COMMITTEE ON THE JUDICIARY
Sub-Committee On Courts

Hon. Frank Dermody, Chairman

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Prepared Statement of A. Leo Levin

My name is A. Leo Levin and I count it a privilege to appear before you today. I was first appointed to the faculty of the University of Pennsylvania Law School in 1949 and currently serve as Leon Meltzer Professor of Law, Emeritus. Among other subjects, I teach Judicial Administration, which deals in part with judicial discipline, selection of judges, financing of judicial election campaigns and organization of courts. I served for ten years as Director of the Federal Judicial Center, a Congressionally established organization devoted to continuing education for federal judicial personnel and to research in judicial administration. Thereafter, I served for two years as president of the American Judicature Society, a national organization interested in judicial selection and other court-related issues.

I. The Public Importance of these Hearings

I think that the citizens of this state owe a debt of gratitude to this Committee, and to its chair, for holding these hearings. They serve to highlight the serious problems facing

the judiciary of this Commonwealth and offer for consideration and analysis proposals for improvement which clearly merit serious consideration. Whatever differences emerge with respect to the details of alternative proposals, underscoring the seriousness of the problems we face must be counted a major contribution.

II. AN INTRODUCTION AND OVERVIEW

I plan to address a number of the proposals for judicial reform that are currently before this body, but I would be remiss if I did not state my view that they are likely to have relatively minimal impact, and indeed in some cases may be counter-productive, unless the legislature also addresses the calibre of our Supreme Court and the need for merit selection.

There are two main reasons for this view. First, the Commonwealth of Pennsylvania deserves a higher quality appellate judiciary, particularly at the highest level of its judicial system. Second, precisely what can be accomplished by legislation depends, in the last analysis, on what legislation the Supreme Court will consider valid and what legislation it will declare unconstitutional as an encroachment on its legitimate powers.

Let us consider the present situation and begin with some objective facts: the time from argument of a case to the handing down of the decision. As is well known, the Supreme Court of the United States adheres to a firm policy under which all cases argued in a given term are decided that very term. This means that cases argued in March or even April are handed down no later than early July of that year, save in the very rare case in which reargument is ordered for the following term.

A few random examples from Pennsylvania: a case argued on April 6, 1993 decided in June, 1994 -- 14 months later.[1] A case argued December 7, 1990 decided almost two years later, November 25, 1992.[2] Finally, a case argued in December, 1990 decided in 1993! [3] Attention has focused recently on delays by the justices in deciding whether to hear a case. Such delays occur, of course, before oral argument. To the extent that both types of delay occur in the same case, the effect is cumulative: the one must be added to the other.

It will not do to argue that the delay may have been occasioned by a single justice. The point is that the court as a whole has allowed practices to remain in place which must leave any intelligent observer concerned about how that institution is operating.

Predicting what the court will do is difficult. The court's reputation for closely reasoned, high quality decisions cannot be characterized as enviable.[4] In the margin I

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[1]. American Casualty Co. of Reading v. Philco Insurance Co., 643 A. 2d 91 (1994).

[2]. Lavelle v. Koch, 532 Pa. 631, 617 A. 2d 319 (1992).

[3]. Snyder v. Snyder, 533 Pa. 203, 620 A.2d 1133 (1993). The precise dates are: argued December 7, 1990 and decided February 25, 1993.

I am told that the problem is widespread and that these examples are not that unusual.

[4]. See, for example, the comments of Professor Mark C. Rahdert of Temple University School of Law in Rahdert, Sprague V. Casey and Its Seven Deadly Sins, 62 Temp. L. Rev. 625 (1989), describing a recent case as an "extraordinary exercise in judicial fiat, " and continuing: "Yet it is because the event concerned the courts, where the justices' personal stake in who serves where and when is at its greatest, that the objectivity of the court ... is most in doubt." [footnote con't on next page]

have quoted one distinguished observer's reference to the court's indulging in "judicial fiat." One need not go that far in order to wonder what legislation governing the court and its procedures will be held unconstitutional.

County of Allegheny v. Commonwealth,[5] bears mention in this context. This is the case in which the court declared that the legislature, rather than the individual counties, had the obligation to fund the courts of common pleas. When, after five years, the Supreme Court was asked to enforce its judgment, the court refused, apparently because of a technicality: the movant had mischaracterized the request for relief.[6] It took four opinions for the seven justices to explain their respective positions. I do not think that these developments have enhanced the reputation of the court, nor am I helped in predicting what the court may hold with respect to other questions involving judicial-legislative relations.

I would not suggest that the legislature is without power. If press accounts are to be credited, it is the

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Professor Rahdert has had a distinguished record, having served as a clerk to Justice Harry Blackmun on the United States Supreme Court.

The point here is not the quality of the particular decision, but rather the reputation of the court. As is well known, sometimes evidence of reputation -- what people generally think of a person -- is more highly valued than evidence of what the person is like in fact (character).

[5]. 517 Pa. 65, 534 A. 2d 760 (1987).

There is no need, for present purposes, to take a position on the merits of Allegheny. It may not be irrelevant, however, to state that I have never understood the logic of the prevailing opinion.

[6]. County of Allegheny v. Commonwealth, 534 Pa. 8, 626 A.2d 492 (1993).

legislature threatening to exercise the power of the purse that has introduced a measure of fiscal responsibility with respect to expense accounts of the justices.

All of this leads me, not to attempt to dissuade you from any reforms, but rather to urge you to give primacy to merit selection of appellate judges.

III MERIT SELECTION

I strongly favor merit selection for two reasons. First, the system of partisan elections as it currently operates in this state is bad, exceedingly bad. The worst thing about it is that candidates are obliged to raise huge sums of money, with lawyers, law firms and potential clients expected to be among the major contributors.[7]

Second, a change in the method of selection would signal that our aspiration level has changed. I will simply say that I do not think that we have expected of the members of the court a level of judicial performance that would be widely characterized as superior. We have been satisfied with less -- and we should not be.

IV SPECIFIC REFORMS

1. Election of the Chief Justice: So long as the justices are selected by way of a political process and appear to be engaged in what is loosely called "judicial politics," I would not favor election of the chief justice. Either seniority with a

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[7]. I do not think that relatively minor adjustments in the applicable rules, such as forbidding donations to a justice after the election, hold too much promise. Large contributions by a particular organization of lawyers, made before the election, are even more serious. And what of loans made by third parties or committees who then seek reimbursement from various individuals after the election?

term limited to five years or appointment by the Governor, analogous to the federal system, appears to me preferable.

2. The Supreme Court should formulate and publish its own Internal Operating Procedures. These should require making known which judges have recused themselves from the allocatur process.

3. Limits on the practice of individual justices placing "holds" on allocatur petitions are entirely appropriate and, in the present climate, necessary. The outer limits should be generous, but they should be there. The litigants are entitled to no less. Whether this is legitimately within the province of the legislature is another question.

4. Documenting the reasons for recusals: I do not favor this recommendation. Our problem has not been an excess of recusals and I fear that requiring public documentation may chill the willingness of a justice to recuse himself or herself in a borderline case. The fact of recusal is legitimately one that should be of record, but the precise nature of the relationship to the case, the litigants or counsel has traditionally been a matter concerning which each sitting jurist had considerable discretion, particularly in border line cases, and the decision to publish concerning the decision has traditionally been left to each jurist.

5. Procedures for assuring that at least four justices (or acting justices) should be in place to hear every matter is a provision that I endorse. The recently enacted constitutional amendment concerning judicial discipline provides one model for reaching out beyond the Supreme Court itself for a judge to hear

a particular case. Other models, more appropriate to the nature of the problem at hand, can be found in other judicial systems.

6. Creation of an Appellate Court Center: At first blush, this recommendation seems to make a lot of sense. It is appealing to think of a center conducive to efficiency, to face-to-face contacts, to discussion and resolution of differences rather than multiplying memos, concurrences and dissents. On reflection, however, it presents a host of complicated issues and, in the final analysis, I believe it turns on a question of priorities.

Implementing this recommendation would certainly cost a fair amount of money and would, in addition, create the impression that some great advance had been achieved. A central question, however, relates to whether it was expected that each justice reside at the seat of the court. (The enforcing mechanism, of course, is denial of reimbursement for coming to any sittings or conferences.)

The federal courts of appeals provide an analogue. Practices are not uniform. However, by and large (1) each court of appeals has a seat of the court; (2) the judges do not feel impelled to take up residence at the seat of the court; (3) the court will, for the convenience of the attorneys and the litigants, sit in various locations.

V CONCLUSION

I conclude as I began: we owe an immense debt of gratitude to the committee and its chair for focusing attention on the serious problems of our judicial system and on alternative solutions available to us.