Pennsylvanians for Modern Courts

3700 Bell Atlantic Tower • 1717 Arch Street • Philadelphia, PA 19103-2793
(215)994-5196 • Fax (215)994-2222

Hon. Edmund B. Spaeth, Jr.
Chair, Board of Directors

Lynn A. Marks
Executive Director

TESTIMONY PRESENTED TO HOUSE SUBCOMMITTEE ON COURTS HEARING ON HOUSE BILL 1320 (REGIONAL MERIT SELECTION)

Edmund B. Spaeth, Jr., PMC Board Chairman
Harrisburg, August 30, 1995

Thank you for inviting me to speak today on three judicial reform proposals now pending before the Senate Judiciary Committee. My name is Edmund B. Spaeth, Jr. and I am the Board Chairman of Pennsylvanians for Modern Courts (PMC).

In offering this statement in support of amending the Pennsylvania Constitution to provide that justices of the Pennsylvania Supreme Court and judges of the Pennsylvania Superior and Commonwealth Courts should be selected and appointed on the basis of merit instead of being chosen by partisan political elections, I shall refer principally to my own experience.

I was a judge of the Superior Court from 1973 to 1986; to become that, I had to run in three state-wide partisan elections. I was appointed to a vacancy on the Superior Court in January 1973. In May 1973 I ran in the primary election, seeking nomination as the Democratic candidate (or Republican, for cross- filing was then permitted) in the November 1973 general election; however, I was defeated. When another vacancy occurred on the Superior Court, in December 1973, I was appointed to that vacancy. In May 1975 I again ran in the primary election; this time I was nominated as the Democratic candidate, and in the November general election I was elected to a ten year term on the court. When my term expired, in January 1986, I declined to run for retention on the court.

When I declined to run for retention, I was President Judge of the Superior Court and 65 years old. Thus, if retained, I would have been able to serve five more years on the court. I very much enjoyed service on the court and regarded service as a high professional privilege; I should have liked to have continued to serve on the court. I was nevertheless unwilling to run for election—even on a retention basis—because in my view the election of judges, in particular of appellate judges, is fundamentally unsound because it is inconsistent with the creation of an impartial and qualified judiciary. In the balance of this statement, I shall summarize my reasons for this conclusion.

First: The election of appellate judges—that is, the justices of the Supreme Court and the judges of the Superior and Commonwealth Courts—does not in any sense reflect a deliberate decision by the electorate; it is rather a process that has been accurately characterized as a "politically bossed system that masquerades as an instrument of popular will."

When I ran for the Superior Court, I often asked my audience whether any one knew who I was or anything about the Superior Court. Except for an occasional lawyer or personal friend, no one did. I was then able to explain the responsibilities of the Superior Court, and so at least inform the audience of the importance of the election, but there was very little I could do to tell them about why they should vote for me. I could not, of course, promise to decide cases in a way that might have pleased a particular audience—that I would be for, or against, labor, for, or against, plaintiffs in accident cases, and so on. I particularly remember a conversation I had with a member of one of the groups I spoke to. After she

had heard me explain that I could not make any such promises because it would amount to prejudging cases I knew nothing about; that a judge's responsibility was to decide each case on its particular facts and on the basis of the law, not on the basis of the judge's own predilections; and that in doing that the judge must be careful to listen to all of the witnesses and to consider the arguments of both lawyers as impartially as possible—after listening to all this, she said, "But how does that help me decide whether to vote for you? Isn't that what every judge is supposed to do?"

In the end, I was elected by a substantial margin. But that didn't indicate in the least that finally, after three campaigns, the voters were in a position to decide whether I would be a good judge. If, right after my election, the voters had been asked who I was, most of them would not have had the least idea. The Democratic party ran an effective campaign in having its party workers get my name on sample ballots (in the 1973 primary, which I lost, the party ran almost no campaign, assuming that no problem would arise; after I lost it was learned that many voters had voted for my Republican opponent under the mistaken impression that he was a Democrat). Most important, there was a vigorous mayoralty race in Philadelphia, which the Democratic candidate won by a large margin. I was on his sample ballots and so came out of Philadelphia with too much of a lead for my Republican opponent to overcome. My election no more reflected the popular will than my opponent's defeat did. We both were either the victim or the beneficiary of political chance.

People do not vote for an appellate judicial candidate as they do for other state-wide candidates. They have some basis for choice in voting for Governor or United States

Senator; such candidates may, and do, take positions (for expanded medical coverage, for family leave, for lower taxes, whatever). But appellate judicial candidates cannot—or should not—take positions on how they will decide cases, and they are picked by voters on the basis of factors irrelevant to their qualifications: the candidate's ballot position; whether the candidate's name has a familiar ring; in what county the candidate lives; whether the local party worker (who knows nothing about the candidate's qualifications either) recommends a vote for or against the candidate.

In short, the argument that electing appellate judges is an exercise of popular will has no merit; it ignores the evidence and is contradicted by the experience of those who have run for election to an appellate court.

Second: The election of appellate judges inevitably and necessarily involves the judicial candidates in a process that compromises their independence, if not in fact at least in appearance.

When I ran for election to the Superior Court, almost all of the audiences I appeared before were Democratic audiences—Democratic County Committee dinners and picnics, for example; almost all of my opponent's audiences were Republican. That's wrong. There are real, and legitimate, differences in political philosophy between the Democratic and Republican parties. But there's no such thing—or shouldn't be—as Democratic or Republican law. To count noses, and say that an appellate court is "Democratic" (or "Republican") because a majority of its judges were elected as Democrats (or as Republicans) is to say that the court is irresponsible—that it decides its cases on the basis

of a partisan political philosophy rather than on the basis of an impartial application of the law to the particular facts of the case. It therefore made me, as it has made many other judicial candidates, intensely uncomfortable to appear before and seek the support of politically partisan audiences. It was inevitable that at least many in the audience, especially the non-lawyers, would infer from my appearance that I would decide the cases that came before me "their way"—as a Democrat. I could not escape the feeling that by appearing before them, I was impliedly promising to do just that—no matter how clearly I tried to say otherwise. And yet, there was no escape. If I was to be elected, I had to campaign, and that meant appearing before politically partisan audiences.

There was also no escape from another fact inconsistent with at least the appearance of judicial independence. No one can run a campaign without spending money. Unless one is wealthy, that means asking others to give you money. And if one is a judicial candidate, that means asking lawyers—not yourself but some one for you—for money. Lots of money. In each of the two most recent appellate judicial elections, a candidate raised well over one million dollars.

Do you think it right that a judicial candidate accept financial support from a lawyer (or association of which the lawyer is a member) and then, if elected, preside over a case in which the lawyer appears? How would you feel if you were the other party? Would you ask your lawyer, "Did *you* contribute to the judge's campaign committee?"

Most lawyers are honorable and understand the judicial candidate's position; if they think the candidate would be a good judge, they make a campaign contribution without any

expectation of later favorable treatment. And most judicial candidates are also honorable; they leave fund raising to their committees, and they do not in any way suggest or hint at later favoritism for supporters. The fact remains that in the common sense view of the non-lawyer citizen, "The one who pays the piper calls the tune."

We can never have a judiciary that is not only impartial in fact but is seen to be impartial, and therefore commands the respect of all our citizens, until judges are selected without being obliged to curry politically partisan support and to seek contributions from lawyers and other special interest groups.

That doesn't mean that we don't have some fine judges. We do. When I was a judge, I worked with many of them, and I count some as valued friends. But such judges are fine judges not because of but in spite of the way they were selected. They have been able to put aside, to transcend, the compromises of the politically partisan process through which they had to go to reach the bench. Not all judges can do that. And the public knows it.

Surely the time has come for us to do better. Pennsylvania is one of only eight states that selects all its judges by partisan political election. Is every one out of step but Johnny?

I don't propose in this statement to describe merit selection. Others in their statements will do that. But the experience of other states shows that merit selection is a far better way than partisan election to get a competent, independent judiciary of unquestioned integrity.

And contrary to its critics, merit selection is not undemocratic. In the first place, the people's elected representatives play a central role in the merit selection process. The

Nominating Committee's members are appointed by the Governor and the leaders of the Senate and House of Representatives, and to become a judge a nominee of the committee must be appointed by the Governor and confirmed by the Senate. And in the second place, merit selection produces a more representative judiciary than partisan elections do. In Pennsylvania the appellate bench is mostly white, male, and from the two largest metropolitan areas. In merit selection states the bench has a much fairer representation of women and minority groups and is much more geographically diverse. This result is not surprising. To be nominated the judge must be a lawyer of demonstrated ability and integrity. Thus, *every* qualified lawyer has a chance—not only lawyers from the largest and most politically powerful counties who have connections and who are willing and able to raise a lot of money for their campaigns, but qualified lawyers wherever they live.

Nothing, absolutely nothing, is more important to the welfare of our citizens than an independent, incorruptible, and learned judiciary. Let us therefore do all we can to achieve such a judiciary. Without it, there cannot be that general respect for the law on which our society depends.

Thank you for the opportunity to present this statement.