

Legislative Committee of the Maryland Judicial Council  
Workgroup to Study Judicial Selection

Public Hearing – Monday, November 28, 2022  
Maryland Judicial Center  
187 Harry S. Truman Parkway  
Annapolis, MD 21401

Testimony of:  
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Thank you for giving me the opportunity to comment today on the matter before you.

My name is Michael Tardif.

In the interest of full disclosure, I am 24-year resident of Montgomery County, an At-Large member of the Montgomery County Democratic Central Committee, and the Communications Chair of the Montgomery County Democratic Party.

I am speaking today in my personal capacity as a citizen of Maryland and the views I express are entirely my own.

I want to begin by stating categorically that I am opposed to the election of judges or to subjecting judges to retention elections, and strongly support the appointment of judges by means of a rigorous, nonpartisan, and transparent judicial vetting and nomination process codified in law that provides meaningful opportunity for public engagement in that process.

A review of the academic research and professional literature on the question of election versus the appointment of judges shows, overwhelmingly, that jurisprudence in those jurisdictions in which judges are appointed is far more equitable than jurisdictions in which judges are elected.

I call particular attention to a November 2008 research paper by Claire S.H. Lim of Stanford University, "Turnover and Accountability of Appointed and Elected Judges," which may be the most comprehensive comparative study on the issue available. I also recommend for your consideration the 2012 book, "The People's Courts: Pursuing Judicial Independence in America," by Jed Handelsman Shugerman, which, to quote from its summary description, "traces the history of judicial elections and Americans' quest for an independent judiciary – one that would ensure fairness before the law – from the colonial era to the present."

I've appended to my written testimony a bibliography that includes both of these works as well as numerous other periodical articles on the topic.

My own unscientific and far from comprehensive survey of the academic and professional literature has yielded an interesting data point: I have not found a single research paper or journal article advocating FOR the election of judges. While the absence of evidence is not evidence, in an era in which agreement on any topic in the public sphere is becoming exceedingly rare, the lack of advocacy FOR the election of judges is noteworthy.

In the 2018, 2020, and 2022 election cycles, I moderated candidate forums for the Montgomery County Circuit Court Judge elections. In each case, the sitting judges made a compelling argument for the rigor, integrity, and fairness of the judicial vetting, selection, and nomination process in Maryland. The compelling arguments made in those forums were, from my perspective, decisive in the outcome of all three elections. What was clear to me from observing the reactions of forum attendees is that when citizens understand the vetting process and how important it is to the bedrock American principle of an independent judiciary, they support it overwhelmingly.

However, I was dismayed in each of those election cycles to observe that progressive organizations to which I belong endorsed one or more challengers in those races. In conversations with the leaders of those organizations, I learned that they framed their decisions in terms of racial equity, without regard or even knowledge of the actual demographic composition of the bench, without any rigorous analysis of the equities or inequities in jurisprudence in our courts, and without any serious consideration of the likely consequences of an elected judiciary, should it become the norm in Maryland. This trend worries me greatly. I worry mostly that a reflexive suspicion of authority and support for the underdog will adversely affect the lives of the very people these organizations claim to represent and defend.

Which brings us to the present moment. Our existing process for vetting and nominating judges in Maryland is not codified in law. It exists by long-standing custom and the executive orders of successive governors. That process takes place largely out of public view with no meaningful way for the public to engage in the process.

Any measure to eliminate the election of judges or the retention election of judges must enshrine, in law, a nonpartisan, transparent judicial vetting, selection, and nomination process that provides meaningful opportunity for public engagement. I contemplate something that, for lack of a better term, might be called "The People's Bar," a group that could be made up of nonprofit organizations, advocacy groups, and ordinary citizens who would have a seat at the table and would vet judicial candidates alongside the many bar associations that already do so.

As you well know, eliminating the election of judges or the retention election of judges in Maryland will require a constitutional amendment, which can only pass with broad public

support. Several years ago, I learned a valuable motto from the transgender community: “Nothing about us without us,” meaning, don’t write laws that affect us without asking us first. In this case, “us” is the people of Maryland. In order for any measure to be successful, a thoughtful grassroots public outreach and education campaign must be launched to build public support among the very people most affected by our judicial system and to mobilize support among progressive advocacy organizations in defense of an independent judiciary that reflects the community it serves and dispenses justice in an equitable manner.

## **Research Bibliography: Elected vs. Appointed Judges**

Compilation Date: March 22, 2022

### **Turnover and Accountability of Appointed and Elected Judges**

The National Bureau of Economic Research, November 2008

Claire S.H. Lim, Stanford University

<http://www2.nber.org/conferences/2009/SI2009/LE/Lim.pdf>

### **The People's Courts: Pursuing Judicial Independence in America**

Hardcover; Harvard University Press, 2012

Jed Handelsman Shugerman

### **To Elect or appoint? Bias, information, and responsiveness of bureaucrats and politicians**

Journal of Public Economics

Vol. 97, January 2013, pp. 230-244

Matias Laryczower, Garrett Lewis, Mathew Shum, Princeton University

<https://www.sciencedirect.com/science/article/pii/S0047272712000941>

Condensed from the abstract:

*We find that justices that are shielded from voters' influence on average have better information, are more likely to change their preconceived opinions about a case and are more effective (make less mistakes) than their elected counterparts.*

### **Princeton University News Release about the above research publication:**

<https://www.princeton.edu/news/2013/02/22/researchers-find-appointed-justices-outperform-elected-counterparts>

("...Justices who don't face voters in general demonstrate a greater ability to analyze information about a case to reach a correct decision under the law.")

### **Should judges be elected or appointed? The lingering debate on merit selection**

Illinois Periodicals Online, December 1977

By Frank Kopecky, Esq.

Director, Center for Legal Studies, Sangamon State University (University of Illinois Springfield)

<https://www.lib.niu.edu/1977/ii771214.html>

### **Rethinking Judicial Selection**

American Bar Association, March 1, 2016

Alicia Bannon

[https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/rethinking\\_judicial\\_selection/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/)

*(This article is publicly available online and as a downloadable PDF to ABA members. Includes extensive endnotes with reference links to other published articles.)*

### **Judges: Appointed v. Elected**

HG Legal Resources, undated

Stephen Gustitis

<https://www.hg.org/legal-articles/judges-appointed-v-elected-44870>

**Should judges be elected by the public? Let's break it down**

Inlander, October 6, 2016

Mitch Ryals

<https://www.inlander.com/Bloglander/archives/2016/10/06/should-judges-be-elected-by-the-public-lets-break-it-down>

**COMMENTARY: Why judges should be appointed, not elected**

June 16, 2016, CNBC

Steve Odland, CEO, Committee for Economic Development

<https://www.cnbc.com/2016/06/16/why-judges-should-be-appointed-not-elected-commentary.html>

**Should Judges Be Elected or Appointed?**

Kiplinger, January 29, 2013

By Knight Kiplinger

<https://www.kiplinger.com/article/business/t043-c013-s001-should-judges-be-elected-or-appointed.html>

**Opinion: The looming influence of state supreme courts**

The Washington Post, March 22, 2022

<https://www.washingtonpost.com/opinions/2022/03/22/looming-influence-state-supreme-courts/>