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TESTIMONY PRESENTED TO THE HOUSE SUBCOMMITTEE ON COURTS HEARING ON JUDICIAL REFORM PROPOSALS

Lynn A. Marks, PMC Executive Director
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Thank you for inviting me to speak today on proposals to improve the state's judicial system. My name is Lynn A. Marks, and I am the Executive Director of Pennsylvanians for Modern Courts (PMC).

PMC is a statewide, non-partisan organization dedicated to ensuring that Pennsylvanians have the best possible courts. The impetus for PMC's founding was the 1988 report of Governor Casey's Judicial Reform Commission, also known as the Beck Commission, which recommended many of the initiatives being considered today.

Some recommendations have been carried out, most notably a constitutional amendment reforming the judicial discipline system which the voters overwhelmingly passed in May of 1993. Unhappily, many of the remaining recommendations are still on the drawing board and that is why, six years following the Beck Commission's report, we are still debating their merits.

In the interim, much has occurred to infuse a sense of urgency onto these continuing debates and endless discussion is a luxury we can no longer afford. I refer most immediately to the very tragic situation involving Pennsylvania Supreme Court Justice Rolf Larsen that this Subcommittee investigated so admirably and masterfully this past spring.

Perhaps at no other time have events involving the state's judiciary so captured the public's attention. However, it is important to put these recent events into the appropriate perspective, focusing not on the troubles of any individual Justice but rather on the challenge we now have to seek opportunity out of adversity. PMC applauds the commitment to seizing this opportunity that this Subcommittee is demonstrating by holding these statewide hearings.

I will not try your patience by speaking to each of the reform proposals listed on the Subcommittee's lengthy agenda. With your indulgence, I will touch on a select few in areas in which PMC has a particular interest.

REFORM OF THE APPELLATE JUDICIAL SELECTION PROCESS

There is perhaps no area of court reform about which PMC feels more passionately than the need to replace partisan political elections of appellate judges with an appointive system based on merit.

PMC's Board Chair, Judge Edmund B. Spaeth, Jr., has presented testimony about the problems inherent in, and his own experiences with, the partisan election process. I want to draw particular emphasis to Judge Spaeth's remarks that partisan elections severely compromise the independence and integrity of the judiciary.

Perhaps the most disturbing portion in this Subcommittee's report on its investigation into Justice Larsen's conduct was its charge that the Justice had kept a list of lawyer friends and campaign contributors whose cases were given special treatment.

The danger of a "VIP list" cannot be underestimated. I could not agree more with the Subcommittee's assertion that any such list would "severely compromise the Court's integrity as a public institution."

Granting preferential consideration to political supporters is violative of a judge's duty to be fair and impartial. Yet, as long as judicial candidates seek and accept contributions from potential litigants, is there not a risk that this duty may be breached? Even if in fact it is never breached, isn't public confidence in the legal system undermined simply by the possibility that it may be?

This past June, House Bill 2—a constitutional amendment for merit selection of appellate judges—was expected to be considered by the full House. House Bill 2 would have eliminated campaign fundraising altogether, and also ensured the selection of judges based on their qualifications, not the irrelevant influences of political connections, money or luck. An amendment to House Bill 2 would have provided the additional guarantee of geographical balance on the appellate courts.

For a variety of reasons, the House recessed on June 21st prior to considering either House Bill 2 or the geographical balance amendment. I'm sure it comes as no surprise that PMC was greatly disappointed by this result.

So too were thousands of Pennsylvanians who, regardless of their position on the judicial selection process, strongly believe that it is time to "let the people decide." Indeed no poll taken by any individual organization, or even by a legislator in his or her home district, can test the pulse of the electorate as accurately as a statewide referendum.

In light of the great turmoil in the court system over the last several years, the voters deserve to decide for themselves how to choose appellate judges. We can rest assured they will take that

responsibility most seriously. In May of 1993, 82% of the primary voters said they wanted reform of the judicial discipline system. At the same time, a second statewide referendum on whether to grant benefits to Persian Gulf war veterans was resoundingly defeated. Make no doubt about it, the voters knew what they wanted.

Those who resist judicial selection reform in the name of protecting the voters' democratic privileges ought not fear a referendum vote. This debate belongs in the public arena and PMC welcomes the chance to present its point of view to the widest possible audience. Regrettably, by recessing prior to considering House Bill 2, the House missed a tremendous opportunity to allow this issue of great importance to appear on a 1995 ballot.

PMC pledges its continuing commitment, energy and resolve to making judicial selection reform for the appellate courts a reality. Our statewide campaign to educate voters about the judicial selection process, through public forums and distribution of materials such as the brochure attached to this testimony, will go on as before.

A coalition of nearly 150 local and statewide organizations and countless individuals have already endorsed an appointive system based on merit, and our number is growing. In the words of Winston Churchill, we will never, never, never, never give up.

REGIONAL ELECTIONS

Proposals to divide the state into judicial districts, with appellate judges elected from within each district, would be a giant step backward.

No one can dispute that Pennsylvania's appellate courts lack regional diversity. Every Supreme Court Justice comes from either Pittsburgh or Philadelphia and no candidate from another region

has won an election since 1981. Most members of the Superior and Commonwealth Courts also reside in or near the state's two largest cities.

Correcting this imbalance must be a goal of any change in the judicial selection process. However, we should not be so short-sighted as to make this the only goal.

Yet that is precisely the narrow objective, and would be the narrow result, of regional elections. Not one other problem of partisan elections, described in Judge Spaeth's testimony and in PMC's brochure, would be solved. Indeed some, such as campaign fundraising, would be exacerbated: the pressure on lawyers to contribute, and the potential conflict of interest for judges, will be that much greater when the election takes place within the smaller districts where contributors have personal ties to the candidates.

An appointive system based on merit, either through a statewide nominating commission or designated regional nominating commissions, can accomplish geographically balanced appellate courts while at the same time best providing for a competent and independent appellate judiciary.

REFORM OF THE PARTISAN JUDICIAL ELECTION PROCESS

In the wake of the House recess in June, a compelling question is necessarily raised: should reforms of the partisan judicial election process be pursued?

PMC's instinctive response is "absolutely not," believing as we do that this would be akin to treating the symptoms of a fatal disease rather than curing the disease itself. Once again, PMC would urge this Subcommittee to proceed boldly and not be sidetracked by recommending

incremental changes that do not advance the goal of ensuring a more qualified and independent appellate judiciary.

However, since election reforms are likely to be debated over the next year, PMC would like to comment on several anticipated proposals.

Eliminating the gag rule. PMC strongly opposes any legislation that would rescind the so-called "gag rule."

Judicial candidates differ from candidates for any other public office. Voters should know where gubernatorial, legislative or mayoral hopefuls stand on controversial issues. We vote for them precisely because of those stands, and have every right to expect that, once elected, they will create and implement policy reflecting their positions.

The role of judges, however, is to resolve disputes based solely on the law and evidence—not to satisfy any commitment made or personal view expressed during their campaign.

That is why Canon 7 (B)(1)(c) of the Code of Judicial Conduct expressly forbids a candidate for judicial office from "announcing his views on disputed legal or political issues." In upholding this prohibition in 1991, the Third Circuit Court of Appeals stated, "If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."

Proponents of proposed legislation to rescind the "gag rule" argue that voters would have more information about judicial candidates.

This reasoning ignores a damaging corollary, i.e. that to attract votes, candidates would feel pressured to respond to the wishes of a political majority. It has often been noted that if federal judges had been required to run for election, it is unlikely that federal courts could have ended racial segregation in schools nearly forty years ago.

Imagine the fear of unionized employees in a legal dispute against an employer, knowing that the presiding judge had campaigned on a pro-business, anti-labor platform. Or a criminal defendant in a homicide case aware that the judge deciding his fate had promised to "lock them up and throw away the key."

It would thus be enormously harmful to compensate for voters' current lack of sufficient information about judicial candidates, and score a political victory for single issue constituencies, by revoking a rule necessary to protect the basic and incontrovertible role of judges in our democracy.

Caps on campaign contributions. While legislation capping contributions to statewide judicial candidates is facially appealing, PMC is concerned that loopholes would strangle its effectiveness.

There are obvious legal impediments to imposing caps on any selected group of contributors, such as lawyers. Even if caps were extended across the board, there is no way to prevent persons who have hit the maximum level from funneling money to candidates through every aunt, uncle and cousin.

Furthermore, how would the legislation treat contributions from political action committees (PACs)? Will donations made through PACs be quietly used to bypass mandatory dollar limitations on individual contributions?

Imposing caps on contributions will undoubtedly please the traditional deep pockets of judicial election campaigns, particularly since there will be several appellate court races over the next few years.

Certain to feel otherwise are the candidates themselves. Since the costs of judicial campaigns would presumably remain constant (or even increase due to higher media expenses), the pressure to raise money would escalate considerably. Instead of seeking 100 people to each contribute $1,000, a judicial hopeful in a race with a $100 cap would have to find 1,000 people to each contribute the designated maximum amount.

For these reasons, PMC's view continues to be that judicial campaign contributions should be eliminated, not limited.

Campaign finance reform. The House continues to grapple with legislation for campaign finance reform, and PMC is reluctant to respond to the issue generally without targeting our remarks to proposed legislation that specifically pertains to judicial candidates.

We fear, however, that laws providing for public financing of judicial campaigns will not "cure" the problems caused by campaign fundraising. Candidates can, and no doubt will, reject public money if they are wealthy or have easy access to special interest contributions.

For those who do accept public money, a significant amount of private dollars still must be raised in order to qualify.

Finally, is there a realistic hope of ample public funds for judicial candidates when the available pool is derived from voluntary taxpayer checkoffs? The experience of other states suggests not.

Rotating ballot position; eliminating the county of residence designation on the ballot. Top ballot position and county of residence have no bearing on one's qualifications to serve on the appellate bench. The former is purely a function of "luck of the draw." The latter is a factor more within a candidate's control, but clearly no more relevant. Is a candidate who moves from Philadelphia to adjacent Montgomery County in order to avoid the reported stigma of being considered a Philadelphian any more or less qualified for the appellate bench?

However, to the extent that these factors may have some impact on who gets elected to the appellate bench, PMC could support changes to the Election Code that would (a) rotate the position of names on a judicial ballot in order to eliminate the importance of ballot position; and (2) remove the designation of a candidate's home county to reduce the role of geographical bias in the outcome of an election.

Again, we feel compelled to note that these reforms would leave completely unchanged the far more profound influence of political connections and money-raising ability in determining who wins statewide judicial elections.

I leave this portion of my testimony by reiterating the following: PMC's discussion of any change in the judicial election process, those listed above and those not addressed today, is engaged in most reluctantly. No hemorrhage can be stopped with band-aids. We look forward to, and will continue to work toward, the day when there are no longer appellate court elections to reform.

SUPREME COURT PRACTICE AND PROCEDURE: RECOMMENDATIONS

OF THE NINTH STATEWIDE INVESTIGATING GRAND JURY

In its report of the ten month investigation into Justice Larsen's allegations against his colleagues, the Ninth Statewide Investigating Grand Jury identified a number of "deficiencies in the [Supreme] Court's procedures which have invited the kinds of allegations that appear in Justice Larsen's petitions." Generally speaking, the perceived deficiencies involve ill-defined practices and unwritten procedures governing the manner in which the high Court acts upon petitions for allowance of appeal.

Certainly it is the prerogative of the grand jury, as well as the other branches of government, concerned citizens and court reform organizations, to comment and even criticize what are seen to be weaknesses in court practices and procedures. Indeed those appraisals often result in welcome improvements such as earlier this month when the appellate courts abandoned their long-standing policy of providing justices and judges with unvouchered expense accounts.

However, no matter how glaring the deficiency or on target the criticism, we must nonetheless recognize that most matters involving the inner workings of the Court can only be corrected internally.

Commendably, in response to the grand jury's report, the Supreme Court on December 29, 1993 announced that it would undertake a self-examination of the appellate petition review process, and would also assess the need for formal internal operating procedures. PMC is particularly pleased that several distinguished Pennsylvanians—including Duquesne University President Dr. John E. Murray, Jr., chair of PMC's Southwestern Pennsylvania Advisory Board—have been invited to serve in an advisory capacity to recommend improvements and innovations. We eagerly await the results of review efforts that hopefully will meet the Court's announced goal of "enhancing the Judiciary's credibility, accountability and unity."

In the meantime, we urge the General Assembly to appropriate sufficient funding to enable the Supreme Court to establish a task force to study issues of gender, race and ethnic equity in Pennsylvania's courts.

SELECTION OF THE CHIEF JUSTICE OF PENNSYLVANIA

PMC suggests changing the method for selecting the Chief Justice of Pennsylvania, whether appellate judges reach the bench through partisan elections or an appointive system based on merit.

Simply put, seniority is the least sensible way to choose a Chief Justice. It introduces an element of chance into a process which should be as professional and carefully thought-out as the search for a chief executive officer of a corporation.

A Chief Justice must be a good administrator in the traditional sense, as adept at managing complex budgetary and personnel matters as the technical issues surrounding the modernization of court administration. A Chief Justice must also be able to work well with, and develop a consensus among, other members of the court and a large administrative staff.

The Justice most senior may indeed possess those qualities. Then again, he or she may not. That is why either of the two methods most commonly used by other states to choose a Chief Justice—selection by one's colleagues or gubernatorial appointment—is preferable to rotation by seniority.

Certainly there are sound reasons for allowing members of the Supreme Court to select the Chief Justice. One can reasonably argue that the chief administrator of the judicial branch should be selected by members of that branch alone and that no one knows better than the Justices

themselves who among them has the requisite administrative ability. This method of selection was endorsed by the Beck Commission and is currently the way the Pennsylvania Superior and Commonwealth Courts choose their respective President Judges.

On the other hand, intra-court selection may lead to dissension if the position of Chief Justice becomes one for which several Justices campaign.

While that particular problem would be alleviated were the Chief Justice to be appointed by the Governor, it might also be replaced by a perhaps more insidious "campaign" in which special interest groups implore the Governor to select their favorite candidate from among the sitting Justices.

An important check on such a "campaign" and an advantage of gubernatorial appointment over court selection, however, is that the Governor is accountable for whomever is selected Chief Justice, and therefore will be motivated to make the best possible choice.

In short, each method of selection has advantages and drawbacks. While PMC does not have strong sentiments favoring one over the other, we would strongly urge the General Assembly to adopt a constitutional amendment abolishing the current method of selecting the Chief Justice.

STATEWIDE FUNDING OF LOCAL COURTS

Six and a half years ago, in *County of Allegheny v. Commonwealth of Pennsylvania*, the Pennsylvania Supreme Court ordered the state to assume funding for local courts. This decision was later concurred in by the Beck Commission in its 1988 report.

Unfortunately, when the Supreme Court mandated statewide funding, it failed to address the question of how or when it was to be achieved. The Court simply ordered the existing system kept in place until the General Assembly had an opportunity to enact "appropriate funding legislation."

No such funding legislation has been enacted; nor has the Supreme Court responded to a lawsuit filed in December, 1992 by the Pennsylvania State Association of County Commissioners seeking to compel the Court to enforce its 1987 ruling.

PMC continues to believe that statewide funding of local courts is an important step toward ensuring an independent judiciary. The current joint state/county funding system has created, and will continue to create, divisiveness between those who allocate funds and those who require them. In the "small world" of the counties, where competition for scarce resources is keen, this places political concerns squarely into the judicial arena.

Compounding these problems are the funding slashes we have come to expect in the Commonwealth's annual budgets for the operation of county courts and district justice offices. Certainly these cuts do not bode well for local taxpayers who are required to "foot the bill" for costs that, by the Supreme Court's order, should be subsidized by the state. Nor does it bode well for the quality of services these financially-strapped courts and offices are capable of providing.

The short-term dilemma of restoring budget cuts have for many years eclipsed the longer-range issue of instituting statewide funding. Yet the Court's reasons for requiring the state to assume funding of all courts in the unified judicial system remain sound. In a 1988 amicus brief filed in the matter of *Honorable Edward J. Bradley, et al., and Honorable W. Wilson Goode, et al. v. Honorable Robert P. Casey, et al.*, PMC urged the Supreme Court to appoint masters to

compile and analyze the data relevant to statewide funding and to recommend a plan for how funding is to be administered. We reiterate that plea today.

CONCLUSION

It has often been said that improving the court system is a mission only for the long-winded. Obviously PMC wishes this were not the case. The fact that this Subcommittee has convened these hearings is, we hope, a sign that court reform issues belong on the fast track. Again PMC commends the Subcommittee for inviting discussion of these issues and extends its heartfelt thanks for your invitation to present this testimony today.