

STATEMENT BY FORMER SUPERIOR COURT PRESIDENT
JUDGE EDMUND B. SPAETH, JR.
IN SUPPORT OF SENATE BILLS 1324 AND 1325
SENATE JUDICIARY COMMITTEE – SEPTEMBER 16, 2008

In 1964, Governor Scranton appointed John McDevitt and Alexander Barbieri, both Republicans, and me, a Democrat, to the newly created Philadelphia Court of Common Pleas. The appointments were supported by both parties, so our election was a mere formality. I raised no money and did no campaigning.

In 1973, Governor Shapp appointed me to a vacancy on the Pennsylvania Superior Court. Later that year, I was defeated in the primary election. As it happened, however, I remained on the court because another vacancy occurred and Governor Shapp appointed me to that. This time, when I ran for election in 1975, I was elected.

In many ways I enjoyed campaigning, and I learned a good deal from the experience. I met a wide variety of people, who were almost always gracious and hospitable, and saw a great deal of our beautiful state. On balance, however, campaigning was deeply unsettling.

By definition, the law is an impartial body of rules. There is no such thing as a Democratic or Republican principle of law. When I was campaigning, however, I was presented, and was seen, as a Democrat. Almost all of the events in which I participated were sponsored by the Democratic Party.

In addition, it was necessary to raise money to pay my campaign manager, and to cover expenses for traveling and advertising. While a committee did this for me, I felt responsible, for it was acting on my behalf. No one ever asked me to make a commitment in return for a contribution. Nevertheless, it seemed to me inevitable that many would see me, if I was elected, not as a judge who would be impartial but as someone indebted to the Democratic Party's political agenda.

Finally, the process of campaigning was mostly meaningless. Legislative candidates can – and should – promise that if elected they will, for example, work for a higher minimum wage. But a judicial candidate can't – and shouldn't – promise, for example, that he or she will favor injured parties over insurance companies. I recall one exasperated voter saying, when I told her the only promise I could make was to apply the law as fairly as I could. “Isn't that what every judge is supposed to do?”

As it happened, I was elected, and it would be nice to think that was because a majority believed I was qualified and would be a fair judge. In fact, it was because of luck. When I ran for election, there was a contested mayoralty election in Philadelphia, which generated a big turnout. Now, Philadelphia is a Democratic town. Early on election night, when the Philadelphia vote had been counted, my campaign manager turned to me and said, “Judge, relax. You're in.”

In the years since I was elected, the process of electing appellate judges has become much worse. I don't recall how much money my committee raised – under \$100,000, I'm pretty sure – but it was a trifle compared to what a candidate needs to raise today. In the last Supreme Court election, I understand, a record \$8 million was raised. Judicial elections are seen, and treated, as partisan battles, and courts are described as partisan institutions, “Republican” or “Democratic,” depending on the party affiliation of a majority of the judges. Polls have shown that nearly 90% of Pennsylvanians believe that judges' decisions are sometimes affected by who contributed to their campaigns.

The only way to change the perception of the courts as partisan and judges as subservient to their supporters is to do as Senate Bill 1324 would do: take judges out of elections so they won't need, or have any reason, to raise money.

Some say that the people have a right to elect all of their officials. But that begs the question, whether they have such a right depends on the law, and the law can be changed. In many states the law provides for the merit selection of appellate judges. The judges on the New York Court of Appeals, for example, are selected by merit. The question is not whether there is a “right” to elect appellate judges but whether electing them is the best way to select judges that the public

will regard as persons who know the law and will apply it fairly. Surely we should know by now that electing appellate judges is a most unsatisfactory way of choosing them.

Some say, however, that merit selection wouldn't be any better – that it would be as politically partisan as elections. I respectfully suggest that any fair reading of Senate Bill 1324 will show that that's just not true.

Certainly politics would continue to play a part in judicial selection. The Governor, after all, is either a Democrat or Republican, and he or she would choose the nominee; and the Senate would decide whether to confirm the nominee. But the Governor would have to make his or her choice from a list developed by a nonpartisan Nominating Committee.

It has been said that choices by the committee would be “elitist,” or “dominated by big law firms” or by “special interests.” I submit, that's just name-calling.

A good judge must have two characteristics: knowledge of the law, and even-handed respect for others, or, as it is sometimes said, “a judicial temperament”. It would not be difficult for the Nominating Committee to determine whether a potential candidate had these characteristics. Now, any lawyer can run to be elected an appellate judge. Under Senate Bill 1324 a candidate would have to have been a lawyer for at least 10 years. You can't be a lawyer that long without showing, by your conduct in court, your briefs and arguments, or by articles you've written, whether you know the law; and without also showing, by the way you treat others and by your community activities, whether you have a judicial temperament.

It is sometimes said that supporting merit selection amounts to saying that elected judges aren't qualified to be judges. But that's an oversimplification and is misleading. The point is that the only responsibility of a merit selection Nominating Committee is to determine whether an applicant has the characteristics of a good judge – a determination, as I've said, not too difficult to make. When a political party decides who should run for election to an appellate court, however, the party takes into account characteristics that have nothing to do with being a good

judge: name recognition, the ability to raise a lot of money, political base. The party's aim is to run a candidate who will win, not one who knows the law and has a judicial temperament.

Thus, a merit selection Nominating Committee will consider a much larger pool of possible nominees than will a political party. A highly qualified lawyer, but with no political clout, and unable, or unwilling, to raise \$1,000,000 to campaign, can become an appellate judge.

Moreover, by emphasizing qualifications instead of the ability to win a partisan election, merit selection will produce a more diversified bench than we have had. Any judge who has sat, as I have, both on courts with and without a diverse bench, knows how important a factor diversity is. A court's decision represents a consensus of the judges' views. The greater the number of views, the more sensitive and thoughtful the decision is likely to be.

An important feature of Senate Bill 1324 is its attention to ensuring that appellate decisions will take into account the diversity of the people of Pennsylvania. The bill provides that the Nominating Committee must include in its membership both men and women who live in different areas, who represent ethnic and racial minorities, and who have varied occupations. One may have considerable confidence that such a committee will submit a list of possible nominees, not "elitist" or homogenous, but reflecting its own composition.

One further feature of Senate Bill 1324 should be mentioned. A merit-selected appellate judge would serve four years; then he or she would have to stand in a Yes/No retention election for a full term. Unlike the present partisan elections, this election would provide voters a meaningful choice, for they would know from the judge's opinions whether he or she was learned in the law and had applied it impartially, and from the judge's conduct they could determine diligence and judicial temperament.

Very little, if anything, is more important than the quality of justice and respect for the law. Both would be enhanced by removing appellate judges from costly partisan elections and selecting them on merit. I respectfully urge the committee to report Senate Bill 1324 out with a favorable vote.

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