



TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE

HB 778 – Circuit Court Judges – Selection and Retention Elections

POSITION: Favorable, With Amendments

BY: Linda Kohn, President

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The League of Women Voters of Maryland has long supported the elimination of contested elections of Circuit Court Judges and substituting retention elections. The League also supports Judicial Evaluation Commissions in order to provide voters with the information they need to decide whether or not to retain a judge or justice in office.

The League supports the provisions of HB 778 that would replace the contested election of Circuit Court Judges with retention elections. Unlike members of the legislative and judicial branches, who should reflect the political desires of the voters, judges should be neutral arbiters of disputes who follow the law even when that may produce a politically unpopular result. Contested elections put pressure on judges to consider how their rulings might be regarded by the public. In an age of misinformation propelled by social media, they must think about how any decision might be misconstrued. No one whose rights are at stake in a lawsuit should worry that the presiding judge will be distracted by the political consequences of the case.

Earlier proposals to replace contested elections with Senate confirmation and retention elections met opposition based on the view that contested elections serve as a check on the Governor's appointment power to remedy any discrimination based on race, gender, or political affiliation. Although we share the concern about bias in appointments, we do not believe that contested elections are effective in addressing that concern. The first difficulty is that the voters in any county will see only the nominees for their Circuit Court. Confirmation by the Senate is a more effective check against discrimination because its members will see the entire pattern of a Governor's appointments. Secondly, experience has demonstrated that women and minority judges appointed by past Governors have sometimes been defeated by male or white challengers. There have been instances in which women and minority challengers have defeated male or white incumbents, but the overall effect of voters' choices has not been an effective safeguard against bias.

The unreliable record of contested elections leads to another concern. The system of gubernatorial appointments with confirmation by the Senate has been effective in ensuring selection of judges based on merit largely because Maryland's Governors have, for many years, employed a system of nominating commissions that screens

judicial applicants based on merit. It is essential that the commissions themselves reflect the diversity of Maryland's population and that their proceedings be open to public scrutiny. The commissions, however, are the product of executive orders rather than the constitution or statute. They could be eliminated or radically altered by an executive order by any future Governor. We believe it would be wise to consider protecting the commissions by basing their authority in the constitution or in law, allowing sufficient flexibility in the structure of the commissions to adapt to the widely varying circumstances of the several judicial circuits. Maryland has fifty years of experience with judicial nominating commissions. While it may be difficult to change the process of gubernatorial appointments in the middle of a Governor's term, we recommend that the Committee review the history of nominating commissions in Maryland as well as practices in other states. At the appropriate time, perhaps at the end of the current Governor's service, the General Assembly should be prepared to propose a constitutional amendment or enact legislation to ensure that judicial nominees are screened by commissions that are structured to ensure focus on the skills and temperament of candidates.

With regard to retention elections, we note that under our current system, appellate court judges standing for retention rarely respond to the League's questions for our *Voters' Guide*, nor do they provide information in campaign literature or any other venue. As a result, voters are asked to make a choice without information. No court would make a decision without considering the evidence, and we should not ask voters to do so. We anticipate that many voters will object to the elimination of contested elections for Circuit Court Judges, and we urge the Committee to ensure that retention elections will provide voters with meaningful information through the creation of a Judicial Evaluation Commission. As used in other states, Judicial Evaluation Commissions focus on a judge's performance of duties such as timely decisions on motions, courteous treatment of litigants, witnesses, and jurors, and clear explanations of decisions. In the absence of information on these essential components of a judge's performance, the public will be tempted to vote based on prejudices or whether they agree with a particular decision. As Committee members may be aware, following the decision of the Iowa Supreme Court to recognize same-sex marriages, voters defeated incumbent justices in the election held shortly thereafter. It would be better to provide voters with relevant information than to allow a vacuum that could be filled by prejudice and misunderstandings.

We also note a technical detail that is a potential weakness in the proposed procedure. The retention elections for all judges would take place after the expiration of one year "from the date of the occurrence of the vacancy that the judge was appointed to fill" If the appointment and confirmation of a judge is delayed, that anniversary may occur very early in a judge's term, far too early to have a meaningful record. Although the proposed provision mirrors the provisions for the elections of the appellate court judges, we urge the committee not to copy that model but to take this opportunity to avert a potential problem in the future.

We urge a favorable report on HB 778 as amended.