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LET THE PEOPLE DECIDE: JUDICIAL SELECTION IN THE 1967 PENNSYLVANIA CONSTITUTIONAL CONVENTION

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The modernization of Pennsylvania's ninety-four-year-old constitution was the unique result of the dual process of amendment and a limited convention. Following the defeat of a popular referendum for an unlimited convention in 1963, and in accordance with the report of a study commission appointed by Governor William W. Scranton, thirteen areas of the Pennsylvania constitution were considered to be vitally in need of revision. Employing the technique of amendment, voters approved two changes in 1966, and seven in 1967. It was also decided that a limited constitutional convention could best accomplish the earliest passage of the most controversial alterations. Consequently, the electorate considered and approved both the call for the convention and a series of comprehensive amendments to the constitution in the primary election of May 16, 1967. One of the most discordant issues left for the convention related to the judiciary article.

Between December 1, 1967, and February 29, 1968, the 163 delegates to Pennsylvania's fifth constitutional convention produced a

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largely self-executing document notable for its flexibility, with surprising initiative for the people.² Nowhere was that flexibility more evident than in the activities of one of the four substantive (or primary) committees of that convention — the Judiciary Committee — and its ultimate product, the Judiciary Proposal, the development and adoption of which caused more debate and contention than any other proposal at the convention. In particular, it was apparent in the single most controversial aspect of the Judiciary Proposal — the selection of judges.

The eight men who comprised the Subcommittee on the Selection of Judges were charged with determining the best possible method of selecting judges in the Commonwealth of Pennsylvania. The prescribed method in Pennsylvania at the time was election with some variation. Subcommittee members examined the existing provisions, reviewed available literature, looked at provisions and conditions in other states, and along with the entire Judiciary Committee, listened to “authorities” testify at public hearings held both prior to, and during, the convention. The subcommittee then drafted a proposal and referred it to the parent Judiciary Committee, which in turn formulated the proposal that was presented on the floor of the convention.

The presentation of the Judiciary Proposal to the convention, and the battle which ensued before a proposal evolved that was acceptable to the necessary number of delegates, was variously described as “the single most dramatic situation” in the convention, a “dog-fight,” and a “free for all.”³

A cursory examination of Pennsylvania's four previous constitutional conventions reveals that the judicial package — particularly the section concerning the selection of judges — was an important and disputed issue in each one.⁴ Perhaps this specific aspect of the judicial article has been so contentious because the position of judges has never been clear. On the one hand, they are to be nonpolitical, oblivious to and free from the fracas of politics. At the same time, few people would dispute the notion of accountability, that is, judges must maintain a certain responsibility to the people. Nevertheless, the

² George D. Wolf, Constitutional Revision in Pennsylvania (New York, 1969), 34.


process of selection is central to a judicial and political system whose final authority rests with the people.

There are three methods for selecting judges. They can be appointed; they can be elected; or they can be chosen by some combination thereof. An increasingly popular "combination" method is the nominative-appointive-elective system popularly known as the Missouri Plan. This plan features a lay-lawyer-judge judicial nominating commission consisting of laymen chosen by the governor, lawyers selected by the bar association, and a judge selected in accordance with rules of the state supreme court, which recruits and nominates judicial candidates. The governor then selects his appointments from these candidates. After a short probationary period, these judges face retention or rejection by the electorate in a merit election, in which their names appear on a nonpartisan "yes-no" ballot.5

Advocates of the Merit Plan or Missouri Plan argue that the operation of the commission is nonpolitical. Individuals are selected according to their qualifications as judges rather than their "electability" as assessed by political party leaders. Supporters maintain that more capable people will be attracted to judgeships if they do not need to worry about a political campaign and the time and money involved in one. Finally, it is asserted that in the long run, a judicial nominating commission will be able to establish specific standards for selecting and rating all judicial candidates.6 The idea of such a commission was considered at the convention. In 1964, Governor William W. Scranton had become the first governor to establish a judicial nominating committee by executive action alone. He used the recommendations of his special nominating commission for the appointment to five new judgeships in Philadelphia. In Pennsylvania, this voluntary establishment of a nominating commission was a variation of the executive appointment plan; it deviated from the Merit Plan in that the judge who wished to be retained had to seek a nomination and election in the regular primary and partisan general elections.7

Of the seven attempts to call another constitutional convention in Pennsylvania after 1874, six were defeated by the electorate. That the 1967 attempt succeeded was due in large part to the work of the Pennsylvania Bar Association (PBA) which, since the formation of

5 Pennsylvania, Constitutional Convention, 1967-1968, The Judiciary, Reference Manual No. 5, 125-27. (At the time of the convention, fifteen states employed some form of merit plan to select their judges; six of the fifteen states used the Missouri Plan in its entirety: Alaska, Colorado, Iowa, Kansas, Missouri, and Nebraska.)
6 Ibid., 128-29.
7 Ibid., 87-88.
“Project Constitution” in 1961, had been seriously concerned with and actively involved in the problem of constitutional revision.

In 1966, the PBA presented its Proposed Judiciary Article — the culmination of a six-year study by 300 members of the association. In its proposed article, the PBA endorsed the idea of a judicial nominating commission, similar to that of the Missouri Plan, to be used in selecting judges on both the state and local levels.

The PBA plan had broad support from numerous organizations in the commonwealth, including the Americans for Democratic Action, the Commission for Economic Development, the League of Women Voters of Pennsylvania, the Pennsylvania Division of the American Association of University Women, the Pennsylvania Federation of Women’s Clubs, the Pennsylvania State Chamber of Commerce, and the Committee of Seventy, a civic-minded group of Philadelphians organized to promote good government for Philadelphia. This support was made public at the hearings held by both the Preparatory Committee and the Judiciary Committee. All these groups were potentially influential as official lobbyists or interested bystanders; however, the ultimate decision on the plan would be made by the delegates themselves.

The chief protagonists in the lobbying struggle in the convention over the question of judicial selection were the Pennsylvania Bar Association and the Pennsylvania Democratic Study Commission which had been formed by the next governor, Milton Shapp. In the continuing debate which at times became rancorous, the PBA endorsed appointment while the Shapp group urged election. The Philadelphia Bulletin suggested that judicial selection was also a partisan issue with Republicans favoring appointment and Democrats election. Bar politics and party organization politics were seen as the contenders. Nevertheless, the Bulletin deplored “Judgeships on a Platter.” The Pittsburgh papers split on the question, with the Post-Gazette supporting appointment while the Press assailed the so-called “merit selection.” Concern for the minor judiciary clouded the issue in rural areas, particularly in the western part of the state, and Philadelphia was protective of its local magistrates.

The delegates to the convention were as diverse in backgrounds and occupations as the commonwealth they represented. Attorneys

predominated — 69 of the total 163 delegates, or 42.3 percent, were lawyers. Thirty-two of the forty-two members of the Judiciary Committee were lawyers, and in this group were six of the eight delegates assigned to the Subcommittee on the Selection of Judges. Whether real or imagined, this preponderance of lawyers turned out to be a handicap in the convention. From the outset there developed an anti-PBA (or perhaps a generally antiattorney) faction. There were times during the debates that an amendment appeared to get short shrift simply because it had been proposed by, or was being supported by, attorneys. (It is interesting to note, however, that a considerable number of lawyers failed to stay on their own "side of the fence.")

Other delegates at the convention were state legislators, real estate and insurance brokers, and accountants. There were executives and industrialists, and a few educators and writers, the most illustrious of the writers being Pulitzer Prize-winner James Michener. There were clergy in small number, and a few farmers and homemakers.

The PBA's Proposed Judiciary Article was introduced to the convention on Judiciary Day, December 12, 1967. Its introduction followed an address by Chief Justice John C. Bell in which he, in effect, launched the plan by saying:

The new Judiciary Article as drawn by the Pennsylvania Bar Association amounts to a major surgical operation. If any of you had to have a major surgical operation, would you go into the highways and byways and ask laymen who the best surgeon would be for you, or would you not go to the experts for expert advice as to the best possible surgeon for you? Such an expert judicial commission is exactly what I recommend to you. . . .

The PBA plan, designated Delegate Proposal No. 1000, was introduced to the convention by Richard Thornburgh, then an attorney from Allegheny County and now the state's governor, and was immediately referred to the Subcommittee on the Selection of Judges, of which Thornburgh was a member and secretary. The divergence of opinion that arose within the subcommittee was a portent of things to come. It is interesting to note that within the subcommittee itself could be found most, if not all, the points of view that would arise within the Judiciary Committee and then, finally, on the floor itself.

In the weeks that followed the introduction of Proposal No. 1000

10 Constitutional Proposals Adopted by the Convention, 51-59. The six delegates on the subcommittee who were attorneys were Cortese, Kauffman, Ruth, Shapiro, Shragar, and Thornburgh.


12 Ibid., 94.
in the subcommittee, many other delegate proposals came before the subcommittee for review. A number of these called for a judicial nominating commission, with only slight variations from Delegate Proposal No. 1000. Others called for the retention of the election of judges; some asked for gubernatorial appointment with the consent of the state senate, without a judicial nominating commission. As the weeks passed, however, it became increasingly clear that the subcommittee would favor a commission in some form. A comparison of the final subcommittee proposal with Delegate Proposal No. 1000 — that of the PBA — reveals that the subcommittee incorporated the major basis of the PBA proposal, including a commission on both the state and local levels.

The factions within the Judiciary Committee turned out to be the subcommittee groups magnified. From the time the full committee first met on January 15, 1968, until January 29 when the committee reached a decision on the selection of judges, the words “consensus” and “majority” eluded the group.

A good illustration of this point can be found in an article in the Stroudsburg News of January 25, 1968, quoting former Governor William Scranton, cochairman of the Judiciary Committee, predicting that “We’ll buy the PBA Plan,” and former Judge Robert Woods, also a member of the Judiciary Committee, declaring that “the one thing that seems to be crystallizing with the delegates is favor for the continued election of judges.”

Votes were taken and proposals fell. As the deadline for the completion of the judiciary proposal approached, the committee was forced into working extremely long days. Despite its zeal, dedication, and “action,” however, the committee was unable to meet its February 2 deadline. It was not until February 5 that its proposals were conveyed to “an expectant and grateful convention” as Judiciary Proposal No. 7.

A comparison of the committee proposal with those of the PBA and the subcommittee reveals that all three incorporated the basic ideas:

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of a nominating (qualifications) commission, both statewide and district, gubernatorial appointment, and merit retention. Voters would be given the option of adopting this plan or continuing to elect their local judges.

After the delegates had received copies of Proposal No. 7, Scranton stressed that the key consideration of the Judiciary Committee had been to separate politics from judicial selection. He also admitted that Section 11 — selection of judges — had been "the most contentious and most contested of all the portions of the article." It would continue to be so. Before the debate on the proposal ended, 108 attempts would be made to amend the judiciary article, approximately 40 of them pertaining directly to the selection of judges.

The trouble that lay ahead for the committee proposal could be predicted when, on the first day of discussion, Walter Wilmarth, a farmer from Kingsley, Susquehanna County, offered the following suggestion: "I would like to suggest that if all those connected with the legal profession will now retire, by 5 o'clock this evening the rest of the delegate body would come up with a judicial article that would be a model for the other forty-nine States." 21

Opposition to the committee proposal took one of two basic forms. There were those who wanted to retain the election of judges in the commonwealth, eliminating judicial qualifications commissions, gubernatorial appointment, senatorial consent, and the like. Then there were those who favored gubernatorial appointment of judges, with the consent of the senate. This second group of delegates did not favor a nominating commission of any sort. Thus, those defending the committee proposal had two distinctly different approaches to repel.

On Monday, February 19, the debate reached Section 11 — selection of judges. The tone of the opposition was set almost immediately by delegate Charles P. Henderson, a school superintendent from Industry, Beaver County, who referred to the judicial qualifications commission as a "blue-ribbon panel," a designation that once attached to the concept would be difficult to dispel. Henderson provided the theme around which opponents of the proposal would rally. Said he: "The will of the people must be realized," implying that the will of the people was to continue to elect their judges. 22

point of view with statements like "The choice of men who will sit in judgment should remain with those who are to be judged," 23 and "They [the courts] belong to the people." 24 Debate on the proposal began in earnest when delegate Gerald Ruth, an attorney from York and a member of the Subcommitteee on the Selection of Judges, offered an amendment calling for the abolition of the local option provision of the proposal and a return to the election of judges on the local level.

Ten speakers supported the amendment; ten opposed it. Perhaps the most impassioned argument for the amendment was made by delegate K. Leroy Irvis, attorney from Pittsburgh, house minority whip, and later speaker of the house. That the amendment itself was proposed by an attorney and strongly supported by some others substantiates the point made earlier that, although there was a distrust of lawyers on the part of some delegates, not all lawyers would support the Judiciary Committee proposal.

As the debate continued, support for the committee proposal seemed to be growing at the expense of the amendment calling for the election of local judges. But when the vote was taken on the Ruth amendment, it carried ninety to fifty-five. 25 That vote eliminated the local option provision of the proposal which was to have given the people a choice as to how to select their local judges.

On Tuesday, February 20, the first item for consideration was the selection of judges on the state level, the method of choosing local judges having been decided in favor of election the preceding day. Timing was important here. As already indicated, there were in the convention three factions on the issue of the selection of judges. Together, the two "appointment" groups were sufficiently strong to defeat the "election" group; yet alone, neither was strong enough to carry the majority. The approach used in discussing Section 11 was the following: the delegates would first decide whether to continue electing state judges. If election were to be continued, there would be no need to spend time discussing forms of appointment. This seemed logical, so the Jirolanio amendment (delegate Justin D. Jirolanio of Northampton County), which called for the election of all state judges, was introduced. One might speculate that if the two methods of appointment had been debated first, both might have lacked sufficient support, and election might have emerged as the majority view.

The arguments for and against the Jirolanio amendment were

23 Ibid.
24 Ibid., 982.
25 Ibid., 992.
similar to those heard the previous day during the debate on the Ruth amendment. The major new argument in support of the committee proposal, that is, appointment of judges by the governor with the advice of a judicial qualifications commission, was that at the statewide level, voters were much less likely to know their judges. Also cited as an argument against the amendment was the fact that no supreme court candidate of one party had been elected in the twentieth century in Pennsylvania when the gubernatorial or presidential candidate from the other party was successful. Champions of judicial appointment argued that the Jirolanio amendment, calling for the election of judges at general elections, would only reinforce this trend.

For every delegate willing to speak on behalf of the committee proposal — or at least against the election of judges — there was at least one supporter who wished to be heard. The debate continued until finally delegate Matthew Gouger, a farmer from Waynesboro, Franklin County, rose and offered this analogy: "Mr. President, down on the farm we know you can destroy a field by plowing it too much. We have plowed this field almost to the point of destruction. We are satiated with oratory. We know the issues. I move you, Mr. President, the question." The vote was taken, and the electronic board registered a tie, seventy-two to seventy-two. Before the vote was officially announced, however, there were charges of an electronic mixup, and this resulted in a revote, the result of which was seventy-five to seventy-five. The amendment fell. An examination of the second vote reveals that of eighteen members of the Judiciary Committee, four of them on the Subcommittee on the Selection of Judges voted for the Jirolanio amendment and therefore against the committee proposal. With the defeat of the Jirolanio amendment, it appeared that the concept of electing state judges had been repudiated and that appointment in some form would be the final action of the convention. Presumption and fact, however, are not necessarily synonymous.

The next amendment to the committee proposal was offered by Bruce Kauffman, an attorney from Montgomery County. This amend-

26 In support of this, delegate William F. Clinger, Jr., a member of the Judiciary Committee, revealed that he had made a survey the previous weekend, the results of which were that of all the members of his county's (Warren) Democratic and Republican committees, and fifty other people chosen at random, only two were able to name the man for whom they had voted for judge in 1966 (Journal, II, Feb. 20, 1968: 1011).
27 Ibid., 1018.
28 Ibid., 1021-24. Eighteen members of the Judiciary Committee voted for the Jirolanio amendment, four of them on the Subcommittee on the Selection of Judges: Cortese, Ruth, Shrager, and Warman (ibid., 1023).
ment, designated here as Kauffman amendment I to distinguish it from others that would be offered by Kauffman, provided for gubernatorial appointment of judges with two-thirds consent of the state senate. No judicial qualifications commission was included. Scranton was among those who opposed this amendment. (This opposition by Scranton appears to have been the first time that the former governor exerted real influence on the floor of the convention.)

Supporters of Kauffman amendment I tried to convince the convention delegates that a qualifications commission, or “panel,” would serve only to “protect” the governor, and that he should be forced to make judicial selections on his own and take full responsibility for them. The counter-argument was that the governor would not make the selections “on his own” in any case; he would necessarily consult others. Having a panel would simply enable the public to identify his consultants. When the question was finally moved, the amendment was defeated sixty-seven to seventy-nine.

Kauffman immediately introduced Kauffman amendment II which provided what its sponsor called a “safety valve.” The governor would be given a choice: he could utilize a judicial qualifications commission, and if he made his selection from the list of ten to twenty names provided by the commission, no senatorial confirmation would be required. If, however, he did not feel that any of the names were “worthy to be appointed,” he would be free to appoint someone not on the list, but such an appointment would require a two-thirds vote of the state senate.

Scranton again rose and pleaded for defeat of this amendment which, if passed, would nullify the committee proposal. Kauffman amendment II was subsequently defeated by a vote of sixty-one to seventy-five, along with several other amendments which were offered before that day’s session adjourned.

Little did the delegates realize when reporting for Wednesday’s session that the day would be spent rededucing what had been decided the previous day. Delegate Robert D. Fleming, real estate and insurance broker from Aspinwall and president pro tem of the state senate, offered an amendment which provided for the election of all judges. As already noted, election of judges had been voted on, defeated, reconsidered, and defeated a second time the day before. Ac-

29 Ibid., 1035.
30 Ibid.
31 Ibid., 1036-37.
32 Ibid., 1039-55.
cording to the rules, which stated that an amendment could be reconsidered only once, this matter should not have been brought up again. Nevertheless, the chair ruled that the language in the Fleming amendment was sufficiently different from that in the Jirolanio amendment, and therefore it could be introduced, debated, and voted on. This action caused consternation among some delegates who felt the pressure of time — much of the judiciary proposal was yet to be considered for the first time. But this was only the first of several times that a matter which had been voted on would be revived.

Debate on the Fleming amendment provided another chance for both sides — election versus appointment supporters — to reiterate their views. Once again, the entire delegation to the convention was subjected to speeches in which each side claimed omniscience as to what the people wanted. Told to search their consciences and do the “right thing,” eighty-one delegates said no to the Fleming amendment, and only sixty-three favored the proposal which called for the election of all judges.

At least momentarily, the tide seemed to have turned in favor of the committee proposal — the delegates had defeated election for a second time. Following defeat of the Fleming amendment, however, as if providing a prelude for what was to come, delegate K. Leroy Irvis of Pittsburgh said: “I, too, get tired of hearing speeches and hearing people say over and over again what they said over and over again before. I get tired of hearing myself saying over and over again what I said over and over again before. But . . . .” With that, delegate Americo V. Cortese, lawyer and former legislator from Philadelphia, stood and asked for a reconsideration of Kauffman amendment I, defeated sixty-seven to seventy-nine the previous evening. Following lengthy debate, the question was moved and voted upon, with the official count seventy-eight to sixty-five in favor of Kauffman amendment I. Less than twenty-four hours had elapsed since the defeat of this same amendment.

An examination of the vote reveals that forty-six delegates changed their votes from the way they had cast them the day before. Interestingly, of those who now found themselves in favor of the amendment, nine were members of the Judiciary Committee, and of these nine, four were members of the Subcommittee on the Selection

34 Ibid., 1060-61.
35 Ibid., 1060-64.
36 Ibid., 1064-65.
37 Ibid., 1065.
38 Ibid., 1065-66.
of Judges of which Kauffman was cochairman. Presumably changes of this magnitude are not made overnight without serious consideration. It is generally agreed that this constitutional convention was not "political"; however, at that moment the bipartisan or nonpartisan attitude appeared to have weakened.

With the passage of Kauffman amendment I, the concept of merit selection of judges by a judicial qualifications commission seemed to have been defeated. The end of the convention, however, was still one week away.

On Friday, February 23, the major attraction, as far as the judiciary proposal was concerned, was what one delegate referred to as a "last-ditch attempt" to restore the committee proposal calling for a judicial qualifications commission in selecting state judges. The attempt was the Stout amendment, offered by William B. Stout, a contractor from Bentleyville, Washington County. This amendment was in essence, if not exactly, the same as the earlier Kauffman amendment II, defeated the preceding Tuesday. Again, as in the case of the Fleming amendment, the language was ruled sufficiently different from any previous amendment, and its introduction was allowed. This time Kauffman was one of those most upset by a reconsideration of the matter of appointment of judges for state courts. A debate between Kauffman and convention president Raymond J. Broderick finally ended in a tabling of the matter until the following Monday.

For some of the delegates, that weekend, the last one of the convention, was a busy one. According to one delegate, unless a lot of "arm-twisting" was done over the weekend, there would probably not be enough votes on Monday to take the Stout amendment off the table and pass it.

On Monday, the first surprise came when Kauffman, who had argued so vociferously against considering the amendment on Friday, made an impassioned plea for its passage. Another delegate com-

39 Those four were Kauffman, Lee, Ruth, and Shrager. Nineteen of the forty-six who changed their votes went from a nay vote and three from not-voting to a yes the second time. Only six who had voted for the amendment the first time voted against it the second. There were six who had voted for it the first time who refused to vote the second time, or were absent, and five who voted against it the first time registered the second time as not-voting. (Records of the Director of Operations, "Roll Call Votes, February 5-29, 1968," Vote on Kauffman Amendment, Feb. 21, 1968.)
42 Ibid., 1202-4.
pounded the confusion by suggesting that “special interests and people of no responsibility, not even minority groups” had been operating over the weekend.\(^45\) In examining the arguments against the Stout amendment, it becomes clear that even though the convention had voted against election twice (defeating the Jirolanio and the Fleming amendments), there were still many delegates who were unsettled by the thought of having to choose a method of appointing judges.

During the debate on the Stout amendment, several references were made to what had transpired the preceding weekend. Emotions reached such a pitch that a direct attack was made on a particular interest group — the League of Women Voters, or “vultures” as one delegate called them.\(^46\) The league, of course, was still advocating merit selection. Following this acrimonious diversion, the delegates defeated an amendment to the Stout amendment. Once Stout’s amendment had been voted off the table, delegate Alan I. Aberman, attorney from Philadelphia, presented another amendment to the amendment. It called for the general assembly to be empowered to establish a judicial qualifications commission.\(^47\)

With the presentation of the Aberman amendment, three alternative methods of appointment were before the convention: (1) Kauffman amendment I: gubernatorial appointment with two-thirds consent of the state senate; (2) Stout amendment: gubernatorial appointment with the choice of either a commission or senate approval; (3) Aberman amendment: General Assembly to choose a judicial qualifications commission. After a relatively short debate, the Aberman amendment to the Stout amendment passed eighty-one to seventy-one.\(^48\) Once again it appeared that a decision had been reached, and that Kauffman amendment I, which had passed earlier, had been repudiated along with the Stout amendment, which had yet to reach a vote. After a dinner recess, the convention delegates decided to reconsider the Aberman amendment on the basis that it had been misunderstood by some of the delegates. Its reconsideration produced its defeat, sixty-four to eighty-four.\(^49\) The Stout amendment was then debated. At 11:00 p.m., that amendment, which had been the subject of so much

\(^{45}\) Ibid., 1227.

\(^{46}\) Reference to the League of Women Voters as “vultures” appeared on pp. 77-78 of the Advance Transcripts of the Convention. Proceedings for February 26, 1968. Interestingly, the term does not appear in the final version of the Journal.


\(^{48}\) Ibid., 1250.

\(^{49}\) Ibid., 1259.
“arm-twisting,” fell seventy-one to seventy-six.\textsuperscript{50}

It should be noted that all this was taking place late Monday night, February 26, and the convention deadline was Thursday, February 29. There was still part of the judiciary proposal to consider, and the schedule to discuss. This time frame should be kept in mind when trying to understand what finally happened.

After the defeat of the Stout amendment, a committee composed of Gustave Amsterdam, cochairman of the Judiciary Committee, Scranton, and some state legislator delegates including Ernest Kline, minority leader of the senate and later lieutenant governor, met to seek a compromise judicial selection plan that could gain majority support. Kline’s amendment, offered under Amsterdam’s name, called for maintaining the election of state judges until the primary election of 1969, at which time the people would be given a chance to vote on a judicial qualifications commission. The Amsterdam amendment passed 108-37, and after some additional discussion, the convention adjourned at 12:55 A.M.\textsuperscript{51}

Three days remained in which to complete work on Judiciary Proposal No. 7. It was advanced to its third reading on Tuesday, February 27, and scheduled for final approval on Wednesday, February 28. However, due to a printing delay, final approval of the proposal was not obtained until the last day of the convention — Thursday, February 29. In its final form, the proposal placed the decision of whether to utilize a judicial qualifications commission in the hands of the voters, the decision to be made at a plebiscite in the primary election in 1969. If approved, the commission would be composed of four nonlawyers appointed by the governor and three nonjudge members of the bar appointed by the state supreme court. Judges so selected would be retained or rejected in merit elections.\textsuperscript{52}

The proposal passed 134-1 after the governor arrived to thank the delegates for contributing to the success of the convention. In his short farewell address, Governor Raymond P. Shafer stated: “Finally, the people asked you to reform the way justice is administered to them at all levels of the law — a reform that was your greatest challenge in a day when order under law is meeting its sternest test.” \textsuperscript{53}

How did the convention meet its “greatest challenge”? One dele-

\textsuperscript{50} Ibid., 1261.
\textsuperscript{52} Constitutional Proposals Adopted by the Convention, Judiciary Ballot Question No. 5: 30-33. In its final form, these were sections 13, 14, and 15.
gate evaluated it this way: "Though the Judiciary Article was not the Convention's outstanding product, neither was it the least of them." 54

While this statement is probably accurate, such an assessment contributes little to an understanding of the process that resulted in the almost unanimous adoption of the Judiciary Article in its final form. That proposal — particularly the section pertaining to the selection of judges — was pure compromise. It is startling to follow the extremely lengthy, often heated debates on this subject, only to discover the final proposal on that section emerging suddenly being subject to a minimum of debate, and passing 108-37.

There are several possible explanations. Time was short; it appeared impossible to get a majority of the delegates to support either of the appointment plans, yet election had twice been defeated. The final proposal combined election and the possibility of a qualifications commission in the future. In addition, the solution gave both sides the opportunity ultimately to prevail. The advocates of the commission system saw a chance to educate the electorate on the merits of the system and to seek its support. Those favoring the continued election of judges were convinced that given the choice, the electorate would not relinquish the franchise. Finally, because the compromise satisfied — to some degree at least — those favoring appointment and those favoring election, it was in essence noncontroversial, and would not endanger the success of the rest of the judiciary article. Given the time constraint and the composition of the convention, one should perhaps not be surprised by the ultimate resolution of the question of the selection of judges — that is, let the people decide.

Although the people in the primary election of April 23, 1968, ratified the work of the convention, it was not without strong opposition to the proposed changes, particularly the judiciary article. Chief Justice Bell and Justice Michael Musmanno were the strongest critics, but the organization and time limit (just under two months) of the ratification campaign reduced their effectiveness. 55 The judiciary article also drew the greatest number of county foes — twenty-one, only five of which were in eastern Pennsylvania. Of the two major counties, Allegheny, which includes Pittsburgh, and Philadelphia, only Allegheny County voted against any question, turning down the judiciary proposal by better than 20,000 votes out of 260,000 cast. Once more, the figure of Justice Musmanno loomed large in the pic-

55 Wolf, Constitutional Revision in Pennsylvania, 54-55.
ture, although Judge Harry A. Kramer of the Allegheny County orphans' court registered his strong protest, too.

Finally, no matter how receptive individual delegates to a constitutional convention are, their collective judgment never strays too far from the prevailing opinion of the general public. They want to know what the voters will think of their efforts, and their decisions are made in terms of acceptability to voters, even if it meant turning the issue back to the voters as was done in the matter of judicial selection.

Epilogue

On May 20, 1969, in the primary election in Pennsylvania, the voters were asked to carry out the role designated to them by the delegates to Pennsylvania's fifth constitutional convention regarding the selection of judges. They were asked to vote on Question No. 5 which read: "Shall justices and judges of the Supreme, Superior, Commonwealth and all other statewide courts be appointed by the Governor from a list of qualified persons submitted by a non-partisan Judicial Qualifications Commission, subject to retention in office thereafter by vote of the electorate, instead of by partisan nomination and election?" By a vote of 643,960 to 624,453, the voters answered no. The people decided to continue their role as judicial selectors through partisan nomination and election.