

CHRIS WEST
Legislative District 42
Baltimore and Carroll Counties

Judicial Proceedings Committee



Annapolis Office
James Senate Office Building
11 Bladen Street, Room 322
Annapolis, Maryland 21401
410-841-3648 · 301-858-3648
800-492-7122 Ext. 3648
Chris.West@senate.state.md.us

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

February 18th, 2025
The Maryland State Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401

Re: Senate Bill 954: *Circuit Court Judges and District Court Judges – Selection and Tenure*

Dear Chairman Smith and Members of the Committee,

As I stand here this afternoon, I get the distinct feeling of *deja vu* all over again. On several occasions during my four years in the House of Delegates and during the past seven years that I have served on this Committee in the State Senate, the State Judiciary has come in with a bill to in one way or another totally eliminate the people's right to elect their Circuit Court judges. Just last week we heard this year's version of the bill. But you could have come to the Maryland General Assembly's House Judiciary Committee or Senate Judicial Proceedings Committee 57 years ago, and you would have heard essentially the same discussion of issues on the question of Circuit Court judicial elections.

I remember well, I first encountered this issue in 1968 when I was a senior in high school. I was a member of the debating club. Our final debate had the topic: "Resolved: that the voters of Maryland should vote to ratify the proposed new state constitution." A special constitutional convention that year had drafted a new constitution, and a special referendum election was being held that spring to decide whether to adopt the new constitution. My side, which took the affirmative - that the voters should ratify the constitution - won the debate, but the new constitution did not fare as well. The voters turned it down.

The principal argument made by the opponents of the proposed constitution back in 1968 was that it contained a provision taking away from the voters the right to elect their Circuit Court judges. So this issue has been on the front burner for at least 57 years, and we are now dealing with the same issue. In the Judiciary's formulation, it has always been presented as an either-or choice: either we stick with the current system, in which every single Circuit Court judge appointee has to run in a contested election, or instead, we follow the recommendation of the Judiciary and totally eliminate all contested elections for Circuit Court judges.

Let me quickly deal with the bill presented last week by the Judiciary. It would, as is always the case with bills advanced by the Judiciary, completely eliminate all contested elections of Circuit Court judges. Under the Judiciary's bill, if a gubernatorial appointee received 50% of the vote

plus one vote on the Senate floor, the appointee would be confirmed and would not run in a contested election, rather in a retention election. As Judge Dumais admitted last week in response to one of my questions, every single judicial nominee for the State's District Courts and for the State's appellate courts over the course of the first quarter of the 21st Century has received at least 50% of the vote plus one vote in the State Senate, so gubernatorial judicial appointees are always all confirmed. Then under the Judiciary's bill, the confirmed circuit court judges would run in retention elections.

In Maryland, retention elections have been charade elections because, no judge has ever come close to losing a retention election. In a retention election, no money is raised or spent, there's no opposing candidate, and there's no campaigning. And so the incumbent judge always wins ... and wins overwhelmingly.

But a system in which the Governor essentially all by himself controls judicial appointments has serious problems. In the 1970's, two consecutive Governors appointed a long line of white men to the Circuit Court for Baltimore City, and the Monumental City Bar Association recruited and supported Black opponents in contested judicial elections. Because Baltimore City had become a majority minority city, many of the Black judicial candidates won ... and in the process ensured that the Circuit Court for Baltimore City reflected the diversity of the City's population. If the Judiciary's bill had been effect in those years, there would have been no opportunity for contested elections, and the Circuit Court for Baltimore City would have remained mostly white.

In the 1990s, Parris Glendening took a very partisan approach to appointing judges. During his eight years in office, he appointed just under 120 circuit court judges. All but four of those judges were Democrats. Eventually, highly qualified District Court judges who had been repeatedly passed over because they were registered Republicans realized what was happening and began to challenge the Glendening appointees. They won a number of elections, particularly in the State's rural counties, thus ensuring that our judiciary more closely reflected the diversity of our state population. If the Judiciary's bill had been in effect at that time, there would have been no opportunitRealy for contested elections, and the State's judiciary would have become regarded as the province of a single political party.

Up until recent years, the number of women on the Circuit Court bench was shockingly low. During the early years of this century, female candidates passed over by our Governors began to run against the appointed circuit court judges and won a number of elections, thus ensuring that our judiciary more closely reflected the diversity of our state population. If the Judiciary's bill had been in effect during those years, disappointed female applicants for judicial office would have been out of luck.

Realizing that a system that required that all circuit court appointees run in contested elections was flawed and that a system that eliminated all opportunities for Maryland citizens to ensure appropriate diversity on the bench was similarly flawed, in 2017, my fellow Delegate Ereik Barron and I sat down and did some creative thinking on this issue. The product of our thinking was memorialized in House Bill 826 that year, which we both co-sponsored, and SB 954, which is the subject of this hearing, is essentially that same bill but with a couple of improvements. By

the way, not long ago, I spoke to Erek and he authorized me to remind you that he fully joined me in support of House Bill 826. Indeed, he sat next to me during the presentation before the House Judiciary Committee.

On that occasion, Delegate Barron and I thought outside the box and came up with a proposed compromise, which we believed would effectively eliminate most Circuit Court judicial elections but would retain the possibility of an occasional election if the circumstances warranted it. In my view, this compromise would represent a win-win solution for both sides. Each side would get most, not all, but most of what it wants.

Now, let me explain to you the details of the suggested compromise and explain why, in my view, it would be an excellent solution to this decades-long conundrum. As I mentioned a minute ago, there is a bill in your folder that contains the details, but it's written in legalese. So I'm going to explain them to you in plain English.

The compromise would make a structural change in the appointment process. Upon a Circuit Court vacancy, the governor would not appoint but rather would nominate a replacement and probably would use the judicial nominating commissions. Frankly the nominating commissions should be codified into law, but that would be a separate bill that I would be pleased to support. The governor would nominate a replacement. Unlike right now, when that replacement goes immediately onto the bench and runs in a contested election to retain his or her seat, under SB954, that nomination would instead go to the state Senate for confirmation.

Now, here's the interesting component of the SB954. If the judicial nominee were to receive less than 50% of the vote, the nomination would fail. If the judicial nominee were to receive over 80% of the vote, the nominee would be seated and would not face an election. If the nominee were to receive over 50% but not over 80% of the vote, thus indicating that there is some significant opposition in the state Senate to the confirmation of that nominee, the nominee would be confirmed, would be seated on the bench, and would have to run in a contested election as at present.

So you've got the 80% hurdle. A couple of things about this proposal. First of all, given the track record of gubernatorial appointments in the state Senate over the past 25 years by both Democratic and Republican governors, it seems quite likely that nearly all of the gubernatorial nominees to the Circuit Courts would receive over 80% of the vote in the state Senate. During the term of a Democratic governor, the governor's nominees almost always are confirmed by Maryland's overwhelmingly Democratic state Senate. Even during the term of a Republican governor, if the records of Governors Ehrlich and Hogan can be relied upon, the governor's nominees nearly unanimously are confirmed by the state Senate with over 80% of the vote. Thus, it can be confidently anticipated that nearly all the governor's Circuit Court appointees would win confirmation and would not have to face contested elections.

This would especially be the case if the governor were to take care to appoint people who are qualified, who are ethically sound, and who are diverse. I will come back to discuss diversity shortly, but based on many years of observing gubernatorial judicial appointments, I have found it very rare for a judicial appointee of the governor to be subject to criticism on the grounds that

the appointee is unqualified or has ethical issues. Part of that probably is the result of the judicial nominating commission process, which only tends to give the governors recommended appointees who are competent and who are ethically sound.

Turning to the diversity issue, over 20% of the members of State Senate are Black, over 20% of the members of the State Senate are Republican, and over 20% of the members of the State Senate are female. If a future Governor were to fail to keep the need for diversity on the bench in mind, it is possible, even likely, that disgruntlement would grow among the Senators who are members of the demographic group being overlooked. That disgruntlement would get communicated to the Governor, and if the Governor brushed off the concern, one or more future appointees could receive less than 80% of the vote. This would embarrass the Governor and hold his feet to the fire when making future appointments.

Now let me venture a couple of additional ways in which SB954 would constitute a huge improvement over the current system.

First, SB954 provides that in the event of a future contested election of a circuit court judge, the only candidates qualified to run against the Governor's choice would be lawyers who had applied for a judicial vacancy, had undergone the Judicial Nominating Committee process and had been put on the list forwarded to the Governor of candidates whom the JNC had found to be "fully professionally qualified" to be a judge. So SB954 would eliminate the oddball candidates who file their candidacies for circuit court judge and who on rare occasions have managed to get elected.

Secondly, one objection to the current system is that many of the most qualified attorneys decline to apply for Circuit Court openings. Because under the current system, as soon as the governor appoints them, they immediately have to close down their law practices, turn all of their clients over to other lawyers, get sworn in, and then later on run in a contested election. If they lose the election, they're left having to try to rebuild their law practices from scratch mid-career. Because of this possibility, many good lawyers, many fine lawyers, decline to apply for appointment to the Circuit Court.

If my suggested compromise should be adopted, this problem would be eliminated. First, as noted earlier, nearly all the governor's appointees would be confirmed by over 80% of the vote in the state Senate and would not face an election at all. Secondly, a nominee would not have to close down his or her law practice until after the confirmation vote. If the nominee were to fail to receive 80% of the vote, the nominee could assess the nature of the opposition and could make an intelligent decision under the circumstances, whether to get sworn in as a judge and face a contested election or alternatively to decline the appointment and continue to maintain his or her law practice.

Another objection to the current system is that in larger counties, each election year brings sitting judge tickets comprised of all the judges required to stand for election. If there is a challenger to the ticket, the imperiled sitting judge is always the one whose last name falls closest to the end of the alphabet. As we all know, candidates are listed alphabetically on the ballot, and voters tend to vote more frequently for candidates whose names appear at the top.

If the compromise I am presenting is passed, and most judicial nominees are confirmed with over 80% of the vote, the rare nominee who fails to get 80% will most likely be running alone in a head-to-head match against a challenger rather than as part of a sitting judge ticket. Thus, the days of sitting judge tickets will be over.

Now let me emphasize that no system of choosing circuit court judges is without flaws. In this regard, there is no such thing as perfect. The current system in which every single circuit court judge must run in a contested election is badly flawed. The Judiciary's proposed alternative has its own serious flaws. The vital need for diversity on the bench is why future governors cannot be given unilateral power to appoint judges. The state constitution must contain a mechanism to allow voters to weigh in when a governor ignores the need for appropriate diversity in the judiciary. And that's where SB954 comes in. It's not perfect. It is possible to hypothesize a situation in which an abuse could occur. But it is far preferable in my view to the alternatives.

In conclusion, I believe this suggested compromise will finally cut the Gordian knot that has tied up the General Assembly for 57 years. Delegate Barron and I approached this issue with fresh eyes. While our approach does not grant either side an unconditional win, thinking outside the box in this way offers the General Assembly an opportunity to adopt a creative compromise. It would eliminate nearly all contested Circuit Court elections while still providing a necessary check on unchecked gubernatorial appointment authority.

For these reasons, I urge a favorable vote on SB954 and would be pleased to answer your questions.