest, the few electors who might give it serious attention are not able to make a genuinely informed choice because they do not know, and cannot know, very much about a judicial candidate. They may not even have decided what the appropriate qualifications for the bench should be. Inside the booth, the voter typically faces a long list of unknown candidates who are prevented by the Code of Judicial Conduct from taking meaningful positions on issues. Critics of the elective system argue that the public can never become sufficiently aware of the relevant facts surrounding a candidate's experience or, in the case of incumbents, a judge's performance. Thus, the electorate can never be in a position to evaluate standards of judicial conduct. The result, say those who are dissatisfied with elections as a method for choosing judges, is that judges get elected in a climate of nearly total voter ignorance. Evaluation of candidates by the organized bar is commonly believed to help reduce voter ignorance, but recent studies have shown bar polls and other rating instruments to be only marginally effective in achieving this goal.

In the opinion of those who prefer the merit plan of judicial selection, all of the necessary ingredients of accountability are built into the merit plan. First and foremost, the responsibility for the final selection of judges is fixed in one identifiable person: the governor. Where judges are elected in a popular election, no one source can be given credit for wise choices and blame for bad ones. But where this responsibility is squarely put on the governor (and shared with the judicial nominating commission), the credit or blame can be meted out unambiguously, and the consequences of good or bad gubernatorial performance in judicial selection will become clear in the next election. This, say the advocates of a merit plan, is a far more effective brand of accountability than popular election.

The merit plan does not, however, entirely eliminate direct popular accountability either. Retention elections, in which the governor's designate must go before the voters after having served a brief probationary term, provide an opportunity for the voters to pass judgment on all merit appointees to the bench. Therefore, a significant degree of popular control over the judicial branch of government is retained, it is stated. In response to criticism that retention elections have proven to be an inadequate channel of accountability since so few retention candidates are defeated, merit plan supporters point to the high proportion of incumbents who are virtually assured of victory even in contested, partisan elections. At any rate, they maintain, a high degree of unsuccessful retention candidacies should not be expected, since the judges who are selected under the plan presumably have been chosen for their outstanding qualifications.

It is widely agreed that the task of removing an incompetent or incapacitated judge is onerous under both the elective and merit selection procedures. Proponents of the merit plan see the electorate, however, as fundamentally unequal to this difficult task. Rather, they profess that a good discipline and removal system is a more dependable solution to problems of judicial misconduct or disability. Only a body which is familiar with the workings of the court and its adjudicators, it is thought, can be genuinely vigilant and responsive to the need for remedial action.

2. Arguments in favor of the elective system

The capacity of elections to hold judges accountable to the public is seen by many as the single most important factor which commands elections over any of the alternative methods of selecting state court judges. Under this view, partisan elections are favored as the most direct and effective means for the electorate to shape the role and the philosophy of the state's highest courts. Beyond the initial selection, later re-election campaigns enable voters to monitor the behavior of judges once they are on the bench. This type of direct accountability is believed preferable to the more indirect accountability the electorate possesses when judges are selected by an appointing official. If there are weaknesses in the partisan elective system, its adherents believe they are far outweighed by the benefits of direct popular accountability.

In spite of criticism to the contrary, supporters of the partisan elective system claim that the electorate has shown the necessary level of interest and information to make the popular lines of accountability work. Voter turnout for appellate court candidates is higher in some states than in others, and it has been shown in New York, Wisconsin, and other states that controversial campaigns can bring a fair proportion of voters to the polls. This suggests that the very same factors which determine the turnout in other state races also affect judicial elections. Beyond simply the level of voter interest, such institutional variables as election
procedures, scheduling, ballot form, and the intensity of competition influence the number and the outcome of the votes cast in judicial and non-judicial elections. Thus, though there is a "roll-off" rate (voters who do not complete the judicial section of the ballot) in all judicial elections, the rate is far less for the competitive judicial election than for the noncompetitive (retention) judicial election. It is not particularly meaningful to speak of an "uninformed" judicial electorate, say those who champion the elective format. Although post-election surveys have repeatedly discovered a marked inability of voters to recall the names of judicial candidates on the ballot they had just seen, the performance of voters in those surveys is probably comparable to the proportion of voters who, at any given time and location, can identify the names of any elected officials or candidates for office. Supporters of the elective system contend that all candidates who do not occupy a preeminent place on the ballot suffer from a lack of name recognition.

Once inside the polling booth, voters employ the same mix of criteria in deciding for whom they will vote for judge as for any other office: party affiliation and a host of other idiosyncratic rules including the candidate's ethnic origin, religion, gender, or ballot position. Why should the decisions of voters — as irrational as they may be — be seen as less valid in judicial races than in executive and legislative races where the same decision-making tools are employed? After all, it is argued, many appointments are made with the same considerations in mind (ethnic background, gender, etc.), except that past political activities are probably weighed even more by a governor than by the public in awarding judgeships. The fact that no Pennsylvania judge has been impeached in more than a century and a half indicates that the choices of the electorate have not been unsatisfactory, argue the proponents of the elective system.

While it may be true that the inclusion of lay members on the merit nominating commission is intended to give the public representation in the merit selection process, opponents of the merit plan feel it is a mistake to view the lay commissioners as independent voices. Some believe that these appointees of the governor tend to serve the governor's interests. And since judges who are brought to the bench through merit nominating procedures are rarely defeated in their retention elections, it is seen as crucial that the voters have an opportunity to express their wishes when judgeships are first sought.

Merit retention elections are thought to be a weaker test than partisan election of a judge's fitness for office because they eliminate two essential factors: party affiliation and the reaction to a rival candidate. The net impact, claim critics, is that retention elections result in life tenure for judges, since the advantages of incumbency, along with the lack of organized party opposition, allow judges to remain in office almost indefinitely (or until mandatory retirement, in states where it is operative). Statistics bear out this opinion. In 1972, when 308 judges (both trial and appellate) in eleven states sought retention, all but four were returned to office. In the thirteen states which conducted retention elections in 1976, only three judges in a total of 353 on the ballot were rejected in their bids for retention, and those three were all trial court judges. In 1978, 486 judges ran for retention in eighteen states, but only thirteen failed to be retained, including one appellate judge. In Pennsylvania, no appellate judge or justice has ever been defeated in a retention bid. Detractors conclude, then, that the retention election is nothing more than a rubber stamp for the work of the judicial nominating commissions.

C. Judicial Independence

1. Arguments in favor of the merit plan

One of the primary arguments offered in defense of the merit plan of judicial selection is that it fosters judicial independence. Choosing judges through partisan elections, it is held, forces judges to assume a mantle of political obligation which is not easily cast off after the campaign. Once a successful campaign has catapulted a judge into office, the stakes are raised even higher, they argue; a judge must carefully maintain party ties in order to maintain a seat on the bench.

In contrast, the merit system is viewed as alleviating the pressure to curry favor with the politicians — pressure which may influence rulings on controversial cases. Thus, it allows for a greater degree of impartiality and objectivity in decision-making. By helping to free judges from their vulnerability to outside influence, the merit system gives judges the opportunity to rule on the merits of cases which come before them, without regard to the political consequences of their findings. Proponents feel that judicial integrity and independence are thrown into jeopardy any time candidates for judicial office are thrust into partisan political struggles.

The merit plan further enhances judicial independence, it is thought, by fostering lengthier tenure for judges once they reach the bench. The fact that so few judges are subsequently defeated in retention
elections allows for the accumulation of experience in the complicated work of appellate adjudication and shores up greater immunity to any special interest groups. Their reasoning holds that any risks which may be inherent in long tenure are more than offset by the public value in the independence it affords.

2. Arguments in favor of the elective system

Supporters of the elective system, like the advocates of the merit plan, believe that their method of selecting judges offers the best guarantee of preserving judicial independence — and, additionally, of keeping that independence from going too far — by retaining a firm measure of accountability. While judges who are appointed through the merit plan may not be beholden to party leaders, they are entirely indebted to the governor. They are not “independent” at all but will invariably sit in the governor’s stead. Supporters of the elective system also note that the selectors on many nominating commissions, too, serve at the behest of the governor.

Although the nominating procedures of political parties may not be very visible, it is conceded, the merit appointment process is invisible. And the political maneuvering which characterizes the partisan nominating process is not unknown in judicial nominating commissions, some of which are marked by heated bargaining and lobbying sessions among the commissioners over the names to be sent to the governor. “Panel-stacking” and “panel-rigging” are documented phenomena of commission nominating in which the members of the commission present a combination of nominees that comports implicitly or explicitly with the governor’s wishes (though a nominating commission can also select a combination of nominees that will force a governor to appoint a non-preferred individual). The merit plan, it is charged, does not free judges of external ties but merely causes a shift in judicial loyalties from party leaders to the governor — who is, in any event, the top political figure in the state.

In addition, the merit plan undercuts judicial independence, it is thought, by virtually guaranteeing lifelong terms of service (until mandatory retirement at the age of seventy) for the judges it taps. Since retention elections have proven to be inadequate as a threat of removal, judges can operate with the knowledge that they will remain insulated throughout their tenure from the degree of public scrutiny that occurs in partisan races. As a result, they are more, not less, susceptible to the advances of special interest groups or influential persons. Only election by an array of individual voters endows a judge with the necessary impartiality needed to settle disputes.

D. Accession to the Bench

1. Arguments in favor of the merit plan

Critics of the elective method of judicial selection point to a startling phenomenon as illustration of a fundamental flaw in that selection format: in states where elective procedures are employed, most state judges do not reach the bench initially through the electoral process. The majority of appellate judges, even in elective states, are appointed to their seats on the court. This occurs because of the large number of appointments made by governors to fill vacancies on the bench created by mid-term departures for retirement, disability, removal (in rare cases), or other reasons. Two studies have found that approximately 56 percent of judges serving on state courts of last resort in elective states had reached the bench initially through appointment. A third study showed that 40 percent of judges in states using partisan election and 66 percent of all judges in states employing non-partisan election were initially appointed.

Pennsylvania mirrors this nationwide pattern. In Pennsylvania, eighty justices have served on the Supreme Court since the passage in 1850 of the amendment creating an elective method of judicial selection. Of these eighty justices, thirty-four (42 percent) have initially acceded to the bench by appointment and forty-six (58 percent) have acceded to the bench initially through election. Thus, the rate of appointment of justices to the highest court in Pennsylvania falls below the national average. Yet the figures for the accession of judges to the Superior Court tell a different story. Of the seventy-one judges who have come to the Superior Court bench since its creation in 1895, forty-seven judges (60 percent) were initially appointed and twenty-four judges (34 percent) were initially elected. Overall, more than half of the state’s judges and justices in these two appellate courts have come to the bench initially through appointment, despite the formally adopted method of judicial selection by popular partisan election.

The high rate of accessions to the appellate bench by appointment is tantamount to “one-man judicial selection” by the governor, claim the advocates of the merit plan. This alone is reason enough to move away from the elective system of choosing judges, which is being naturally subverted by the realities of judicial accession. The merit plan acknowledges these realities and, it is argued, provides the only effective control over gubernatorial appointing prerogative.
2. Arguments in favor of the elective system

Critics of the merit plan, however, challenge whether “one-man judicial selection” is actually the norm. They point to a more recent study which revealed wide variability in the pattern of judicial accession to state courts of last resort. This data showed that a bare majority of nearly 53 percent of over four hundred judges in twenty-two elective states had originally reached the bench through appointment. Other researchers found in Ohio that only 20 percent of the Supreme Court judgeships in that elective state were obtained through appointment and in Louisiana that the vast majority of court judges had reached the bench by means of that state’s election process. Thus, the nationwide trend, and Pennsylvania’s own record, may not adequately reflect the differences which exist among the states in the means of accession to the bench.

Even if the pattern of initial accession through appointment were uniform, supporters of the elective system might view it as a clarion call for the continuation of judicial elections. If so many judges are reaching the courts through appointment, then it is all the more vital that the public have an opportunity to pass judgment on them at a later time in a competitive race with other candidates. In light of the high degree of partisanship displayed by the governor in naming judges (see above), popular elections may serve as a measure of control over the excess of partisan influence in the judicial branch of state government.

E. A High Quality Judiciary

1. Arguments in favor of the merit plan

One of the greatest assets of the merit plan, its supporters assert, is the capability it offers for producing a better quality bench. Since the emphasis is directed away from partisan to professional goals, better candidates are nominated and selected. At the very minimum, the “gray area” of mediocre judges can be reduced. Moreover, the assurance of a respect for quality increases the pool of highly qualified lawyers who might consider a career on the bench. In many cases, the specter of campaigning is itself enough to dissuade prospective judges from seeking the post. Under the Missouri Plan, recruitment of talented lawyers, which is undertaken by the judicial nominating commission rather than party leaders, would be given greater attention and would focus on character and qualifications instead of past service to a political party. A survey in Missouri revealed a general sentiment that the merit plan had resulted in the placing of better judges on the bench, though other evidence suggests that the merit plan does not produce clearly superior judges.

Advocates of the merit system also point to the likelihood of greater geographical diversity under that plan. Under Pennsylvania’s current system of judicial selection, geography has arguably become a primary criterion for judgeships. More than one-third of all Supreme and Superior Court justices and judges have originated from just two counties: Allegheny and Philadelphia. Many counties in the state have never sent a judge to the appellate bench.

2. Arguments in favor of the elective system

The counter-argument cites the state’s tradition of capable appellate justices and judges as the best evidence of the success of the elective system in producing a high quality bench. The record of the appellate courts over the last 130 years should speak for itself: the state already boasts a reasonably effective standard of adjudication. Because political parties are under great pressure to perpetuate this tradition of excellence and to further their own prestige, it is believed, they will not back weak candidates but will put forward the best candidates available for the job. Even where popular elections “have not given the courts as many Phi Beta Kappas as an appointive process might have produced,” neither has it “saddled the electorate with despotism.”

F. A Representative Judiciary

1. Arguments in favor of the merit plan

The merit plan is championed by its supporters as the best promise of a more representative judiciary. As one said, “Over one hundred years of political selection hasn’t resulted in judges representative of society.” The elective system, they assert, has done nothing to mitigate against prejudice in judicial selection. As one judicial candidate stated, “I came out of the campaign convinced that the most defectively implemented merit selection scheme is unlikely ever to match the racism which creeps irrelevantly into the election process.” Along with reliance on political affiliation, emphasis on gender and ethnic or racial considerations can be eliminated under the merit plan, claim its supporters. They also argue that the nomination panel itself does not have to be heterogeneous in order to recommend a heterogeneous mix of nominees. In any event, as supporters of the merit plan point out, undoubtly there is an equal if not greater predominance of white males among the party officials who control the nomination of judicial candidates under the partisan elective system.
In Missouri, the merit plan has preserved diversity in other spheres as well: it has not favored graduates of prestigious law schools but has placed a greater number of locally-trained attorneys on the bench. Moreover, the judges selected under the merit plan have not been found to be more "conservative" in orientation than popularly elected judges, as sometimes speculated.

2. Arguments in favor of the elective system

Those who prefer the selection of appellate judges by partisan election laud it as the best means of achieving a judiciary which will better reflect the social, economic, and political makeup of the state. If the choice is left to the voters, then sizeable voting blocs of minorities and women will be able to utilize their political clout to elect a greater number of minority and female judges to the bench. Research on the composition of judicial nominating commissions in states which have adopted the Missouri Plan, which revealed their membership to be 97 percent white and 89.6 percent male, is cited as a bad portent for changing the socio-economic character of the courts. Such a selection process, it is charged, will also yield the "bluebloods" of the profession who have attended national law schools, while solo and small firm practitioners who are graduates of less prestigious law schools will be put at a disadvantage. It is also thought that the process will favor "establishment" forces as opposed to "progressive" interests (i.e., those associated with disadvantaged groups in society). At least one study has shown, however, that elective judges are not necessarily more liberal than merit plan judges.

G. The Right to Vote

1. Arguments in favor of the merit plan

Advocates of the merit plan view their preferred method as entirely consistent with this country's democratic traditions. We live in a republic, not a pure democracy, they point out; ours is a representative form of government which finds its foundations, to a great extent, in the indirect rights of the people through their chosen representatives.

The right to vote for judges was not inherently granted by the patriots who founded the country; the first judges were appointed, and judges continued to be appointed well into the nineteenth century. This system was originally set up for good and sufficient reasons, many maintain, and it should be re-established, with appropriate modifications such as the screening commission. There is no sacrifice of democratic ideals in the merit system, they feel.

Voters who recognize the other significant advantages it offers over the elective method of judicial selection would not regret giving up their option to vote for judges in contested partisan campaigns, especially since they would retain the right to pass judgment on merit appointees in later retention elections. The fundamental cause of the move to the elective system had little to do with the relative merits of it, but was rather the ideas and pulses of a violent swing toward democratization generally. Many other reforms of this era in American politics have been unceremoniously repealed, they point out; there is no reason to cling to this one.

2. Arguments in favor of the elective system

The hallmark of the democratic tradition is the inalienable right to vote, say supporters of the elective method of judicial selection. Any system of choosing important public officials which shifts power away from the voting public at-large, they contend, is an abrogation of that precious birthright and an erosion of the democratic form of government. Far more than just a technician and a lawyer, a judge is an interpreter of the law and, as such, an expositor of the compelling needs of a changing society. Therefore, it is essential that the people retain direct control over judicial selection and tenure, including the power of removal through electoral defeat. The wish of the voters to elect judges, as confirmed by pollsters, must not be ignored. The public wants the responsibility of electing its judiciary and is the most capable, the most logical constituency to do so, conclude the supporters of the elective system.

Popular judicial elections are also justified, according to their proponents, by the role they play in securing the popular legitimacy of the courts, along with public acceptance of—and compliance with—decisions by the court. First, the judges themselves benefit because they receive a mandate from the electorate, and thus they remain equal to their counterparts in the executive and legislative branch. Second, the voters are well served because elections provide a means of acquiring knowledge about the judicial process and issues which are pertinent to the adjudication of justice. Under the elective system, the electorate bears its rightful responsibility for the perpetuation of the democratic process and for the performance of the judges it elects to office. Once people are more—not less—involved in judicial selection, say supporters of the elective system, democracy will work for this function, too.
III. CONCLUSION

When it comes to judicial selection, beauty is in the eye of the beholder. Preference for one particular method of selecting judges over another appears to be almost totally colored by an individual philosophical predisposition toward either an elective or appointive process of choosing public officials. In the case of judges, cogent and compelling arguments are offered by advocates of each arrangement for selection.

At its core, the argument put forth in favor of the elective system holds that accountability is the single most important criterion of a good judicial selection method. Above all else, the argument goes, the public should be provided the means of control to keep judicial decision-making in line with popular sentiment. The central argument advanced on behalf of the merit plan, around which all others cluster, is that independence should be the prime consideration in fashioning a sound method for choosing judges. The 200-year debate continues.

Yet even as the two sides advance their differing points of view, many recognize the need for a judiciary that is both accountable and independent. A truly superior bench must be sensitive to public will and, at the same time, wholly bound to the sometimes unpopular dictates of the law. Perhaps the more constructive question, then — rather than the over-arching value of either accountability or independence — is which selection system best accomplishes the delicate balance between the two, while also helping to insure a bench of high quality, integrity, and suitable temperament. The following chapter presents views of experts interviewed by the Committee of Seventy concerning the state of judicial selection in Pennsylvania today and ways it might be altered.

NOTES to Chapter Three


3. The nineteen states which have adopted a merit nominating plan for appellate judicial selection are: Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New York, Oklahoma, South Dakota, Tennessee (intermediate appellate courts only), Vermont, and Wyoming. Nebraska was the first formerly non-partisan state to convert to a merit plan, and Wyoming the most recent. See notes 74 and 75 to Chapter Two.


6. See note 63 to Chapter Two.


23. These figures were compiled from information found in the Pennsylvania Manual and several state and local newspapers (the Philadelphia Evening Bulletin, the Philadelphia Inquirer, the Pennsylvania Inquirer, the Press, etc.) from the year 1850 through 1982.

24. Dubois, From Ballot to Bench, p. 140, Table 15; pp. 258-259, n. 22.


31. Annual Reports of the City Commissioners, Registration Division and Voting Records, 1954 to the present.


47. See Dubois, From Ballot to Bench, p. 64; see Ladinsky and Silver, "Popular Democracy and Judicial Independence," pp. 128-169.


49. Dubois, From Ballot to Bench, p. 62.


51. Refer to notes 32-38 above.


53. Dubois, From Ballot to Bench, p. 62.

54. Costlyan, Behind Closed Doors, p. 177.


60. Reath, "There is a Better Way," p. 17-A.


63. Dubois, *From Ballot to Bench*, p. 11.


65. Watson and Downing's study showed that the merit plan has had the result of lengthening judicial tenure in Missouri (*Politics of the Bench and the Bar*, pp. 340, 345).


68. Pennsylvania Manual. (For this project, all volumes of the Manual and its predecessor publications have been consulted from 1866 to the present.) Two justices who had been appointed to the court prior to 1850 were subsequently elected under the new system.

69. Pennsylvania Manual. The higher figure for judicial appointments is due in part to the creation of the court and its expansion, both of which were accomplished through appointment.

70. Commonwealth Court, Pennsylvania's other appellate court established in 1969 (pursuant to Pa. Const. art. V, § 4), is too new for inclusion in this analysis.


79. *Pennsylvania Manual*. Judges of the Commonwealth Court, Pennsylvania's other appellate court, are not included since that court was too recently established (in 1969 pursuant to Pa. Const. art. V, § 4) for a pattern to emerge.

80. *Pennsylvania Manual* (e.g., Berks County, Union County).


83. Waltz, "Some Firsthand Observations," p. 188.


91. Mullinax, "Judicial Revision," p. 34.


"You need some system for the selection of judges. Judges don’t drop like manna from heaven.” These are the words of an expert in judicial selection spoken to the Committee of Seventy. For this study, Seventy conducted extensive confidential interviews with individuals who have been deeply and directly involved in Pennsylvania’s judicial selection process. Every effort was made to obtain a cross-section of opinion. Interviews were held throughout the Commonwealth with present and past appellate justices and judges of Pennsylvania, aspirants to the appellate bench, political leaders, academics, members of state and local bar associations, trial lawyers, lay and lawyer members of screening commissions, present and past officials of the General Assembly and the executive branch, and civic leaders. This chapter presents their opinions of Pennsylvania’s present appellate judicial selection process and their recommendations for improving it. It should be noted that the Committee of Seventy is neither the author nor the proponent of views contained in this chapter.

The system of judicial selection which includes a nominating commission as one of its principal elements is popularly known as the “merit selection plan,” and was referred to as such in Chapters One, Two, and Three. A number of interviewees — some who opposed and some who endorsed “merit selection” — objected to the term since it implies that other selection systems do not consider a candidate’s merit, and that the commission plan considers only a candidate’s merit. They felt that the term “commission” more accurately captures the essence of that particular system. This chapter will use the terms “commission plan,” “commission method,” or “commission system.”

The first three chapters of this study have shown that, on paper, Pennsylvania has a method for filling its appellate bench. The system is easy to summarize: every candidate for appellate judicial office who wishes to serve for a full ten-year term must defeat other candidates in a statewide election. To serve additional terms, he or she must win in a retention election. Those judges appointed by the governor to fill judicial vacancies must be approved by the Senate by a two-thirds vote and, if they wish a full term, must compete in a partisan election. Is this system — or is it?

As this chapter will explain, virtually all of the experts interviewed sharply criticized the manner in which this selection system has operated over the past two decades. They blamed that system for a steady decline in the quality of the appellate judiciary, particularly at the level of the Supreme Court. In light of this assessment, nearly all proposed that the present method of choosing appellate justices and judges be revised. Three basic recommendations were made: a large majority favored replacing the current elective system with a commission plan. A minority preferred to continue selecting judges by popular election, but offered a series of proposals designed to correct major flaws. Finally, a few interviewees proposed that the governor appoint members of the appellate bench without using a nominating commission.

The wide variance of these proposals shows that interviewees fundamentally disagreed on the relative advantages and disadvantages of each method of judicial selection. Nevertheless, in evaluating Pennsylvania’s present selection method, there was wide, almost unanimous, agreement: as it operates today, the "system" is a farce.

I. EVALUATION OF THE PRESENT SELECTION SYSTEM: THE PENNSYLVANIA LOTTERY

If guessing is a system; if decision by serendipity is a system; if requiring voters to choose from long lists of unfamiliar names is a system — then Pennsylvania has a system for choosing its appellate justices and judges. This derisive appraisal of the present method of selecting judges was offered by the overwhelming majority of those interviewed, who viewed the realities of the method as a continuing disaster. Interviewees characterized the selection process for appellate courts as "vacuous," "a charade," "meaningless," "haphazard, chancy, and completely irrational," and "a legal outrage." In their experience, most interviewees asserted, Pennsylvanians are essentially choosing the members of the appellate bench by lottery. The best that could be said of the present system was that Pennsylvania has been lucky; the Commonwealth has gotten more qualified judges than should be expected.

A. Lack of Voter Information

The selection process has degenerated into a lottery largely because the voters simply do not know the candidates, interviewees claimed. One interview participant after another contended that the people go to the polls without any knowledge of the candidates’ qualifications to serve on the appellate bench. Moreover, interviewees believed that the public is uncertain even of the role
of the appellate judiciary, or the functions of the individual appellate courts. As one person put it, "Most of my intelligent, knowledgeable friends don't know what each court is or what a judge on that court does." Another declared, "When a law school graduate asks you if the Commonwealth Court is in New Jersey, you can't fault the people."

The citizenry's lack of knowledge is attributable to several factors, interviewees suggested. First, given the sheer numbers of candidates for each appellate judicial office in recent years, interviewees argued, a nearly impossible burden has been imposed on the electorate. Voters cannot realistically be expected to evaluate dozens of unfamiliar candidates for numerous appellate seats, it was asserted. Some interviewees also blamed the news media, civic organizations, bar associations, and political parties for failing to educate the electorate about the unique role of the appellate judiciary and the qualifications of candidates. Because voters traditionally have been less interested in appellate judicial offices than in almost all other elected positions, they stated, this type of assistance is imperative. Finally, some interviewees noted that the canon prohibiting candidates for judicial office from announcing their views on controversial issues narrows the information which voters can obtain.

The lack of knowledge extends to virtually all voters, interviewees contended. Repeatedly, they referred to conscientious and otherwise well-informed friends who sought their advice after expressing a complete inability to evaluate appellate judicial candidates on the ballot. Unfortunately, the interviewees all too often found themselves equally at a loss to vote intelligently.

B. No Screening Mechanism

If the first rule of Pennsylvania's appellate judicial lottery is that the voters act in ignorance, the second is that they have carte blanche to choose unqualified justices and judges. Almost all interviewees emphasized that Pennsylvania has no effective screening mechanism to ensure that only qualified candidates are placed before the voters.

Ten to twenty years ago, a screening mechanism did exist, the interview participants believed. Until the late 1960s or early 1970s, the screening function was performed by the state's Democratic and Republican party organizations, as each struggled to place its candidates on the appellate bench. The parties and their leaders were powerful enough to guide the electorate's selection of an appellate judge in the direction of the officially endorsed candidates. Party structures were well-financed and well-disciplined at all levels — divisions, wards, counties, and state — with control emanating from the statewide party leaders. Most important, interviewees noted, the parties could bring out the vote for their endorsed candidates at the primaries.

The leaders of those parties, conscious of their capacity to determine the outcome of primary elections, generally developed a concomitant sense of responsibility to support qualified candidates, interviewees explained. This sense of responsibility was attributed to a combination of genuine concern for the judiciary and a calculated judgment that "good judges were good politics." Believing that in the long run they and their parties would be held accountable for poor choices, party leaders took their power to screen candidates seriously. Those strong parties could, and did, keep unqualified people off the bench, interviewees agreed.

That system was not universally revered, however. Several interviewees noted that during the time of party dominance, the Pennsylvania Supreme Court was sarcastically referred to as the "second board of the Pennsylvania Railroad," in recognition of the numerous opinions denying claims of injured plaintiffs who today would certainly prevail. All interviewees conceded that party leaders did not apply purely merit-based criteria in selecting candidates. Political background, personal beliefs, and other factors not necessarily related to an individual's capacity to judge were also given great weight, and many interview participants recalled examples of truly deficient selections by the parties. Despite these criticisms, interviewees agreed that the parties did provide Pennsylvanians with some good appellate judges. "At least there was some rationale, and some accountability for the choices," one person noted. "At least it was more than a lottery."

C. Weakened Political Parties

Good or bad, the old screening system no longer operates effectively for appellate judicial offices, interviewees declared. "There has been a breakdown of party organizations and of the discipline within them and the competition between them," said one individual. Increasingly, the parties are unable to meet the basic test of effectiveness: the ability to get out the vote. Several people explained that, to maintain the appearance of effectiveness in their
weakened condition, parties even find themselves endorsing appellate judicial candidates they believe will win, whether endorsed or not. As one person stated, "The candidates get contacts lined up, sweep in with their people to the state committee meeting, and get endorsements" — regardless of the party's true preferences.

Interviewees attributed this decline in party effectiveness to several causes. One was the "ferment of the sixties," which featured "cataclysmic social and economic changes," and a spreading disillusionment with the quality of government provided by those whom the parties had delivered. New constituencies and splinter groups of old ones articulated their particular ideals, concluding that they had been ill-served by the parties. The effect was described as the "balkanization of parties" into single-issue, single-candidate politics.

Television was considered to be another important cause of the weakening of political parties. As one individual observed, "In 1964-65, the parties still had the muscle to put their candidates over, but television changed that." The packaging of candidates "like soap" had begun in earnest. Television enabled candidates with independent sources of funds to appeal directly to the electorate without resorting to the traditional party apparatus.

A third cause of the parties' loss of control at the polling place was financial. As one interviewee noted, "It is a sad but true" fact of life that money — who has it, who controls it — is all-important in partisan politics. As long as most campaign funds were controlled by the parties' statewide leaders, those leaders could require the allegiance of party members throughout Pennsylvania to endorsed candidates. Interviewees explained, however, that new legislation and party rules in the 1970s, designed to open up the parties and to correct past campaign finance abuses, drastically curtailed the control of party leaders over the money. Limits on the amounts individuals could contribute directly to candidates, for example, led to an abrupt increase in the importance of "unaffiliated" political action committees; as their coffers grew and those of the parties shrank, these PACs increasingly became an alternate source of funding for candidates and their supporters.

Moreover, because campaigning by television became extraordinarily expensive, parties were compelled to set priorities concerning which contests to finance fully. It seemed less critical to fund appellate judicial elections than most executive and legislative ones, where the opportunities for direct benefit — favorable laws, contracts, patronage — were more obvious. Interviewees noted, too, that as old party leaders gave way to new and less powerful ones, there was a reduction in the level of concern for the quality of the appellate bench. The parties turned their attention elsewhere, interviewees stated.

Whether these changes were for the good — in that they opened elective office to judicial candidates who never before had a chance — or for the bad — in that they eroded what many view as the foundation of a successful democracy — one outcome was clear. With the parties fragmented and in decline, it has become entirely possible to obtain a party's nomination for the appellate bench without first receiving its endorsement. In fact, because of cross-filing, it has become possible for judicial candidates to obtain both parties' nominations and almost certain victory in November. "The screening stops when party endorsement doesn't matter," one interviewee concluded. "After that, anyone can run."

To most interviewees, sometimes it seems as though everyone has. "They're coming out of the woodwork to run for office," exclaimed one person. Almost all the interviewees decried the fact that ballots have become cluttered with a mixture of qualified and mediocre candidates. Candidates with minimal qualifications run, just to see what will happen, interviewees noted. "It's a crapshoot now," observed one interviewee, not only for the candidate, but for the voters as well.

D. Serendipity

Under such circumstances, what does control the outcome of the Pennsylvania appellate judicial lottery? Not the quality of the candidate, but "serendipity among a serendipitous people," declared one interviewee. This was a view that almost all shared. As the interviewees also noted, however, the results in appellate judicial elections are seldom random. In addition to the remaining influence of parties and endorsements by the media, interviewees cited several factors which affect the outcome. The problem, they noted, is that these influences have nothing to do with the qualifications of the candidates who benefit from them.

One such factor is geography — the candidate's county of origin. Lacking adequate information, voters have come to depend on those cues that are available. Since ballots list each candidate's
county of origin, voters are more likely to support candidates from the “home team,” and it follows that candidates from the most populous counties have a built-in advantage over those from smaller ones. Interviewees noted that the advantage is readily apparent in Allegheny County, where voters are especially supportive of local candidates, regardless of their party affiliation. Indeed, the string of victories by such candidates led some interviewees to rechristen the Supreme Court of Pennsylvania as the Supreme Court of Pittsburgh. A similar advantage would exist for Philadelphia, interviewees explained, were it not for vote-splitting among numerous candidates from Southeastern Pennsylvania and a general antipathy for Philadelphia elsewhere in the Commonwealth. The accident of geography has precluded qualified candidates from smaller, rural counties from aspiring to the appellate bench, it was stressed. This is “judicial selection by provincialism,” declared one interviewee.

A candidate’s ballot position also influences the outcome of judicial appellate elections without bearing on the candidate’s qualifications, interviewees suggested. The position of a candidate’s name on the ballot, determined randomly, can by itself lead to the gain or loss of votes, many believed. “People file nominating petitions just to see what position they get,” one person noted, with the belief that a top placement guarantees an advantage.

Name recognition, too, bears fruit, it was contended — even if voters are unsure why they recognize the name or have confused it with that of another. One way to obtain name recognition is to purchase it, interviewees noted. An interviewee flatly claimed: “If I had the money, all I’d have to do is go on television for a week, and I’d win. I guarantee it.” Another avenue was disparagingly referred to as the “gimmick” — a popular, but reversible, judicial opinion or an “outrageous,” “outlandish” campaign pledge designed to seize the media’s attention. As one interviewee explained: “It used to be that I took it as a given we’d get judges who were honest, industrious, who would try to exercise good judgment, be fair, and if they knew a little law it wouldn’t hurt. Now, if someone is all those things, but hasn’t done something dramatic, that candidate will lose.”

II. WHAT’S THE HARM?

A. Mediocrity on the Bench

Voicing infinite frustration with the present system for selecting appellate justices and judges, one interviewee remarked: “Today, Donald Duck from Allegheny County with the number one ballot position can win.” Whether or not this gloomy assessment overstates the case, almost all interviewees agreed that as a direct result of the judicial selection process, the Supreme Court of Pennsylvania is, at best, mediocre. This is the tragedy of selecting members of the judiciary by lottery, one interviewee said. “Under any true selection process, you couldn’t get the people you now have on the Supreme Court.” Most interviewees targeted their criticism at the state’s highest court, which has had a disproportionate share of vacancies in the recent past. Generally, they believed that although the Commonwealth and Superior Courts have taken a turn in the direction of mediocrity, their quality exceeds that of the Supreme Court.

The Pennsylvania Supreme Court’s fall from excellence has been swift, interviewees noted. They described the court through the 1960s as one of extraordinary scholarship and ability — “a vast reservoir of talent.” Until then, it had a reputation as one of the finest courts in the country. One measure of this respect was the great extent to which Pennsylvania’s opinions were cited by courts of other jurisdictions.

This is not true any longer, observed the interviewees. “Today,” one person asserted, “our court is one of the laughing stocks of the nation and is generally thought to be one of the worst.” In the judgment of almost all the interviewees, the selection process has led to a Supreme Court which is “exceedingly uneven,” “mediocre at best, with the exception of certain good and conscientious justices,” “often lacking in temperament, lacking in intellect, and lacking in diligence.” The courts, interviewees claimed, are run, not by the top members of the legal profession, but by “less than the best possible.”

Interviewees charged that the Supreme Court has sorely neglected its constitutionally imposed responsibility to administer the Commonwealth’s judicial branch of government. This breakdown was so acute in the mid-1970s, one interviewee explained, that an ad hoc committee stepped in to fill the gap and made several recommendations for appellate reform, including the correction of certain financial practices and the expansion of the Superior Court. Further, the Supreme Court has failed either to write or publish its own rules, interviewees noted, leaving responsibilities largely undefined and creating opportunities for serious abuses. Inadequate oversight by the Supreme Court over
the judicial system has led to a variety of ills, interviewees charged, including unjustifiable delays in the disposition of cases, erratic exercise of the Supreme Court’s authority to discipline attorneys and judges, and great fiscal waste.

B. Unsatisfactory Jurisprudence

Although, in one person’s words, “One of the most important things a supreme court does is to develop a body of principles,” few saw any awareness of this responsibility in the Pennsylvania Supreme Court. Few believed that the court has taken the lead in refining existing principles of law or developing new ones — part of the maturation of justice. Instead, most interviewees described a state’s jurisprudence that is careening out of control.

In past decades, interviewees claimed, as individual cases progressed through the Pennsylvania judicial system from the lowest court to the highest, one could perceive consistency, predictability, and an underlying rationale in the ultimate outcome. One sees too little of this now, interviewees stressed repeatedly. “Difficult issues are being handled in a sub-par manner.”

To illustrate their point, interviewees looked to those who must interpret and follow the Supreme Court’s opinions: the state’s trial and intermediate appellate courts, and, in certain cases, federal courts with jurisdiction in Pennsylvania. These courts have been “bewildered and puzzled” by the spate of inconsistent, conflicting decisions emanating from the Pennsylvania Supreme Court, it was charged. Through its decisions, interviewees asserted, the court is adding haphazardly to the body of common law, which governs Pennsylvanians no less than the statutes enacted by the General Assembly.

Poor case law puts all citizens in harm’s way, interviewees noted, jeopardizing the very quality of life. A supreme court’s reach is at least as wide as that of the other branches of government, touching upon every facet of society, from crime to personal injury, to environmental concerns, to taxation, zoning, utility rates, and basic social issues. The most fundamental conflict of all — that between the individual and society — is the judiciary’s special province, interviewees stressed. “There is nothing more important,” one interviewee said, “than having a place where the unpopular, the poor, the hated, and the oppressed can get relief.” With such heavy responsibilities, interviewees emphasized, a court plagued by mediocrity can affect — and harm — the lives of all, not only of those who are directly involved in a case. “A judicial system is a beautiful, honorable, wonderful thing if it meets out justice,” one person noted, “but as beautiful as it is when the court system works, that’s how catastrophic it is when it doesn’t.”

C. Public Cynicism

Perhaps the most enduring harm caused by Pennsylvania’s judicial mediocrity, interviewees contended, is the cynicism for the courts that it has engendered in the citizenry. Interviewees asserted that by its actions, the Supreme Court has profoundly shaken the public trust in its judiciary, a trust which is based on little more than good faith and a perception that all is well.

This comes at a particularly bad time for the citizenry, interviewees noted, for as other institutions of society — the family, the church, the university — have lost the capacity to handle their disputes internally, people have looked increasingly to the courts as the last place for fair treatment. Now the sanctity of that last refuge has been called into question by the actions of those who are charged with guarding it.

Like a gyroscope which keeps a sea-going vessel level, the Supreme Court must serve as a source of stability within this turbulent society, one interviewee believed. The executive and legislative branches are not expected to perform such a function, because they are appropriately responsive to shifts in public opinion. The judiciary is different, however, owing its allegiance less to individuals than to the law itself. It should be a source of constancy, interviewees believed, and a source of change only when sound reasons justify it. When a court is, as now, a source of cynicism and shaken confidence, the future is not so bright, interviewees warned. “There is a ripple effect whenever the public loses confidence in a branch of government,” observed one. “The entire strength of the society is sapped.”

“The law is a matter of great skill and heart,” one interviewee said, requiring equal measures of intellect, judicial temperament, integrity, character, diligence, and training. Inevitably, when those who reach the appellate bench are less endowed with one or more of these attributes, the court’s ultimate product — justice — suffers. It may take decades to assess fully the damage of a mediocre court, interviewees believed, but the damage is pervasive, and lasting.
D. Where Do We Go From Here?

Having concluded that Pennsylvania’s system of appellate judicial selection has devolved, resulting in a mediocre Supreme Court and declining Superior and Commonwealth Courts, the overwhelming majority of interviewees proposed changing that system. The three approaches to reform which they endorsed are described in detail immediately below and in Chapter Five.

By far the most heavily endorsed proposal was to replace the popular election of appellate justices and judges with a commission form of judicial selection. This would entail gubernatorial appointment from lists of candidates prepared by an independent nominating commission. Many supporters of this method also proposed that the state Senate approve appointments and that appointees be subject to retention elections.

Advocates of the elective system formed a distinct minority. On philosophical grounds, all adamantly opposed removing the voters’ power to select their judiciary in competitive elections. A few had no recommendations for reform, although only one contended that the present system works well. Most agreed that reforms are essential and offered a series of suggestions aimed at establishing a screening mechanism capable of thwarting demonstrably unqualified candidates, and at correcting some of the inequities in the present elective system.

Finally, several interviewees joined proponents of the commission plan in repudiating the popular election of the appellate judiciary, but regarded the commission itself as ill-advised. They favored instead pure gubernatorial appointment, akin to the federal model, which includes Senate approval of each appointment.

One proposal which the interviewees did not make also deserves emphasis. Despite their extensive criticism of the appellate judiciary, interviewees generally did not propose that the terms of incumbents be abbreviated or terminated if a new system is adopted. Though the terms of sitting justices were abruptly terminated in 1859, interviewees dismissed such a scenario, labeling it unfair to those who were duly elected and impractical in light of the several years of chaos that would follow a clearing of the bench. Nor did the interviewees wish to join in a wholesale condemnation of all members of the court.

Although no Supreme Court justice will be subject to mandatory retirement until 1995, interviewees did not believe inaction can be justified by the fact that the Supreme Court has no assured vacancies in the near future. There are two other courts to be concerned with, interviewees cautioned, and there is the long-term well-being of the entire judiciary as well. As one person put it, "We can’t put our heads in the sand for fifteen years."

III. MAJORITY VIEW: ADOPT THE COMMISSION PLAN

The large majority of the experts whom the Committee of Seventy interviewed felt strongly that Pennsylvania must change its method of judicial selection. It is time, they believed, to adopt the commission plan for choosing the Commonwealth’s appellate judges and justices. The decline of the political parties has so rocked the foundation of the partisan election system now used that we are on the “brink of disaster.”

The present method of judicial selection was termed “ludicrous,” “horrendous,” “miserable,” “a joke,” and “a shambles.” It was characterized as among the worst, if not the worst, in the country. Choosing judges by election is “random” and “unpredictable,” they said, and sometimes “it’s a bloody disgrace we get as a judge.”

In a sweeping condemnation of the current selection format, one interviewee stated, “Everything is wrong with these elections. You couldn’t come up with a worse system.” Beyond this assessment of the overall picture, those who were interviewed cited four specific problems of the elective method: 1) the pressure on candidates to speak out on controversial issues; 2) the ethical contradictions inherent in fundraising; 3) the diversion of judges from their duties when campaigning; and 4) its fundamental distortion of the judicial branch.

A. Faults of the Elective System

1. Pandering to the Public

Over and over, interviewees emphasized the unavoidable discomfort of campaigning as a judicial candidate — discomfort which extends far beyond the tiresome routine of chicken dinners, unfamiliar crowds, and endless miles on the road. During a campaign, all candidates are constantly asked to voice their opinions on important legal or political issues, but this type of electioneering is supposedly prohibited by a canon of the Code of Judicial
Conduct. Since many voters feel they have a right to know a judicial candidate's opinions on such issues as capital punishment or abortion, for example, there are enormous pressures on judicial candidates to bend or break the canon of ethics and to give opinions on those subjects and even issues which may come before them once they reach the bench.

Consequently, campaigns have a way of breeding injudicious conduct and statements. Judicial candidates are supposed to deal only with issues of competence, integrity, and experience, but the interviewees stressed that those topics don't make the six o'clock news. Moreover, voters who publicly press a candidate for his or her views on a particular subject aren't satisfied with what they perceive as "platitudes." Since the electorate often fails to distinguish between judicial candidates and candidates for executive or legislative office, a judicial candidate may well be faced with the choice of speaking out or losing. To compound the problem, they explained, there is a difference of opinion among judicial candidates concerning what the canon will allow. Candidates who interpret the canon broadly or simply ignore it, the interviewees argued, gain an advantage over those who adhere strictly to the absolute letter of the canon's dictates.

At the very least, the interviewees pointed out, speaking out on controversial issues can demonstrate pre-judgment of a case or "telegraphing an opinion." That is patently unfair to litigants (especially to defendants in criminal cases), the interviewees felt. At worst, it amounts to making commitments in exchange for votes, which is an ominous practice. It is almost inevitable, the interviewees maintained, that a candidate who professes to favor the defendant in products liability or the plaintiff in unemployment cases will be biased once on the bench. But speaking out on such issues is a virtual prerequisite for getting elected, many stated. "You almost have to commit to things you shouldn't in order to win," one said. What it proves, they agreed, is that future judges should not be put in that position.

Perhaps most damaging of all is the "visceral" approach to judicial selection which elections have inspired in the wake of party control. In this climate, the interviewees explained, it is possible for one candidate to capture the attention of the media and ride the tide of publicity to victory. Especially if it makes for good television, a "gut issue" — and such issues as mortgage foreclosures, child support, and chain gangs were cited as examples during the interviews — can be exploited by a candidate to catch the public eye and garner mass support. It was widely acknowledged that judges can now get elected by "kowtowing" to the public in this fashion, and the interviewees questioned whether this constitutes a credible selection process.

2. Ethical conflicts of fundraising

Equally problematic as the pressures of electioneering are the demands of raising money which the elective system imposes on its judicial candidates, according to those with whom Seventy spoke. It is bad enough, they said, that individuals who are expected to be impartial in court are put in the position of asking for money. "It's like asking a novitiate to go out and hustle," said one interviewee. Even worse is that they must go hat in hand (either directly or indirectly) to the very people they will have to judge: attorneys and potential litigants such as the insurance industry, the banking industry, unions, etc. After all, the interviewees noted, lawyers and litigants are often the only ones with enough of an interest in the outcome of judicial races to make sizeable investments in them. It is these contributions which troubled many interviewees, who feared the appearance of impropriety even where there is no actual conflict of interest.

The Code of Judicial Conduct stipulates that candidates for judicial office be removed from soliciting funds by forming committees to carry out fundraising activities on their behalf. Interviewees commended the judicial candidates who have obeyed this rule but lamented that many do not. If a candidate must sign a fundraising report, they pointed out, the candidate is hard-pressed not to know who contributed and who did not. (The interviewees contended that most lawyers will give because they are reluctant to risk the consequences of not giving to the winner—or even to the loser, who might succeed in a future election.) Many of those who were interviewed expressed a belief that on some level, judges cannot help but be influenced by a big contribution. It's the rare benefactor, it was avowed, who wants nothing in return; most contributors give because they want a friend on the bench, or at least want to avoid making an enemy.

The interview participants described factors which have made the issue of fundraising increasingly serious. First, the declining power of the political parties has forced candidates to look for funds
outside of the parties, their traditional source of support. For this reason, contributions from attorneys and special interests are actively courted (indeed, judicial candidates are now often asked to give money to the party, instead of the reverse). Second, the last two decades have witnessed dramatic changes in electoral campaigns, requiring candidates to raise far more than in the past just to be competitive. Campaigns are now so television-oriented that the budget for TV advertising alone may make or break a race. Since television is expensive, the task of fundraising is a far different proposition than it was twenty or thirty years ago, even for judicial candidates.

What it boils down to, alleged some interviewees, is that we are nearing the point where judgeships can be “bought.” Judicial qualifications may count for little in relation to personal wealth or financial backing when running for election. When judges can get elected on the basis of a few smart ads, they argued, the ideals of Jacksonian Democracy have been turned completely upside down.

3. Distraction from judicial duties
A third fault of the elective system identified in the interviews was the difficulty of running for election once on the court, in the case of vacancy appointees seeking a full term, or for judges running for a higher court. Campaigns cannot help but intrude on duties and affect performance on the bench, it was felt. The initial steps alone are time-consuming: filing nominating petitions, organizing a committee, and making contact with political leaders. The rigors of campaigning, however, were seen as absurdly incompatible with the obligations of hearing cases and writing opinions. A judge “can’t be in two places at the same time,” they averred.

Trying to arrange a campaign schedule and travel plans can become a full-time job for many. What is a judge who is hearing oral argument supposed to do, it was asked, when a phone call comes requesting an appearance at a pig roast in a distant county? It is too much to ask a judicial candidate to juggle cases and a campaign at the same time. By the end of the election, interviewees said, judges are too exhausted to do the job they were elected to do. This is unfair to taxpayers and a waste of judicial talent, in the opinion of many who were interviewed. (In the same vein, it was pointed out that very few top-notch trial lawyers have the luxury of taking a year away from a busy practice to campaign for judicial office.)

4. Distortion of the judicial role
Judicial elections strike a discordant note with the very theory behind a tri-partite form of government, maintained the interviewees. The founders of our country recognized that the judicial branch is a “different animal” from the executive and legislative branches of government, it was stated, as a result, they provided for an appointed judiciary. The power of the purse was granted to the legislature, which necessarily had to be an elected body—no more taxation without representation. The power to carry out the law was delegated to the executive, over whom the populace was also given direct authority. In contrast, the judiciary was removed one step from popular vote in order to shield it from popular control. The majority of the interview participants were convinced that it should again be returned to the mold originally cast for it, with the modifications of the commission plan.

Every citizen wants to make sure, and rightly so, that his or her views are represented in the executive and legislative branches, the interviewees felt. It is just the opposite (or should be) in the case of the judicial branch, it was believed. We should seek judges of high moral character who are knowledgeable in the law, and who can apply the law to a set of facts and render an objective opinion. It is inappropriate to expect wise and able jurists to represent a certain point of view. Judges aren’t supposed to be able to “deliver” or to do favors. Nevertheless, vote-seeking does, in effect, almost force judicial candidates to adopt a stance of “you scratch my back, I’ll scratch yours.”

“If what you want are judges of integrity, ability, and objectivity,” said one interviewee, “then you don’t want people running for office and raising money.” It is demeaning not only to the judges themselves and to the office, but to our very form of government when judges are asked to enter the political arena and submit themselves to the vagaries of elections. At its very essence, the judicial branch is unsuited for partisan elections, because elections cut against the grain of the judicial role. Electing the judiciary, the interviewees claimed, is fundamentally inconsistent with the scheme of democratic government drafted by the founders of our country.

B. Advantages of the Commission Plan
It is an awesome responsibility to select individuals for service on the appellate bench. The majority of the interviewees believed
that this responsibility is not now being effectively discharged. It's
time for a radical change, they felt: Pennsylvania should adopt the
"merit" or commission method for choosing appellate judges and
justices. The reform that was instituted at the last constitutional
convention, to shift judicial elections to the "off-year," did not go
far enough. Only a switch to the commission plan can impose a
sense of rationality on the Commonwealth's chaotic appellate
judicial selection process and fix responsibility for the choice of
appellate judges in one place.

Almost all of those who advocated the commission system thought
it should be adopted through constitutional amendment. If pro-
visions for a commission plan were written into the constitution,
it was felt, the plan would be protected from "tinkering" later on.
In contrast, one interviewee viewed that idea as the primary rea-
son not to enact a constitutionally-based merit plan; once "frozen"
in the constitution, the plan would be too difficult to change if it
didn't work, or even if it required minor adjustments. Thus, the
interviewee supported a statutorily-based commission plan in-
stead, with only the procedure for gubernatorial appointment
inserted into the constitution.

The commission plan embraced by the majority contained the
three basic elements of the classic Missouri Plan: the nomination
of a slate of candidates by a specially-constituted commission, the
appointment of one of those nominees by the governor, and the
popular ratification of the appointment in a non-competitive re-
tention election. (The specific details of all facets of such a plan
are discussed in Chapter Five.)

The crux of the plan is the commission itself. The manner in
which the members of the commission would be chosen was the key
concern of the interviewees. A few felt the governor alone
should be allowed to set up this "blue-ribbon" committee, since
the governor is a duly-elected official of the people. Others, how-
ever, thought that the leaders in both chambers of the state legis-
lature should also get some appointments to the nominating
commission, thus broadening the representation of the public
and guaranteeing a role for the minority party in the choice of
judges. Some interviewees would give the Chief Justice authority
to name some of the members of the nominating commission,
and still others favored allowing the bar to designate its own
members of the panel. Inclusion of representatives of community
groups on the commission was also mentioned in the interviews,
though no specific selection procedures were suggested.

The other matter of central importance to those interviewed was
whether or not the governor's appointee should be confirmed by
the state Senate. Several interviewees expressed their personal
opposition to the inclusion of Senate confirmation in the com-
mission plan, but they sensed it might be necessary to gain popular
approval of the plan. It is preferable not to have Senate con-
firmation if the goal is to eliminate "hardball" politics, it was stated,
especially if legislative leaders participate in the commission's
nomination procedures.

While one interviewee vowed to fight any provision for con-
firmation, even at the expense of defeating the proposal for a com-
mission plan altogether, most conceded that a small "political
broke" would be tolerable if it meant change in the overall
selection method. Other interviewees leaned toward Senate con-
firmation, perceiving a need for "ventilation" somewhere in the
selection process. Anybody who wants to be an appellate judge, it
was thought, ought to be able to go through Senate proceedings.
There was also disagreement concerning whether the confirm-
ation should be through a majority or two-thirds vote (see Chapter
Five).

The commission plan is not merely a substitution of bar politics
for partisan politics, the majority of interviewees contended. The
influence of the bar can be minimized or nearly eliminated, if
desired, by carefully delineating the composition of the nominat-
ing commission to exclude the bar. Nor is the commission plan
"elitist," it was advanced. That charge is always leveled whenever
a small group is entrusted with a decision, it was stated, but it was
dismissed in the interviews as a "populist code word." If well
constructed, the commission plan is a valid, democratic way of
choosing judges, the interviewees declared. The argument that
commissions will only select "fifteenth floor" judges from big
firms is an exaggeration.

1. A more responsible selection process

One of the most compelling reasons offered for changing to a
commission plan is that few people actually know much about the
process of appellate judicial selection. In this respect, the justice
system can be compared to a hospital, many interviewees agreed.
Only the doctors, nurses, administrators, and other staff know and
care about the day-to-day operation of the hospital. Most people
remain relatively unconcerned about hospitals until they themselves or a loved one must undergo hospital treatment.

Similarly, the interviewees felt most citizens are apathetic about the justice system until they are personally involved in a court case. Only the judges, lawyers, and court personnel understand what the courts do, it was thought. "To the extent that their son is not going to jail, and they're not harmed, the average man or woman on the street doesn't pay much attention." Further, many people simply don't even care very much about what goes on, especially at the appellate level. At best, they may have a vague desire to feel confidence in the courts. By showing little interest, the public is all but abdicating its right to choose judges, to the detriment of the present system. "You get the kind of justice you deserve," in the words of one interviewee.

Because people are not attuned to the workings of the judicial branch, the majority of interviewees deemed it naive to think that the public can select appellate judges. "You can't expect the electorate to know who they're voting for," it was stated. "They can't possibly know the qualifications of all the candidates running." Even well-educated, concerned people can't acquire and digest all the information they need.

The commission method would re-establish a bona fide system of screening and selection. It would restore order to the disheveled, disorderly process which now exists in the absence of party control. The parties are not going to experience a renaissance, they insisted, and even when the parties were strong, their choices were not always the best. Some other system must be instituted.

The challenge remains for those who want change, many admitted, to convince an essentially uncaring public that it should care enough to pass a constitutional amendment which will bring about a commission plan. Right now, the argument goes, the only ones who know and care enough about the judiciary to see the need for reform are the "usual suspects" — judges and attorneys who tend to communicate only with each other at conventions or in law review articles. Once and for all, those who have the ability and the knowledge should paint a vivid picture of the failures of the present system, said the interviewees; they must convince the public that good judges do make a difference. This task would entail a different kind of education than rehearsing the candidates' qualifications prior to each election. The objective would be to convince people that they must care deeply enough about the function of judicial selection to entrust it to those better qualified to carry it out.

2. Greater independence

A second significant attribute of the commission selection format highlighted in the interviews is its capacity to assure greater judicial independence. Many interviewees felt that an elected judiciary can never be truly independent, since decisions must in some sense be based on re-election hopes. True independence was defined as the ability to sit and decide weighty questions "without having to look over your shoulder to see which PACs support you."

Times change, and social values change with them; this has to be recognized, the interviewees acknowledged. Legal problems should not be approached in a vacuum but with awareness of the community's mores as one of many factors. Judges should not be entirely beyond the reach of voters, it was stated, but they should be distant enough to achieve the kind of stability that is not shattered by storms of the moment. Law develops slowly, and it must be undergirded with a deeper philosophy than 'thumbs up, thumbs down' judgment.

Moreover, argued the experts interviewed, it is not the function of judges to reflect the will of the people but to interpret the law. The major source of law is legislation (or a higher court's understanding of legislation), much of which the elected legislature is free to alter at any time. The notion that in construing statutes, the court should re-make them according to fluctuation in public sentiment was called "puzzling." Judges can't make decisions on the basis of letters they receive, it was explained. Even in developing the common law, there are too many complex strands to make decisions dependent on popular will.

Independence, the sine qua non of the judicial branch, can best be achieved under a commission plan, according to the majority of interviewees. Unlike the executive and legislative branches, the judicial branch of government was created to be insulated from public opinion. Our democracy is not based on absolute majority rule, they insisted. The rights of the minority are also to be respected, and it is judges who protect them — "That's what the blindfold of justice is all about." The need for independence, then, is paramount. Supporters of the commission plan believed it
should be adopted because it affords a judge far greater latitude to protect the liberties of all, to prevent the majority from riding roughshod over the minority.

3. Better quality judges

A third important asset of the commission plan, in the opinion of a majority of interviewees, was its promise of bringing higher quality judges to the bench. The pool of highly-qualified lawyers who are eligible for the job will increase. Under the elective system, people running must have two characteristics: the ability to be a good judge (ideally) and the ability to be a good candidate. There is no reason that only those who have a “marketable personality and a willingness to face crowds” should sit on the appellate courts. Many lawyers with impeccable credentials who would not consider running for a judgeship would accept an appellate appointment, the interviewees affirmed, thus raising the standard of excellence for all judicial hopefuls.

The commission method is more like the federal system of selecting judges, which was generally agreed to attract better judges than the state system. At present, it was stated, the standards have been so relaxed that nearly anyone has a chance of being a judge on the state bench — even a twenty-five year old just out of law school. State judgeships would be taken more seriously and carry greater prestige if they, too, were filled through a conscientious nomination and appointment process.

In the minds of many, the public has shown itself incapable of choosing the best qualified judges. Since judges are now more likely to be selected on the basis of name and geography than qualifications, the reputation of the Pennsylvania appellate courts has plummeted. The Supreme Court, in particular, was characterized as worse than at any other time in the last several decades. This is a serious situation, many said: “You can survive a bad governor or two, but you can’t survive bad judges.” With the current volume of litigation, it is imperative that our appellate courts have the best talent available, it was stressed. If the object is to procure the finest, then we need a system able to achieve that goal. The commission plan, the majority argued, has the built-in capacity to attract the best and keep out the worst.

4. Increased diversity

Another major advantage of the commission plan is that it provides a better chance of yielding diversity on the court. Women and minorities have a far greater chance of reaching the appellate bench under a commission system than through popular elections, many interviewees strongly believed. There will be greater accountability for inclusiveness with a commission plan, it was stated, because there will be a finite number of people to blame if only white males are chosen. In the existing voluntary merit plan for vacancy appointments, a greater sensitivity to the need for diversity has already been brought to commission nominating, it was pointed out. Under the current elective format, the only minorities and women who have even a distant hope of getting elected are from urban areas (i.e., Philadelphia and Pittsburgh); a female attorney from Bethlehem or a black attorney from Reading has little chance of reaching the appellate bench.

In fact, the interviewees pointed out, almost no one from beyond the Pittsburgh or Philadelphia metropolitan areas has a decent chance of winning. The commission plan is most capable of addressing this unfair geographical obstacle as well. There is a tremendous regional problem on all three appellate courts, the interviewees emphasized repeatedly. Cleavages exist between Pennsylvania’s east and west which are only exacerbated by the elective system, they felt. In a sense, this Commonwealth is really (at least) three “states”: eastern, western, and central. All three should be represented on the statewide courts. The commission plan, many agreed, can help achieve far better geographical distribution.

5. Built-in popular participation

The commission plan should not be equated with a traditional appointment plan, its supporters observed, because it contains a striking difference: an opportunity for the public to pass judgment on the governor’s choice. Once the governor has made an appointment and the appointee has served a short probationary term, the judge would run in a “retention” election which allows voters to decide whether he or she should be given a full term on the bench.

This arrangement, claimed the interviewees, keeps enough of the Jacksonian ideal to allow the public a genuine option: if the governor has made a mistake, the public has easy recourse. “You don’t want or need to eliminate democratic politics entirely from the judicial branch,” it was contended; the judiciary is, after all, a branch of government, and government is intrinsically political. On the other hand, however, interview participants saw a need
for democracy to be controlled. Putting thirty-five candidates on
the ballot, one interviewee exclaimed, is like "trying to run New
York City by a town meeting"—it’s unmanageable and hopelessly
frustrating to the public. A retention election is a far more effi-
cient way of including public participation in appellate judicial
selection.

As discussed in Chapter Five, many interviewees favored a plan
which would call for successive retention elections at a specified
interval, while others preferred a system of life tenure following
the initial retention election. Life tenure would amplify judicial
independence and performance, it was believed, since it would
eliminate the need to organize retention campaigns.

Yet many interviewees felt that periodic retention elections, al-
though they require some amount of "politicking," are an impor-
tant safeguard to correct any problems that might arise. A hope
was also expressed that the incorporation of retention as a feature
of the commission plan might make the plan more palatable to
the public and increase its likelihood of adoption.

C. Summary

There is no perfect method for choosing judges, all agreed. Every
selection system has its flaws. Even the most ardent supporters of
the commission plan recognized that it could be mishandled.
Their aim, they said, was to design a selection system that would
be less vulnerable to abuse and more likely to produce competent
judges.

Clearly, the success of any such plan hangs on the governor’s
willingness to cooperate and the commission itself. It does matter
just how the commission is constructed, many emphasized; it
should not be casually fixed but should be carefully and thought-
fully designed. It was acknowledged that governors, if given the
opportunity, will probably choose someone who is congenial to
their point of view. This is not necessarily bad, argued the inter-
viewees, if the governor’s choice is limited to those who have
already been determined to be intelligent and able. In any case,
governors often feel that one legacy they can leave is a decent
judiciary. Most governors do feel a sense of responsibility to
appoint worthy judges; it was pointed out.

None of the interviewees pretended to guarantee that a com-
mission plan would work miracles. After all, it can really only assure
that those who are clearly incompetent or "venal," or those who
have demonstrable physical or mental problems, will be barred.
Under the commission system, though, it was predicted that less
"horse-trading" will occur, and there will be fewer "pocket can-
didacies" and "personal relationships" than there are now. Even
with the potential drawbacks of the commission system, the clear
majority of interviewees felt it was preferable to the elective method,
which, one remarked, "has not a single redeeming feature."

Public support for a change does exist, they maintained, as shown
by the narrow defeat in 1969 of a constitutional amendment,
despite a poor campaign for its passage. All that remains is to
fashion a sound plan and persuade a few more people of its merits.

IV. MINORITY VIEW: RETAIN THE
ELECTIVE SYSTEM

A minority of the experts who were interviewed by the Commit-
tee of Seventy expressed the view that the elective system should
be retained and improved. This support was based not only on a
conviction that the elective system offers numerous advantages
over any other, but also on a belief that the commission system in
particular is fundamentally flawed. Thus, advocates of electing
judges, like advocates of other plans, were motivated by admir-
ation for their own system and distrust for all others.

A. "If It Ain’t Broke, Don’t Fix It"
The elective system may be a bit "tarnished," the minority stated,
but it is not broken. There are some very good aspects to it, and
with a few important revisions, it can be sufficiently improved.
Instead of scrapping the system altogether, it should be "fine-
tuned" and made to work. The present system is by far the best
method of appellate judicial selection, this group of interviewees
believed, and is worth a substantial effort to save.

The fact that appellate judges and justices are elected cannot be
blamed for the deficiencies which have occurred. After all, it was
pointed out, "We’ve been electing judges since 1850. If the present
problems in the appellate courts are due to the election method,
why should they have surfaced only in the last ten years?" The
power of the political parties to screen candidates and choose the
eventual winners has declined, nearly all agreed, and the power of
individual "bosses" has eroded. They pointed out, however, that
the political selection mechanism has become more serendipitous
for all offices ("that’s what launched Jimmy Carter out of Georgia
for the Presidency”), and that even the parties’ loss of absolute control of the selection process has not precipitated catastrophe on the three appellate courts. Those who most vehemently criticize the Pennsylvania Supreme Court are probably disinclined with the decisions handed down, one interviewee observed, especially in the criminal area.

The elective system is still basically intact, it was agreed; some of the party-endorsed candidates may have been defeated, but many do win. The parties may well experience a revitalization in the near future, it was speculated. What’s wrong in judicial selection is what’s wrong with democracy in general, the interviewees held. The people are the ultimate guardians of it, and when they do not attend to it closely, things start to go awry. Instead of helping to re-focus public attention constructively, the media has accelerated a loss of respect for the courts and a lack of interest in judicial campaigns, which generally lack the “sizzle” of executive or legislative races.

The commission or “merit” plan could have a deleterious effect on the judicial branch of government if adopted, asserted these interview participants. The judiciary is already used as the “whipping boy” of the other two branches. Under the commission plan, the executive and legislative branches would gain control of the judicial branch, and the very doctrine of separation of powers would be undermined. This group of interviewees challenged supporters of the commission plan to produce any tangible evidence that it has resulted in better judges where it has been adopted. Nominating commissions, it was charged, are a “charade,” a “facade,” and a “detestable deception”; in reality, the governor is the one choosing the judges, and the commission is a mere “stamp of approval.” As a result, it will be law firms with a history of big donations to the governor’s campaign coffers whose partners find their way into the system. It is too risky to turn the selection process over to a select group or “inner circle” which operates under no constraints and is easily dominated by special interests such as the organized bar, it was believed. There is no guarantee that this commission will strive to choose the “best” and not something else.

The interviewees who preferred retaining the elective system felt that any other system removes the right of the people to select by whom they will be judged, the touchstone of the democratic process. So much power now reposes in the hands of the appellate courts, particularly the Supreme Court, that they should be selected by popular vote. Besides, it was pointed out, the political process acts as a “proving ground” and has a way of “weeding out those who do not belong in leadership.” The encounters which elections necessitate between candidates and voters are beneficial, they stated, because candidates must articulate their views and, more important, are forced to listen to the opinions of the voters.

**B. Benefits of the Elective System**

1. **Democracy in action**

“I'd rather rest my confidence in the average person on the street,” said one interviewee, “than with a small group of people.” The primary benefit of the existing elective system identified in the interviews is that control lies in the hands of the people, which is where it should be in a democracy. In selecting judges, the electorate performs much the same function as a jury, it was asserted. Made up of ordinary people — “not just those with MIT degrees” — juries diligently seek to render a verdict based on common sense and intuition. Almost always, the interviewees felt, juries come to the right conclusion, and justice is done.

Similarly, once in the voting booth, voters exercise reasonable judgments regarding the kind of judges and justices they wish to elect to the bench. The choice they make is no less intelligent than the one they make for governor or senator. “It doesn’t take a college degree to know who you want in office,” and the beauty of the elective method, it was explained, is that everyone’s opinion counts. (It should be noted, however, that several interviewees felt the electorate could not be compared to a jury, since a jury is presented with evidence and can “get a feeling” about the litigants.)

This minority group of interview participants believed that selection of appellate judges by partisan election is not akin to hospital (see above). The public may not have sufficient knowledge about all the candidates on the ballot to make an informed choice, it was conceded, but they do have an ongoing concern for the state of the judiciary. The number of votes cast shows that people do care. If the problem is ignorance, the solution is better pre-election education programs. The voters can only know as much about judicial candidates as they are helped to know through efforts of the bar and other civic organizations, it was felt. The electorate can become more sophisticated with proper assistance. The sentiment in the interviews was that democracy shouldn’t be done away with but strengthened and made to work.
2. Greater accountability

In the judiciary is deposited the protection of individual rights (as opposed to the legislature, which is concerned with the common good). An elected judiciary, then, is the main safeguard against the abridgement of those rights, asserted the interviewees. When people feel that judges are not responsive to public sentiment, it was argued, they feel that the most powerful organ of democracy has gone astray.

The federal system was cited as an example of a “tyrannical” system which demonstrates the problems of an appointive method of judicial selection. Federal judges are not better by virtue of appointment, rather, they are no better or worse than if they were elected, the interviewees said. Furthermore, they tend to be “arrogant” and “despotism,” and because they are granted tenure for life, they project an “air of untouchability.” The federal system is one of the greatest causes for apathy toward judges and general disinterest in the courts, one interviewee claimed. People do not feel they run the courts anymore, and they feel that what has happened on many fronts—particularly on social issues—is the result of a judiciary they can’t change.

Judges need independence, but it must be a “balanced” independence, the interviewees thought. It is not that judges should decide cases on the basis of public outcry, but they need to recognize what people want and what people have a right to expect. Independence is provided in Pennsylvania, it was pointed out, by giving judges ten-year terms which are far lengthier than the terms of office for the executive or the state legislators. Judges need a long term, but they must also retain a “touch of humility,” knowing that they will have to go back to the source of their power: the people.

Whether a retention system is continued (as most interviewees supported), or whether a judge should run for re-election in a partisan election (the preference of one interviewee), initial appointment and life tenure are not good. They allow human beings to become “abstract,” it was felt. Under the elective system, the voters have an opportunity to install judges whose decisions can be counted on to reflect their views.

3. Wider accessibility

Finally, the elective system is beneficial because it affords everyone an opportunity to vie for a seat on the appellate bench, interviewees contended. No one is automatically rejected, as they might be in the eyes of a commission arbitrarily exercising its own selection criteria. Too often, commented the interviewees, the membership of merit nominating commissions is top-heavy with “establishment” types from big law firms and large corporations who tend to consider only those who are like themselves. In addition, when given the opportunity, the commissions almost always nominate someone from the same political party as the governor, it was observed.

Those who were interviewed said they thoroughly and uncompromisingly believed in the elective system, where “everybody has a shot at it.” It is part of the “American Dream,” they stated, that anyone can aspire to the loftiest goal and attain it. No one should be precluded from the Pennsylvania appellate judiciary, it was said, because they went to the wrong law school or once dropped out of college. People want judges who are erudite but who can also identify with “the little guy.” The best way to get these qualities in a judge is through election.

C. Refinements of the Elective System

The minority of the experts whom seventy interviewed favored retaining the basic structure of the present method of appellate judicial selection now employed in Pennsylvania: partisan election for the first full term of office, followed by retention election for subsequent terms. The reason given for keeping retention was that it functions as a kind of “sitting judge” rule to favor incumbents. Among this group of interviewees, however, there was a prevalent belief that the current system is in need of “fine-tuning” to make it more efficient. Some of the interview participants who favored the commission plan also supported the enactment of revisions for the short term. Several reforms were suggested.

1. Eliminate the canon

The canon in the Code of Judicial Conduct which prohibits judicial candidates from making statements on disputed political or legal issues was characterized as “too restrictive on the election process.” When running for office, judges ought to be free to express the general philosophy that will serve as the framework for their decisions, it was felt. People deserve to hear the candidate’s views on such topics as capital punishment. It is not that judicial candidates would say, “In every rear end collision case, I think the plaintiff should win X amount of money.” That would be wrong. But judges should be able to describe their philosophy about personal injury, for example, without reaching the point of pre-deciding cases.
Eliminating this “gag rule” is the only way to help the public get the kind of information it needs to make intelligent decisions when voting for judges, the interviewees stated. It is not enough to hear judicial candidates talk about where they went to school and how much they want to be a judge; nor do bar association ratings do the job. People shouldn’t have to “vote blind,” and they have a right to know what they’re getting in an appellate judge, it was argued. Moreover, judges should not have to be “second-class citizens” whose own democratic right of free expression is curtailed by virtue of their office.

In contrast, however, other interviewees sensed it was important to preserve the canon. It is not a “shackle,” they said, and judicial candidates are not “unduly circumscribed” by it. Candidates can still campaign effectively by taking positions on judicial administration and suggesting ways to speed up justice or to reduce the cost of litigation.

A “disaster” was predicted by these interview participants if the canon were removed. It’s the quality of a person, not particular opinions, which is important, it was argued, and society has no right to expect philosophical commitments from its judges unless it wants to repudiate the concept of an objective, dispassionate judiciary. “It’s mind-boggling,” one interviewee related, “to think of converting the selection process into a way of determining how judges will decide an unknown stream of cases in the future.” Even though the canon may be violated occasionally in the heat of campaigning, it is a sound canon, they believed, and it should not be withdrawn.

2. Eliminate cross-filing

Another aspect of the current system perceived as undesirable was the allowance of cross-filing, or seeking the nomination of both parties. Cross-filing has “really fouled it up,” one interviewee complained. It has made the partisan elective system too much like the non-partisan system, which is generally understood to be less effective. It has not removed judicial selection from politics, as it was intended to do, but it has made it hard for the voters to know whether a judicial candidate is actually a Democrat or Republican at heart, the interviewees said. If cross-filing were eliminated, parties would have to slate candidates in earnest again, and perhaps a greater voice for the parties in judicial selection would be restored. None of the interviewees was of the opinion that cross-filing was a positive feature of the present system.

3. Introduce pre-screening by the bar

If the problem is that too many unqualified candidates are aspiring to the bench, the solution is to determine in advance which candidates do possess the necessary credentials for service on the appellate court, it was suggested. Interviewees recommended that the bar should rate the candidates not after the parties have made their endorsements, as is the case now, but before the parties select their candidates. Some went further to suggest that the bar begin its review a full year in advance of the election, so that only individuals rated “qualified” would be allowed to file at all. (In any event, the bar should be sure to complete its screening process before the last day to withdraw from the race, it was noted, so that any who were found unqualified could remove their names from the ballot.) If implemented successfully, pre-screening by the bar might help decrease the large number of candidates which now crowd the ballot.

4. Rotate ballot position

Favorable or unfavorable ballot position was frequently acknowledged by those who were interviewed to be a major factor in determining the outcome of judicial races. Since voters are often unfamiliar with the names on the ballot for appellate judgeships, they may well decide to cast their vote for the first name listed, or perhaps the last name. To eliminate any undue advantage gained by the luck of the draw for ballot position, it was advised that different configurations of the candidates’ names should appear on ballots around the Commonwealth. Under such a plan, no single candidate would bear the burden of bad ballot position or reap the benefits of a good ballot slot.

5. Require a minimum of years in legal practice

A complaint frequently voiced during the interviews pertained to the fact that Pennsylvania has no minimum requirement of years in legal practice for judicial office. The only qualifications now mandated by the Constitution are Commonwealth citizenship, residence, and membership in the bar of the Supreme Court. As a result, even recent law graduates are technically eligible to sit on the appellate bench, though they can hardly be considered as qualified. A good appellate judge or justice must be a seasoned veteran whose years as a practitioner of the law will lend maturity,
wisdom, and "street smarts" to his or her appellate decisions. For this reason, several interviewees wished to enact a prerequisite of ten or fifteen years of legal experience for service on the appellate courts.

6. Remove county of origin from the ballot

A problem of geography on our current appellate courts was widely recognized by the interviewees. Because of the state's population spread, it is difficult—if not impossible—for candidates from the counties in the middle of the state to get elected. Moreover, candidates who originate from the Philadelphia area are looked upon with a certain disdain by residents in other parts of the Commonwealth. Both of these problems could be ameliorated if the candidate's home county no longer appeared under the candidate's name on the ballot, it was believed. This measure would reduce regional biases in voting, the interviewees felt, and help to correct the geographical imbalance that has arisen.

7. Change financing rules

The manner in which fundraising is undertaken also concerned the interviewees who advocated the retention of the elective system. Candidates are raising more and more money, they said, and it is the same sources which are being tapped repeatedly for contributions. The prime contributors, it was also stated, are either attorneys or major industries and special interest groups who may find themselves in court. Two reforms were proposed: either a limit on campaign expenditures or the public financing of judicial campaigns by means of a check-off on income tax returns. Others pointed out, however, that in an era when a single action which draws television news coverage can accomplish the same goal as massive advertising, such financing reforms may not be very meaningful.

8. Strengthen the JIRB

Instead of tinkering with the selection system, some interviewees admonished, why not focus on the removal process, which is most in need of revision. It is removal, and not selection, which is the weak link in the chain, they insisted. Any method of choosing judges needs a check and balance; in Pennsylvania, that check is supposed to be the Judicial Inquiry and Review Board. Several interviewees (including both those who favored the commission plan and those who supported the elective system) evaluated the performance of the JIRB as "disappointing" and thought it essential to give the Board more clout. Their major concern was that it be removed from the control of the judiciary. A more "muscular" JIRB, it was felt, could improve the entire system of judicial selection and tenure, as well as have a significant impact on judicial administration.

D. Summary

The elective system may not be ideal, and it may not be working as well as it should, but it is working, in the view of the minority of interviewees. The bottom line is that cases are being heard and opinions are being rendered. The Supreme Court and the two intermediate appellate courts are productive, they argued, and the results are reasonable, with enough good judges elected to keep things on the "straight and narrow." There have been some progressive decisions in areas such as products liability, personal injury, and criminal law, it was felt. It is a positive development that the courts are no longer dominated by the interests of big business or big law firms, the interviewees asserted, but are now more consumer-oriented.

In light of the fact that all methods of choosing judges are imperfect, the interviewees believed that the people should be allowed to make the mistakes that will occur in any system. There is a greater awareness of the problems of the election system because that's what we have now, they asserted; that doesn't necessarily indicate a need for sweeping change. Interview participants expressed deeply-held personal beliefs that people have a right to elect their public officials, including judges. Moreover, they articulated a confidence in the public to make the right decisions most of the time.

If people don't want the responsibility of selecting judges, they have a right to give it up. So far, they have not chosen to forfeit this privilege. Democracy is a lot of trouble, it was observed, but it is worthwhile because it ultimately represents the best interests of mankind. So far, interviewees stated, no one has come up with a better system for popular participation than the one we have.

V. A THIRD OPTION: DIRECT GUBERNATORIAL APPOINTMENT

A small number of experts advocated that Pennsylvania's appellate judges and justices be appointed directly by the governor, without
benefit of assistance by a legally-constituted commission. This preference was derived largely from their favorable view of the federal judiciary, with its direct appointment of judges by the President, Senate confirmation by majority vote, and life tenure. They also believed that this responsibility rightfully belongs to the governor, the elected representative of the people in a representative form of government.

Supporters of direct gubernatorial appointment expressed considerable admiration for the federal courts, with one observer remarking, "I think the federal system is magnificent." Essentially, they proposed duplicating that system in Pennsylvania, suggesting that it would produce a judiciary of vastly improved quality. They approved heartily of a chief executive whose nominating power knew no commission-imposed restraints, and which only needed the verification of a careful but routine background investigation for validation. On the federal level, they noted, the President's nominee seldom stumbled over the obstacle of Senate confirmation, and that when one did, it was the result of genuine questions relating to the qualifications of the nominee, not just idle political haggling.

Proponents of direct gubernatorial appointment of appellate judges also wished to borrow the federal provision of life tenure for judges. Several attributed the clear superiority of the federal bench to this provision, explaining that it freed a judge from worry that an honest but unpopular decision might lead to losing the job. These boosters of a strong, independent judiciary all opposed the specter of a panel of judges performing a political litmus test every time a volatile issue came before the bench. Life tenure, they hoped, would yield judges who could make difficult decisions without regard for public reaction.

Supporters of these changes denied the popular charge that such a system would be conducive to a "blue-blooded" bench composed of big firm lawyers. The most influential people in the selection of federal judges, they contended, were elected political leaders, not individual attorneys; nor is there evidence to suggest that corporate attorneys dominate the federal bench. Further, they held that appointing officials traditionally sought excellent candidates because of the great importance of the bench. Similar behavior could reasonably be expected at the state level, they added.

Proponents of introducing the federal model of judicial selection to the state conceded that this system occasionally produces "despotic" judges arrogant toward those who appear before them and out of touch with the concerns of the people. They denied, however, that this occurs on the federal level with any greater frequency than it currently does under Pennsylvania's system of electing judges. "The federal bench doesn't have a monopoly on despotic judges," it was argued. They also suggested that what some might perceive as despotism, others see as the performance of an independent judge following the dictates of established law rather than the whims of the public.

Everyone who supported an appointed judiciary preferred appointment by the governor, they specifically sought to free the governor from all unnecessary encumbrances. The governor, they argued — elected by the people and vested with great power — should be free to establish his or her own rules, procedures, or voluntary commissions, always aware that the result of these efforts will be judged by the voters in future elections. Why elect a governor, one asked, and then take this popularly-confers power away and give it to a "blue-ribbon panel"? Selecting judges is an executive function which rightfully belongs to the governor, it was felt. Thus, proponents of direct gubernatorial appointment agreed that "the governor ought to have the appointing power, just like the President does."

Finally, direct gubernatorial appointment of appellate judges is entirely consistent with this country's republican form of government, it was contended. People regularly elect representatives to make choices for them and then pass judgment on those choices at the ballot box. The public has no inherent right to decide every issue, they maintained, nor does it have any specific right, either stated or implied, to select judges. One interviewee noted, "You can't have a referendum on everything." Accountable public officials are elected precisely for the purpose of doing the people's bidding. Gubernatorial appointment of judges is a time-honored system which is simple and efficient.

VI. WHAT IF THERE IS NO CHANGE?

What if none of the changes which the interviewees proposed is instituted? A handful of interviewees who rejected the character-
ization of the present selection system as a lottery were undisturbed at the prospect. In their view, the voters know more about the candidates than they are given credit for, and an elective system without prior screening poses no great threat to the judiciary.

In contrast, the overwhelming majority were distressed by the prospect of no change. In their overall assessment, if appellate justices and judges continue to be selected by a purely political process which lacks an effective screening mechanism, the quality of the appellate bench will deteriorate. The quality of the law will follow the same path.

Without change, the fortuitous selection of exceptional candidates will occur less frequently, interviewees suggested. Some potential candidates with excellent qualifications will avoid the selection process altogether, as they would avoid Russian Roulette. Many outstanding candidates who do run will lose. Of these, some will rebel passively, declining to raise or expend significant sums of money and foregoing gimmickry.

Meanwhile, interviewees contended, lawyers or judges of unchallenged mediocrity will take a chance and run, hoping to elevate themselves from undistinguished careers. Too often, those who are most willing to "sacrifice to the blandishments" of campaigning, who have private means, or who are supported by special interests will prevail.

Interviewees believed that with more candidates of lesser quality, the likelihood of obtaining justices and judges with too little integrity or judicial temperament will increase. Therefore, numerous interviewees forecast serious improprieties within the appellate courts, particularly if the Judicial Inquiry and Review Board remains weak. There will be improper, ex parte approaches to the courts and politically motivated opinions, predicted one person. There will be more scandals. "Some day there will be an impeachable offense," another surmised. Inevitably, it was charged, public confidence in the judiciary will erode further.

The sense of urgency which most interviewees shared was based partly on their perception that "one court — the Supreme Court — is ruined already; the others will be ruined unless something is done." The same selection process which damaged Pennsylvania's highest court will take a continuing toll on the other appellate courts in the years ahead, it was asserted. Further, interviewees stressed that the possibility of incompetence and corruption at the level of the Supreme Court poses a direct threat to the Commonwealth and Superior Courts, since the Supreme Court enjoys unfettered control over the entire unified court system. Under these circumstances, it is not enough to "muddle along," while praying for more enlightened and effective political leadership. One interviewee declared: "Right now there's smoke and a little flame — it's got to be put out before it spreads."
"You’re either for the commission plan or you’re against it." This was the position taken by a great many interviewees. The difficulty with that view, as others noted, is that there is no single "commission plan." As Chapters Two and Three illustrate, there are almost as many versions of the plan as there are states which have adopted it. Some versions of the commission plan arguably go further than others to address the objections of supporters of the elective system. Consequently, in order to evaluate the commission plan in general, or to design a specific version, it is helpful to know all the ways in which the plans can vary.

This chapter identifies nine elements of the basic commission plan over which, as one interviewee said, "reasonable people can differ":

1) who appoints the nominating commission
2) the composition of the nominating commission
3) the number of nominees to be presented by the nominating commission to the governor
4) whether the governor should have the right to reject all of these nominees and request additional panels of names
5) whether the names submitted to the governor as nominees should be a matter of public record
6) whether judicial appointments of the governor should be subject to confirmation by the state Senate, and if so, by simple majority vote or two-thirds majority
7) the tenure of appointed judges and justices
8) whether appointed judges and justices should stand for retention elections
9) whether all appointees to Pennsylvania’s appellate bench should be required to have prior experience as a judge at the trial court level.

These are not trivial issues, interviewees stressed, for a commission plan can only work as well as it is designed. Many who supported replacing the elective system with a commission plan expressed strong opinions concerning these nine elements, believing that the plan would work best only if their preferred features were included. Despite this belief, most supporters expressed great willingness to compromise their personal preferences for the sake of change, contending that almost any form of a commission plan would improve appellate judicial selection in Pennsylvania.

I. THE NOMINATING COMMISSION: "WHO PICKS THE PICKERS?"

At the heart of the commission plan of judicial selection is the nominating commission itself. This commission is responsible for evaluating applicants for vacancies on the appellate bench, recruiting qualified candidates, and recommending the best candidates to the governor. How well the commission performs this task is largely a matter of the caliber of its members. The chief factors in determining the quality of its membership are "who picks the pickers," why they pick them, and whom they eventually pick.

A small number of those interviewed felt that the governor should select the entire commission. As an elected official, the governor would then be accountable to the state’s voters for the quality of all judicial appointments. This responsibility was viewed by some as an executive function and therefore rightfully the sole prerogative of the state’s chief executive. One person felt that this power should be tempered by requiring that gubernatorial appointments to the panel be confirmed by the Senate. Nevertheless, most opposed granting this power exclusively to the governor, stressing that the commission must be independent. The ability of any governor to create the entire nominating commission destroyed the credibility of the screening process, it was charged. What many feared in a commission appointed wholly by the governor was that it would produce "a pre-shaped trio of names" which reflected the governor’s thinking—a political undertaking rather than an honest effort to bring the state’s finest legal minds to the appellate bench.

By far, the majority of those favoring the commission plan preferred that appointing power be divided among a number of sources; many hoped to see this power divided between the governor and the legislature. While no one proposed granting exclusive appointing power to the legislature, many agreed that this shared arrangement yielded a number of benefits. One advantage noted is that legislative appointees, chosen by elected representatives of the public, would replace the expression of public will erased by the switch away from popular elections. Similarly, legislative appointers could be held responsible by their constituents for the quality of the bench, or, as one person warned, "We can
look to someone if a lemon gets through." As an additional measure of the popular will, it was widely recommended that this power of appointment be granted specifically to the elected representatives of the voters’ elected representatives—the majority and minority leaders of the state House and Senate. This would also assure bi-partisan participation on the commission. Finally, a number of interviewees hoped that the power of representatives of the legislature to shape the panel would facilitate Senate confirmation of nominees—an arduous, politically-charged process in recent years. Under such a system, the legislature would have an investment in the governor’s nominee, thus making it more likely to approve of the appointment.

The majority of those interviewed felt that the governor and legislature should share the power to appoint members of the commission with the Supreme Court—or with the Chief Justice of the Supreme Court, in particular. No one could possibly know better what qualities to seek in a candidate for the judiciary than a sitting judge, it was maintained, and allowing the Chief Justice to appoint members to the panel would greatly enhance this search. While this proposal garnered wide support, it also provoked the most vehement disagreement concerning the subject of commission formation. Judges should do nothing but judge, and they should especially avoid involvement in this highly political process, some argued. Whether judges had any special expertise to lend to this process and whether they were the best people to choose other judges was questioned. By far, however, the greatest concern of those who opposed giving the Supreme Court a role in shaping the nominating commission was that it would lead to "too much opportunity for self-perpetuation of certain points of view," with appointees of the court seeking candidates in their own image. "I don’t like a self-perpetuating Supreme Court," cautioned one interviewee.

A number of interviewees proposed adding appointees of the bar to the panel. As an interested party, lawyers have a special stake in the selection of judges, and by virtue of their work, they are in the best position to know who might be capable of becoming a good judge. Some felt that including the bar association in the process would help validate the role it has fulfilled unofficially for a number of years by rating candidates. Others, however, opposed official bar association involvement, fearing that the perception of an "elitist" mentality within the bar might jeopardize public acceptance of a commission plan.

In addition to these more widely approved suggestions, a number of alternatives to the more traditional sources of appointing power were recommended. The formation of a grand jury-type panel comprised of representatives chosen by political, business, community, and civic organizations was proposed. It was also suggested that the Deans of Pennsylvania’s law schools appoint members to the commission; and one individual proposed the empanelment of a traditional trial jury to serve as nominating commission. Throughout, two themes were prevalent: first, that no single person or group be allowed to dominate the panel through overwhelming appointive power; and second, that the panel have enough diversity to represent citizens throughout the Commonwealth.

II. COMPOSITION OF THE NOMINATING COMMISSION

In addition to the appointers of the nominating commission, the actual composition of this commission is one of the key factors in determining whether or not the nominating process would successfully fulfill its mandate. Exactly who serves on the commission, moreover, is instrumental not only to the success of the panel but to the public’s perception of its workings. Those interviewed differed widely in their views concerning who should serve on the nominating commission.

Generally, it was agreed that the commission must be of manageable size; most regarded nine to eleven members as appropriate, although a few preferred grand jury-sized panels of up to twenty-five members to assure a broader representation of the public’s interests. Above all, interviewees stressed that commission members must enjoy independence from political influences. Some feared that if members joined the commission as representatives of a political party, they would feel obliged to act as representatives of their party. In contrast, the proposal that the floor leaders of the legislature appoint members to the commission was viewed by some as a positive step toward assuring a bi-partisan panel. One interviewee, however, strongly disagreed with a calculated effort toward bi-partisanship, arguing that if a bi-partisan court were the objective of the selection process, the state political parties could select judges. "You don’t want a bi-partisan court;" it was stated, "you want a non-partisan court." This interviewee preferred non-partisanship because "you want them all to be free
from political influence when they get on the bench."

The presence of appointees of the legislature on the nominating commission was urged by many of the experts interviewed. While one interviewee felt that the selection of judges was solely an executive function and another maintained that, "I don't think you need political leaders on the panel," the vast majority felt there was much to be said for having representatives of the legislature on the panel. In addition to assuring a bi-partisan panel, these representatives would facilitate Senate confirmation of the governor's nominee by giving the Senate a stake in the commission's efforts. These appointees would also provide the reflection of public will usually associated with popular elections. In some of the endorsed versions of the commission plan, the majority and minority leaders of the House and Senate would themselves serve on the panel.

Another major issue in the composition of the commission was whether it should include lay members. The participation of lawyers created little dispute: it was widely agreed that lawyers know the law and the judicial system are in a good position to determine who would make a good judge. The participation of lay members on the commission also garnered strong support. Selecting judges, one person explained, entails more than merely deciding who has the legal skills to decide the merits of individual cases. The panel must also ascertain whether a candidate has the temperament, character, and integrity to decide those cases, and many felt lay members were equal to lawyers in judging these traits.

Lay members have been gradually included in many legal functions formerly regarded as the exclusive domain of attorneys—disciplinary boards and county and state bar association judicial selection committees—with great success, it was noted. In addition, it was contended, "it helps the credibility of the selection process if lay persons serve on it." While even many of the advocates of lay representation on nominating commissions preferred that such participants serve in the minority on the panel, a number of interviewees supported a commission comprised entirely of lay members if this would help obtain public approval of a commission selection process.

Nevertheless, support for lay participation on the nominating commission was not unanimous. "How many people know any-thing about what makes a good judge?" one interviewee asked. Others doubted lay members' ability to assert themselves in the presence of strong-willed lawyers and judges. Finally, some were willing to allow token lay participation on the commission despite their conviction that such members would contribute little to the process.

The issue of judges serving directly on the panel fomented considerable disagreement. Many considered judges uniquely qualified to select other judges, noting that they, better than anyone, know what makes a good judge and who would make a good judge. It was argued that judges know how the system works and what is needed, and they have considerable expertise to lend to the proceedings. One interviewee, after considering the arguments against judicial participation, declared that, "I would prefer, as a lawyer in the system, to put my marbles with the Chief Justice."

Others strongly opposed the participation of judges in the selection of judges, citing the possibility of "improper influences" in boosting the fortunes of their own candidates and philosophies. One interviewee remarked that such participation was inappropriate insofar as "they're already paid-up members of the club." Still others feared judicial dominance if judges participated in too great a number, and even many who supported judges serving on the commission recommended limiting that participation to a clear minority. One skeptic suggested that "people with certain titles have undue influence as being 'superior among equals.'" Other commission members, especially lay members, might be intimidated under such circumstances.

The best way to bring diversity to the bench, it was asserted, is to assure that the commission itself be diverse. Several advocates of this need proposed mandating such diversity constitutionally. Representation on the panel for racial and ethnic groups, as well as women, is needed because these groups need "a voice" in the selection process. One interviewee felt that an even wider range of interest groups should be represented on the panel. Noting the domination of the appellate bench by Philadelphians and Pittsburgers, interviewees also suggested equitable geographic representation on the commission.

The overriding concern of the interview participants was that the composition of the panel satisfy the public's quibbs over the nature of the commission selection process. While interviewees
invariably had their own preferences and justifications for them, most expressed a willingness to compromise these preferences for the sake of change.

III. NUMBER OF NOMINEES

Under the commission plan, once the nominating commission concludes its deliberations, it submits a list of qualified candidates to the governor for consideration. The number of nominees submitted to the governor in most states now employing the commission plan is three to five. In addition, under Pennsylvania’s current voluntary commission plan, the governor receives five names from the commission. The overwhelming majority agreed that the nominating commission should provide the governor with the names of three to five qualified candidates for a vacancy on the appellate bench.

Those supporting just three names pointed to the success of efforts in states with such a requirement. Critics, however, contended that three names did not provide a broad enough selection for the governor. Proponents of the three-to-five name limit approved of greater variety, yet warned, “We don’t want to exchange one lottery [the current elective system] for another” by requiring more names. Five names was considered to be an improvement over just three, since there is a need for flexibility; after all, the commission’s job is to provide good candidates, not to select the judge. Opponents of a five-name lower limit maintained that with hundreds of qualified lawyers across the state, even five nominees was too limited a selection. The greater the number of nominees, however, the harder the task of choosing from among them, some noted.

In some states, nominating commissions must provide the governor with ten qualified candidates per vacancy, and at least one interviewee agreed that this was an appropriate requirement. Another disagreed, maintaining that ten nominees was not “merit selection” at all. If the requirement were ten names, one interviewee said, as governor, “I’d say ‘thanks for nothing.’” A final group opposed any limit at all, arguing that if a commission which earned the faith of the public were formed, it should be allowed to nominate as many candidates as it desired.

The possibility of “panel-rigging” was a special concern of the interviewees. No consensus could be reached, however, over how such a practice could be prevented. Proponents of large lists of nominees feared that with small panels, the nominating commission could include a number of poor candidates, effectively forcing the governor to select the candidate the commission preferred. Advocates of small panels countered by arguing that it would be easy to slip an unqualified but politically-favored candidate into a large panel, thereby invalidating the commission’s work in favor of the governor’s wishes.

IV. ADDITIONAL LISTS OF NOMINEES

By a significant margin, proponents of the commission plan of judicial selection opposed allowing the governor to reject the nominating commission’s panel of nominees and to request a second list of candidates for the existing vacancy. If the commission performed its job properly and submitted its three or five best candidates, it was argued, one list is all that is needed. The right to demand a second list gives the governor too much political control, an interviewee charged. An additional list was also characterized as a “second bite of the apple” which might cause further delays in the filling of judicial vacancies — delays, many agreed, which Pennsylvania can ill afford. The prerogative of the governor to request a second list under the current voluntary system is one of the biggest flaws in Pennsylvania’s method of judicial selection today, it was thought; this diminishes and dilutes the political accountability of the governor and the judiciary. In short, as one interviewee alleged, with a second list “you’re circumventing the whole purpose of the process.”

Only a few of those interviewed supported the submission of a second list. They stressed that the panel should act only as an advisory body; the governor, as an official elected by the people, should be permitted to ask for as many lists as desired. Nevertheless, even those in agreement with this position considered it unlikely that there would not be any excellent candidates on the first panel.

V. A PUBLIC OR PRIVATE PROCESS?

The extent to which the efforts of the nominating commission are either public or private is of great significance to those who support this method of judicial selection. This question, moreover, is one of perception and degree: exposing the public to the
commission's deliberations too early in the process may discourage some qualified applicants from seeking seats on the bench; on the other hand, keeping the proceedings guarded too long a time may infringe on the public's right to know and understand how their judges are selected.

Supporters of a private nominating process saw no reason to publicize the names of nominees and suggested that all nominees were free to identify themselves publicly if they desired, one observer noted ironically that the names frequently leaked out anyway. Others feared that public knowledge of the nominees before an appointment was made would lead to political efforts on behalf of individual candidates, since the electorate or special interest groups might pressure their representatives to reject a nominee in favor of someone else on the list. This, in turn, would plunge the confirmation process into partisan politics.

The career problems posed by such a disclosure constituted another argument against the publicization of the judicial candidates. Several interviewees feared that many well-qualified lawyers might be reluctant to apply for the position for fear that losing the competition would have an adverse effect on their professional standing and law practice. One interviewee disagreed with this contention, suggesting that it should be considered a "plum" to get that far in the nominating process.

Among the many supporters of the commission plan, only one favored revealing the names of all applicants for a vacancy from the very beginning of the process. Lawyers who submit their names for consideration by the nominating commission automatically place themselves in the public sphere, and the public has the right to know their identity, it was argued. The personal interests of the applicants do not need to be protected, since they enter the process fully aware of its possible ramifications.

Many supporters of the commission plan agreed, however, that out of sympathy for those who are not chosen, every name considered by the commission need not be publicized. Only the names ultimately submitted to the governor must be revealed. This, they hoped, would increase public interest in the judiciary and promote the faith of the public in the nominating process. Insisting that "the system should not be cloaked in secrecy," they argued that the public has a right to know the final group from which a nominee has been selected. Should something objectionable be discovered about the nominees, "the governor should be entitled to know anything that might fall out of the sky" about them.

VI. SENATE CONFIRMATION

In Pennsylvania today, a governor's nomination to fill a vacancy on the appellate bench must win the approval of two-thirds of the state Senate. In some commission plans of judicial selection, nominees undergo similar confirmation proceedings, in many, they do not. Whether Pennsylvania, if it adopted a commission plan, should continue with two-thirds confirmation, reduce the margin needed to simple majority, or eliminate the need for confirmation altogether sparked considerable discussion among the interviewees.

The majority of those interviewed preferred maintaining a confirmation requirement but reducing it to a simple majority of the Senate. The highly politicized nature of the two-thirds confirmation process where "the minority party can hold the majority party hostage" was repeatedly emphasized. The minority party can easily use confirmation as a tool for negotiating policy with the governor, creating delays that have little to do with a nominee's qualifications for the bench. The minority must be appeased, one person declared. Critics of two-thirds confirmation noted that long delays resulted before vacancies were filled. Arguing that the need for two-thirds confirmation has increasingly resulted in the demands of the minority party for one-half of the appellate vacancy nominations or refusals to approve any nominations, one observer maintained that, as a result, "We're back into politics of the worst sort." Another participant suggested that such political "horse-trading" was tolerable for appointments to the Liquor Control Board or the Turnpike Commission, but not for the state's courts.

The improved screening process which would result from a formal commission plan makes the assent of two-thirds of the Senate unnecessary, argued proponents of majority confirmation. After a candidate has emerged through the screening process, with its rigorous standards and careful investigations, Senate confirmation should be a mere formality. With legislative representation on the nominating commission, several maintained, no more than majority confirmation should be needed. Such confirmation, they felt,
would still provide an appropriate measure of public input into the final approval of appellate judges.

A considerable number of interviewees opposed any confirmation whatsoever of the governor’s selections to the bench. Again, the greatest fear of confirmation was that “it makes the governor hostage to the partisan political arena.” Any situation in which a nomination was impeded by anything other than questions regarding the qualifications of the nominee should be avoided; there is no room for political considerations in this process. Further, they argued, a good panel choosing good candidates would eliminate the need for Senate confirmation. The presence of legislators or their appointees on the nominating commission further precludes this need.

Finally, a small group of those interviewed proposed maintaining confirmation by two-thirds of the Senate. Some felt bound by history: “I’m a traditionalist—keep the two-thirds.” Others based their approval of two-thirds confirmation on the extent of support it required for candidates to gain approval. Proponents of the latter noted that such a level of support required the backing of both political parties. Any candidate who emerged from the confirmation process with this bi-partisan endorsement would thereafter be free from political influence. As one person declared, “You don’t belong to anyone anymore.”

VII. TENURE

Pennsylvania’s appellate court judges enjoy ten-year terms of office after winning election to the bench, and most of those interviewed proposed retaining this length of term. Many feared that the need to seek re-election or retention might inhibit a judge’s independence, but one maintained, “Any judge worth [his or her] salt is in a good position to be independent” with a ten-year term of office. Because of the need to limit tenure to insure judicial accountability — a cornerstone of the Jacksonian ideal — and the virtual impossibility of removing a judge from office, the people should retain a voice in who shall serve as a judge, it was believed. Many proponents of the ten-year term, however, expressed that view because they considered life tenure unacceptable to the general public. As one interviewee claimed, “I don’t think Pennsylvania is ready for lifetime tenure.”

In contrast, some interviewees felt that life tenure was the ideal term of office for judges. One interview participant, noting the rigorous process through which any judge must have passed (the nominating commission’s screening process, gubernatorial selection, and Senate confirmation) to reach the bench, argued that “once they’re up there, leave them alone.” Proponents of life tenure repeatedly pointed to the success of the federal bench and its ability to act independently as a glowing example of the fruits of life tenure. Many cited a number of landmark federal court decisions which might never have been made by judges preoccupied by their prospects for re-election. The lure of a lifetime appointment has also attracted a higher caliber aspirant to the federal bench, it was thought. “If you want to get the best quality judge of all, you’ll pick them for life,” one interviewee proclaimed.

VIII. RETENTION

At the end of their first full ten-year terms, judges elected to Pennsylvania’s appellate bench may choose to seek another term by filing for retention — a non-competitive election in which the voters respond either yes or no to the question, “Shall Judge X be retained in office?” Retention election is an original element of the commission plan of judicial selection, and it is used in most states that employ that plan. Most of those who advocate a similar plan for Pennsylvania hoped to continue employing the retention election here.

“Merit retention election makes a lot of sense and is a safety valve to get rid of those who are exceptionally bad,” declared one supporter of retention elections. This view embodies the three major contentions of those supporting perpetuation of Pennsylvania’s retention tradition: that the public continue to participate in the composition of the appellate bench; that commission selection, followed by retention election, is a significant improvement over partisan elections; and that retention elections provide a “safety valve” against the emergence of an inadequate or unsuitable judge.

Public acceptance of this yes/no referendum was seen by proponents as an essential step in obtaining public approval for a commission plan of judicial selection. It is vital, they maintained, because “the public has got to feel it’s got an option.” For people who might be reluctant to surrender what they perceived to be their “right” to select their judges, retention might offer a sufficient
degree of public participation to allay their concerns.

Retention elections, one interviewee observed, produced "all the difference in the world over original election" and represent "a great step forward." Not only is retention beneficial to the public, another explained, but it is also helpful to judges, who need to know that they will keep their seats as long as they act properly and perform their jobs as they should. While some interviewees feared that a judge seeking retention would still feel compelled to raise money and campaign vigorously in an effort to garner support, several regarded this possibility as a tolerable trade-off for the accountability the process affords. Others expressed concern over how the need to win retention might affect a judge's performance on the bench at retention time. Generally, it was agreed that the retention process significantly reduced the politics of the electoral process and did not jeopardize the integrity of the bench as partisan elections do.

Finally, many supported retention elections because "even the best designed system can make mistakes." The purpose of the retention election, interviewees explained, is not to eliminate those judges who might not be living up to their potential, but "to get rid of the horrible mistakes" and to provide "a little check on a lifetime appointment." In this respect, many advocated retention elections since, as one interviewee stated, "a part of me wants a chance to vote out an undesirable judge."

Retention was not without its opponents, however. Supporters of life tenure for appellate judges naturally saw no need for retention elections. The most popular argument against retention, moreover, mirrored the primary argument against partisan elections: voters do not know the candidates or the issues. Foes of retention envisioned few circumstances in which voters could know or learn more about a candidate at retention time than they could during original election or selection. Moreover, the original ideal of the retention election has been corrupted, it was felt, whereas it was hoped that judges would merely "stand" for retention, they now "run" for it, raising money, making political contacts, and campaigning. Further, sitting judges would still be vulnerable to the growing hard core of disgruntled voters who turn out to vote "no" on virtually every question placed on the ballot. This group, it was pointed out, increases yearly, and soon, it may turn sitting judges out of office for no apparent reason.

A fear that retention elections infringe upon the freedom and independence of the judiciary was also expressed in the interviews. Judges who must worry about how a decision will affect their chances at a retention election in the near future cannot possibly be independent, it was argued. Retention elections can be used as means of getting rid of a judge who has done something courageous but unpopular. The few examples of Pennsylvania trial court judges losing retention elections were cited as evidence of this type of punishment.

A number of those interviewed questioned how, under the present judicial canon of ethics, a retention campaign could be waged effectively. It was argued that retention elections were unnecessary since people do trust judges, even though they have misgivings about the courts. How else, it was asked, can you explain why people repeatedly voted "yes" for judges they do not even know? Thus, opponents of retention concluded that it was either superfluous (as in the case of life tenure), obstructive of judicial independence, unnecessary, or of questionable value.

IX. EXPERIENCE AS A TRIAL JUDGE

The possibility of requiring that all commission plan nominees to the appellate bench have prior experience as judges of a trial court intrigued many of those interviewed by Seventy. Pennsylvania currently has no such requirement, and the vast majority of those interviewed opposed placing this restriction on aspirants to Pennsylvania's appellate bench. Many agreed that such experience would certainly be helpful, and several proposed giving trial bench experience added weight in the nominating commission's screening efforts. Establishing it as an absolute criterion, however, was opposed. First, many of Pennsylvania's more highly regarded judges and justices, now and in the past, came to their posts without such experience, it was noted. Further, this provision would eliminate qualified academics and public administrators, along with a considerable number of qualified practicing attorneys. "The cream of the bar won't want to serve as trial judges," it was argued, but "there are extremely competent lawyers who are not now judges who would make excellent judges" and who would like to serve on the appellate bench. Of particular interest was the successful, financially secure, highly qualified attorney who wished to serve on the appellate bench as the final, crowning glory of a distin-
guished legal career, but who would be prohibited from serving by this restriction. A good appellate judge does not have to be a trial judge first, they concluded.

Several critics of this requirement pointed to the need for diversity on the bench, explaining that judges see issues in light of their own backgrounds. With only trial judges on the bench, a broad perspective and a proper foundation from which to render decisions would be lost. It would be wrong, they concluded, to place too many "artificial restraints" on who may serve on the appellate bench. As one interviewee declared, "There's nothing magic in having been a judge."

Proponents of the requirement of trial experience asserted, "No one should put on a robe in an appellate court until [he or she] has worn a robe in the lower court." The problems faced at the appellate court level, they claimed, could not be understood by judges who had not "been in the pits awhile" and dealt with comparable issues in a trial court. In an age in which many attorneys specialize in one aspect of the law, they explained, it cannot be assumed that those without judicial experience have a sufficient breadth of experience to sit on the appellate bench. Supporters of this requirement were willing to overlook the pool of potentially qualified lawyers in favor of the over 300 trial court judges across the state, fearing that the transformation from practicing lawyer to appellate judge would require a "learning curve" of several years. One skeptic asked, "Do you have time to wait for a great trial lawyer to develop into a great judge?" Perhaps the greatest advantage of the experience requirement identified was that with a bench comprised entirely of former trial court judges, every member of the appellate court would, at one time or another, have been elected by the people to a seat on the bench. Thus, the requirement of trial experience would incorporate another dimension of popular participation in the commission plan.
Two hundred years later, the debate over judicial selection is not yet laid to rest. It is a difficult and complex issue which lies at the very nexus of democratic theory, legal philosophy, and practical politics. Few in the general population would claim to be knowledgeable or concerned about the appellate judiciary; it is primarily other judges, lawyers, and litigants who watch to see who balances the scales of appellate justice. Those who do care, care deeply about our method of selecting judges. Emotion and rhetoric run high on all sides.

It is the intent of the Committee of Seventy that this study should serve as a springboard for informed public discussion. If it fulfills this purpose, it will bring the subject into clearer focus and help transform divisive wrangling into reasoned and productive deliberation. In the near-unanimous opinion of the interview participants, precious time has been lost already. The quality of Pennsylvania's appellate courts and its jurisprudence are at stake.

In choosing the group of experts to be interviewed, the Committee of Seventy exercised no pre-judgment of the views to be sought and entertained no preconceptions of the conclusions to be reached. All of the individuals were chosen on the basis of their prior interest and experience with the subject. We have endeavored to present all opinions faithfully as they were expressed in the interviews.

Inevitably, the conclusions of the majority have assumed a greater proportion of space in this report, since they were articulated in a widely divergent manner by more people. They cannot be lightly dismissed, since they may well represent a sizeable body of public opinion. Yet, as noted in reference to the role of the judiciary, the perspectives of the minority — even of a very small number — must receive the same serious consideration. They, too, reflect one inclination of the electorate.

In the end, responsibility for determining Pennsylvania's means of selecting appellate judges and justices rests with the people. Any constitutional amendment, for example, will be subject to popular vote, whether it provides for a commission plan or one of the reforms suggested for the elective system. When that comes about — if that comes about — all sides will present their case, and the people will decide.

Change, regardless of its aim, comes slowly. The search for the best method of appellate judicial selection is not, in the words of one interviewee, "a race for the short-winded."


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*Pennsylvania Manual.* This book was first published in 1866 as the Manual of Rules of the General Assembly of Pennsylvania and Legislative Directory Together With the Constitution of the United States and Pennsylvania and was compiled by John A. Smull. In 1867, the publication was re-titled Smull's Legislative Handbook. Publishing rights were passed on to others and sold throughout the years, but the name remained the same. In 1925, the state purchased the copyright and renamed it the *Pennsylvania Manual.* The book has always been printed by whoever had contracted to perform the state printing and is currently published by the state itself in Harrisburg. Formerly published annually, the book has been published only every other year since the state assumed ownership. For this project, every volume of the *Pennsylvania Manual,* in all its forms, was consulted.


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