As I sit here today, I get the distinct feeling of deja vue all over again. You could have come to the Maryland General Assembly's House Judiciary Committee or Senate Judicial Proceedings Committee 50 years ago and you would have heard essentially the same discussion of issues on the question of Circuit Court judicial elections that you are hearing in the course of the meetings of this commission.

The issue of the election of Circuit Court judges has been the subject of serious deliberation for 54 years by my counting. I first encountered it in 1968 when I was a senior in high school and as a member of the school's debating club was assigned to argue the affirmative side in our final debate. The topic of the debate was "Resolved, that the voters of Maryland should vote to ratify the proposed new State Constitution". A specially elected Constitutional Convention that year had drafted a new Constitution, and a special referendum election was being held that Spring to vote to adopt the proposed new Constitution. Although my side won the debate, the Constitution did not fare as well. The voters turned it down. The principal argument made by the opponents of the proposed Constitution was that it contained a provision taking away from the voters the right to elect their Circuit Court judges.

So here we are 54 years later dealing with the same issue, and it's 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 Maryland Judiciary and totally eliminate all contested elections of Circuit Court judges and instead substitute "retention" elections, which are charade elections because no judge has ever even 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 ever since 1968, as regularly as clockwork, the Maryland Judiciary comes to Annapolis and presents a bill to eliminate all Circuit Court elections and to substitute retention elections. These bills have always failed.

In 2017, my fellow Delegate, Erek 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. I should note that Erek is now the U. S. Attorney for the State of Maryland and due to the exigencies of his position is not able to come before this commission to offer his view on the subject, but we chatted on the phone recently, and he authorized me to represent today that he fully joined me in support of House Bill 826.

In House Bill 826, Delegate Barron and I thought outside the box and came up with a proposed compromise which we believed will effectively eliminate MOST Circuit Court judicial elections but will retain the possibility of an occasional Circuit Court judicial election if the circumstances warrant 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 then explain why, in my view, it would be an excellent solution to this decades-long conundrum.

The compromise would make a structural change in the appointment process. Upon a Circuit Court vacancy, the Governor would nominate a replacement, and unlike right now when that replacement goes immediately onto the bench and runs in a contested election to retain his or her seat, under my proposed compromise that nomination would go to the State Senate for confirmation. Now here's the interesting component of the compromise: If the judicial nominee were to receive less than 50% of the vote in the State Senate, the nomination would fail. If the 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% of the vote 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.

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 record of Governors Ehrlich and Hogan can be relied upon, the Governor's nominees nearly unanimously are confirmed by the State Senate. Thus it can confidently be anticipated that nearly all of the Governor's Circuit Court appointees would win confirmation and 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'll discuss diversity in a moment, but, based on many years of observing gubernatorial judicial appointments, I have found it to be very rare for a judicial appointee to be the subject of criticism on the grounds that the appointee is unqualified or has ethical issues.

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. And if they lose the election, they are left having to try to re-build their law practices from scratch, mid-career. Because of this possibility, many good 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 of 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 however, a nominee would not have to close down his or her law practice until after the confirmation vote, and 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 either 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 the larger counties, each election year brings sitting judge tickets comprised of all of the judges who are required to stand for election. If there is a challenger to the ticket, the imperiled sitting judge is always the judge whose last name falls closest to the end of the alphabet because 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 of the ballot. If the compromise that I am presenting should be passed and most of the judicial nominees are confirmed with over 80% of the vote, the rare nominee who fails to get over 80% of the vote will most probably be running in a head to head match against a challenger rather than as a member of a sitting judge ticket. Thus the days of sitting judge tickets will be over.

Given the fact that this suggested compromise would eliminate nearly all contested judicial elections, you may ask why judicial elections should not just be abolished altogether. Here's why. When Governors get too powerful, they tend to make poor decisions. As the members of this commission should be aware, in the 1970s and 1980s, Governors ignored the legitimate judicial aspirations of African-American lawyers and, failing to keep the need for diversity on the bench in mind, appointed mostly white attorneys to the bench in Baltimore City, a city which was majority Black. In response, in a series of elections extending over ten years, the Monumental City Bar Association supported Black challengers of the sitting judges and unseated a number of white sitting judges.

In the 1990s, another Governor ignored the legitimate judicial aspirations of Republican lawyers, and, failing to keep the need

for diversity on the bench in mind, appointed nearly only attorneys to the bench who were registered Democrats. In response, in a series of elections extending over six years, Republican attorneys mounted challenges to the Governor's appointees and managed to unseat a number of sitting judges.

In both situations, the lack of diversity in judicial appointments was corrected by the voters. In my view, during the 1970s, 1980s and 1990s, Governors pursued ill-chosen policies, and the voters were in a position to correct them. Appropriate diversity on the bench is absolutely essential. The voters recognize this fact, even if some of our Governors have not.

The 80% requirement contained in the suggested compromise will hold future Governors' feet to the fire. If a Governor fails to nominate a reasonably diverse group of judicial candidates, there are enough African-American State Senators to deny an appointee 80% of the votes; there are enough Republican State Senators to deny an appointee 80% of the votes; for that matter there are enough female State Senators to deny an appointee 80% of the votes. No Governor will want to suffer the embarrassment of seeing a judicial appointee forced into a contested election because the Governor failed to keep the paramount need for diversity in mind when making his judicial selections. But this vital need for diversity on the bench is why future Governors cannot be given the unilateral power to appoint judges; the State Constitution must contain a mechanism to kick the issue of judicial appointment over to the voters in the (hopefully) rare cases in which the Governor ignores the need for appropriate diversity in the State Judiciary.

In conclusion, I believe that the suggested compromise will cut the Gordian knot that has tied up the General Assembly for 54 years. Delegate Barron and I approached this issue with two sets of fresh eyes. While our approach will not hand either side an unconditional win, thinking outside the box in this way provides an opportunity for this commission to adopt a creative compromise that will eliminate nearly all contested Circuit Court elections in the future while providing a necessary check on untrammeled gubernatorial appointive authority.