

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

* * * * *

Judicial Reform

* * * * *

HOUSE JUDICIARY COMMITTEE'S
SUBCOMMITTEE ON COURTS

Third Floor Courtroom
Frick Building
Pittsburgh, Pennsylvania

Friday, November 18, 1994 - 9:30 a.m.

--oOo--

BEFORE:

Honorable Frank Dermody, Subcommittee Majority
Chairman
Honorable Gregory Fajt

KEY REPORTERS

1300 Garrison Drive, York, PA 17404
(717) 764-7801 Fax (717) 764-6367

1

ALSO PRESENT:

**Karen Dalton, Counsel
House Judiciary Committee**

**Bill Kent, Assistant Director
Legal Research Office**

**John Fulton
Research Analyst**

**Tom Andrews
Information Specialist**

C O N T E N T S

<u>WITNESSES</u>	<u>PAGE</u>
Opening remarks by Chairman Dermody	5
Cyril Sagan, Professor Slippery Rock University	6
Honorable David W. Craig Retired President Judge Pennsylvania Commonwealth Court	33
Robert Byer, Esquire Kirkpatrick & Lockhart	54
Arthur Hellman, Professor University of Pittsburgh School of Law	83
Honorable Joseph F. Weis, Jr. Third Circuit, U.S. Court of Appeals	96
Guy Zoghby, President American Judicature Society	120
Pennsylvania Trial Lawyers Association William Goodrich, President	134
William Caroselli, Past President	147
Mary Sue Johnston Citizen	162
Cyril D. Brain, Esquire	189
Mary Anne Kramer	192
Eleanor Smith	196
Joyce McChesney	203
Rose Marie Mitchell	205
Honorable Jeffrey A. Manning Allegheny County Court of Common Pleas	212

1

C O N T E N T S (CONT'D)

- (Written testimony submitted and attached hereto on behalf of Rose Marie Mitchell)
- (Written testimony submitted and attached hereto on behalf of J. Lynne Myers)
- (Written testimony submitted and attached hereto on behalf of Jo-Ann Spierling)
- (Written testimony submitted and attached hereto on behalf of Joyce McChesney)
- (Written Testimony submitted and attached hereto on behalf of Robert Byer)

1 1 CHAIRMAN DERMODY: Good morning. My
2 name is Frank Dermody, and I am chairman of the
3 House of Representatives' Subcommittee on Courts,
4 a subcommittee of the House Judiciary Committee.
5 This is the third of a series of hearings we are
6 having on court judicial reform in the
7 Commonwealth of Pennsylvania.

8 As I am sure you all are aware, over
9 the last two or three years, there has been an
10 Attorney General's investigation of our Supreme
11 Court, a grand jury report that indicted a
12 Supreme Court justice and issued several
13 recommendations about how they felt, that is the
14 grand jury felt, the Supreme Court and the
15 appellate courts of the Commonwealth should
16 change their ways in certain areas.

17 There have been several reports done
18 over the years and commissions and studies done
19 of our judicial system, and they have made
20 several recommendations. All of the
21 recommendations that have been made by the
22 previous reports by the grand jury are subject
23 and part of our hearing process and investigation
24 and will be included in a report and recommended
25 legislation next session.

1 1 We appreciate your attendance here
2 today. Your input is very important for not just
3 the subcommittee but for the people of
4 Pennsylvania and the future of our judicial
5 system.

6 So with that, we will start. We
7 have a very distinguished panel here today that
8 will be testifying until three-thirty this
9 afternoon. Our first witness is Cyril Sagan,
10 Professor for Slippery Rock University.

11 MR. SAGAN: Thank you. I'm grateful
12 for this opportunity to present my thoughts, and
13 I especially want to thank again Mr. Fulton for
14 being so courteous and setting up my time, as
15 well as to let me know of the new date for this
16 hearing today.

17 Regarding my background, I have been
18 pursuing the judicial system for 21 years with
19 earnest; and I haven't let up. When Senator
20 Shumaker had a special Senate committee, I'm not
21 sure what prompted this; but he had a special, I
22 think, a subcommittee that conducted some
23 hearings in 1984.

24 I wanted to have some input in that.
25 I guess it was irregular for a layman to ask to

1

1 sit on a senatorial panel that would review all
 2 sorts of things. What happened was, of course,
 3 their witnesses were essentially all lawyers and
 4 judges and then some professionals from outside
 5 of the state, also lawyers and judges.

6 It was kind of disappointing to me
 7 because I had just gotten to the point at that
 8 time that I wanted to rub elbows with those who
 9 had the influence and really represented the
 10 citizens of the Commonwealth.

11 I did testify, though, the first
 12 January that Governor Casey had become governor
 13 because one of the first things he promised to do
 14 was to establish a committee that would consider
 15 judicial reform. And I attended at the
 16 University of Pittsburgh, and I presented my
 17 testimony at the law school.

18 I also attended Senator Craig's
 19 Senate hearings at Duquesne, and I made a
 20 presentation in Erie a few months after the one
 21 that I attended there. I attended the hearings
 22 that were at Oakmont at, I guess, the high school
 23 or the intermediate school there. Then I was
 24 also a participant in the Caltagirone hearings a
 25 couple of years ago.

1 1 CHAIRMAN DERMODY: I hate to
2 interrupt. We are unfortunately without
3 microphones this morning. So try and keep your
4 voice up so people can hear you.

5 6 MR. SAGAN: For 21 years, I have
7 been making recommendations, both critical and
8 what I really believe are constructive, for
9 improving the court. I have also attended a lot
10 of citizens' meetings; that is, organized groups
11 who had some gripe about a court in various
12 phases.

13 14 I sat in many court cases on my own
15 or where I was invited in probably all of the
16 counties in western Pennsylvania and also in
17 Philadelphia. I have attended hearings before
18 the Supreme Court and the Superior Court.

19 20 I have run for political office
21 mainly on the platform of attempting to do
22 something that, as I perceive it, will never
23 happen in my lifetime in terms rectification of
24 the judicial system.

25 26 So if we have lawyers and judges
27 here who have an interest in reform, I don't
28 think any one of them or all of them put together
29 could match my interest.

1 Before I wrote my presentation down,
2 I wasn't quite sure how to go about the ideas
3 that I had. So I asked myself a few questions.
4 And then after that, I decided to choose two
5 topics to give a little elaboration about; and
6 then I will list some recommendations at the end
7 as a conclusion.

8 So the first question I ask is, Is
9 court reform intended to increase the size of the
10 courts by employing more judges and adding more
11 quasi-official judges as lawyer masters; that is,
12 what makes a lawyer master legal in the first
13 place to hear these hearings because oftentimes
14 the cases end with whatever was heard before a
15 master?

16 We didn't elect these people. So
17 the question is, Just how does the State intend
18 or hope to respond to the Common Pleas judge in
19 Chester County who said, Probably the most
20 important thing that people such as yourself
21 should consider is case overload?

22 Well, I don't think that's the way
23 to go in terms of just getting lawyers to mediate
24 or be the intermediary between the initial
25 hearing and the judge. That just doesn't seem

2

1 right to me.

2 Or will reform come as a way to
3 increase the efficiency of doing business in
4 court by taking steps to minimize the number of
5 litigants seeking legal resolution of their
6 differences?

7 Now, that's a toughie; but I think
8 the last point that I make in my recommendation
9 addresses it. It's not an easy one. You would
10 probably think it's crazy or revolutionary; but
11 to me, it's the only sensible thing that could be
12 done in a country like ours.

13 Another question that I ask is, Is
14 the effort of this committee intended more to
15 make life easier for judges, or is the committee
16 more interested in restoring public confidence in
17 the judicial system?

18 Is the intention of this committee
19 to increase the insulation and the isolation of
20 judges from the public; or is it to provide the
21 public with more information and knowledge about
22 their courts, about their judges?

23 And finally, the question that I
24 ask, Will your efforts end up benefiting judges
25 and lawyers; or will it amount to truly

2 1 substantive judicial reform that addresses
2 interests that all members of the Commonwealth
3 have something to share?

4 Before I came down, I figured I
5 should get my hair cut yesterday. So I went to
6 the barber in New Castle. While I was waiting
7 for my turn, there was a man who had just
8 retired, I guess, from the Army. He looked like
9 a distinguished person. He was yacking with the
10 barber.

11 Well, when he got up, I sat in the
12 chair; but this guy was still in there continuing
13 the conversation. So he asked the barber, he
14 said, Hey, have you ever served on jury duty?
15 And he says, Well, no, I didn't; but I have been
16 there a couple of times. The guy, I guess, got
17 out of it for maybe legitimate reasons.

18 The man who asked the question had
19 just come from jury duty, had just finished his
20 civic duty. He had been on the jury for three
21 days. So I kept in mind that I have to keep my
22 mouth shut here.

23 So I listened to their conversation,
24 but they didn't have one good thing to say about
25 the courts. They are older. It takes a few more

2

1 years than me to be older than me, but I think
2 both of them have been around longer than I have
3 and would have known the politicians and would
4 have known the judges in Lawrence County. And
5 they just said it stinks.

6 And some of these have been involved
7 in a very intimate way either as witnesses,
8 expert witnesses or character witnesses. So when
9 I left, I said, Would you guys mind if I at least
10 tell this committee what was the nature of their
11 conversation? They said, By all means.

12 The message is that they were
13 disgusted with the situation. So I come as a
14 layman in a sense like these two gentlemen who
15 were in the barbershop. I don't think I am any
16 better or any worse than they are. And I don't
17 think I am any better or worse than any judge or
18 lawyer who is going to present testimony or who
19 isn't even going to be here.

20 I have taken two topics of court
21 reform that I want to comment on in a little
22 detail, and the first one is public confidence in
23 the courts. And I think I should be recognized
24 as an authority, just one member of the citizenry
25 of the Commonwealth.

1 I think that the reference I just
2 made about the two in the barbershop is a general
3 feeling among members of the Commonwealth, at
4 least the laypeople, people who are outside the
5 bar association, not involved either as an
6 employee of the courts or a judge or a lawyer.

7 And it is these people that I
8 consider have a lot more at stake than judges and
9 lawyers. So whatever is going to happen in
10 judicial reform I think really has to consider
11 the laymen because these are the people who
12 really own the courts in my view. So they should
13 take the top priority.

14 I think the people want to know what
15 goes on in court, how it happens. And I think
16 they want to know what happens to the judges just
17 as they want to know about their legislators and
18 governor outside of their official capacities
19 while they are in office. But it doesn't seem to
20 be the way that the courts operate.

21 You know, the silence of it all is
22 what disturbs me, and I guess that disturbs
23 somebody else. They really don't have anything
24 constructive to say. They only hope on the basis
25 of what the Constitution says, there are going to

1 be three branches of government, we will give the
2 respect to whoever assumes that job.

3 The question is, Why don't they want
4 us to know; that is, why are we shut out? And I
5 kind of feel that that branch of government
6 purposely excludes people from knowing what is
7 going on. And if a case has been heard and it's
8 decided, all we get is what is in the newspapers.
9 Sometimes slanted and sometimes not, maybe not
10 enough information.

11 But we should have a track record of
12 what a lawyer is and what a judge is in their
13 performances. And if we knew, let's say, from
14 the point of view from an attorney, we would know
15 who to seek out without trying to just go down
16 through the Yellow Pages and take our luck at
17 finding the person that would suit us. In the
18 case of judges, the problem is even worse in
19 terms of the secrecy and the isolation.

20 So looking at the way judicial
21 elections are conducted, for example, it is
22 obvious why people feel disenchanting. People are
23 made to feel that they are just too damn dumb to
24 vote on judges.

25 In a sense, it is understandable

3

1 because we don't have any information, nothing
2 substantive. We know maybe their wife's name,
3 their children's names, the university that they
4 might have graduated from, trivial information
5 like that. We don't have anything that would
6 allow us to weigh as we would you as legislators.

7 If the argument that would protect
8 them from that kind of scrutiny is impartiality
9 or the Judicial Code of Conduct that prevents
10 them, that's a cop out. If anybody, we should
11 know who our judges are, what their background
12 is, and what we think they would do for us as a
13 sitting judge. So I think we are purposely kept
14 in the dark.

15 To look at a judge as if he has a
16 cloak on and as if he is all-holy doesn't sit
17 well very much anymore with people in
18 contemporary society. There might have been,
19 let's say, in my day, because I think I'm at the
20 end of a generation, I think there was almost
21 automatic respect for judges at that time. But I
22 don't think so anymore today.

23 And I think we are still expected to
24 accept a myth that there is something pure,
25 something immune about these former lawyers who

3

1 are now judges. And I don't think what you want
2 to do is to continue such a myth; that is,
3 whatever a judge is or the judicial branch is, it
4 should not have any more respect either for the
5 branch or for the individuals who are in it than
6 you as legislators.

7 So to hell with that myth, if it is
8 a myth. As a matter of fact, I know it is
9 because there was a writer out of Dickinson
10 College, it seems like 10 or 15 years ago, who
11 says there is something about the courts and
12 about this silence and the isolation that we
13 should keep because there is a myth about the
14 judges that we should keep that.

15 That just doesn't seem right; that
16 is, if anything, we should know about the judges.
17 If they are good, we should praise them and give
18 them a lot more honor and respect than they
19 currently get.

20 The second topic is kind of
21 connected to previous one in terms of merit
22 selection. I guess there are two sides to that
23 and you have probably heard so much of this, but
24 I feel strongly about that.

25 First of all, I don't even think

3 1 there is such a thing as merit selection. And I
2 2 think it's a sin even to call what is intended to
3 3 be identified as merit selection merit selection.
4 4 Call it aristocratic appointments, if you will.
5 5 Don't call it merit selection because I see no
6 6 merit in something that is intended to dispense
7 7 with the political nature of the court system;
8 8 that is, where is the politics?

9 The only politics that will be in
10 10 there apparently will be the politics from
11 11 within; that is, the guys who are judges may be
12 12 based on the law firms that they represented or
13 13 were partners or members of in the past. But you
14 14 can't say that politics is going to be dispensed
15 15 with just because voters don't choose them.
16 16 That's the only right we still have with that
17 17 branch of government. The only thing we have is
18 18 to vote for them.

19 Now, if we do it in ignorance -- and
20 20 admittedly we don't know a whole lot about it, as
21 21 I had mentioned previously -- then we should be
22 22 educated about them; that is, you relax that
23 23 Judicial Code of Conduct that silences them.

24 So appointing judges to me appears
25 25 only to have virtue to those who are in the

3

1 courthouse arena; that is, to the lawyers who
2 would recommend or not recommend a potential
3 judge that the governor may appoint. But keep in
4 mind the people don't like to look at their
5 courthouse as a playground for this kind of
6 stuff.

7 I know it goes on in the
8 legislature. I have seen it. That is excusable,
9 the petty stuff; but the respect that judges
10 expect, the clients, the witnesses, everybody
11 else who sits on the court, has got to be
12 reflected in what they do as well. And it is not
13 just because they have a robe or they sit there
14 in silence. It has to do with the way they
15 think.

4

16 I feel that the public has got to
17 maintain as a voting public that connection to
18 their judges. It's all they've got. By
19 excluding the very people for whom the judicial
20 branch of government was established is to ensure
21 a closed shop for select members of society, and
22 that idea, I think, the public resents.

23 They can't say a whole lot about it
24 because the only time, I guess, they can really
25 say something that they feel would be heard is at

4 1 a meeting like this; but you only have maybe 10
2 to 20 or 30 presenters. And very few of those
3 are the lay public.

4 They resent the encroachment of
5 their control over the court ever since Article
6 V, in my opinion, because that would probably
7 span most of the generation, Article V, Section
8 10 that was adopted as a constitutional amendment
9 in 1968.

10 As a result of that article,
11 legislative powers related to judicial practice
12 and procedure were formally transferred from the
13 legislative branch to the judicial branch. To
14 me, that's a mortal sin. And I think if there is
15 anything that should happen, it is that the
16 legislative branch should demand that that
17 amendment be repealed.

18 The 1968 article was to have
19 established a centrally managed, unified judicial
20 branch for peak efficiency. Yet many Common
21 Pleas Courts in the state have their own rules
22 that contradict or neglect the notion of
23 uniformity.

24 Each judge seems to be a rule maker
25 onto himself. And it seems as if by crafty

4

1 design the bar association persisted in pressing
2 for a constitutional convention back then, which
3 actually robbed the people of their legislature's
4 authority.

5 From 1891 to 1953, voters always
6 defeated the calls for constitutional convention.
7 I don't know that it was necessarily related to
8 improvements of the judicial system; but still
9 when presented to the voters, they resisted a
10 constitutional convention.

11 In 1963, the Bar Association of
12 Pennsylvania stated, quote, the people rejected
13 the idea shortly before then, but this time the
14 vote was close. 150,000 votes was the difference
15 between rejection and acceptance of a
16 constitutional convention.

17 In 1964, the Pennsylvania Bar
18 Association presented a report to Governor
19 Scranton's 1964 commission on constitutional
20 revision following the recommendation under
21 Article V regarding the administration of courts.

22 From Section 12-B, quote, the
23 Supreme Court shall have power to prescribe rules
24 in all civil and criminal actions and proceedings
25 for all courts. These rules shall have the force

1 and effect of law and shall suspend all statutes
2 inconsistent therewith.

3 I am quite sure you are familiar
4 with this; that is, there has been in recent
5 history cases where the court has revoked
6 whatever legislative act was passed by both
7 houses.

8 But eventually Governor Raymond
9 Shafer signed what became Act No. 2 into law in
10 1967. The constitutional convention was held
11 between December 1, 1967, to February 29, 1968.
12 And that's the amendment that gave away the
13 legislature's constitutional control over the
14 judiciary.

15 The act had the effect of giving the
16 judicial branch power to suspend all laws to the
17 extent they are inconsistent with rules, not law
18 but rules of the court. If the law conflicts
19 with a court rule, the court can suspend the law
20 made by the legislature.

21 Now, this committee, in my opinion,
22 must begin to reclaim authority that rightfully
23 belongs to it. You are one of the branches. And
24 I guess this would be the unit cell from which
25 any reform would originate, but you are

4 1 pussyfooting around with these other things.

2 They are important, but they are not
3 as important as I believe this act that became
4 incorporated into the Constitution as an
5 amendment back in 1968. That has to be repealed.

6 You start from there. Then you have
7 a smooth playing field; that is, you can begin
8 again. You can listen to the judges and the
9 lawyers, but you should also listen to the public
10 in terms of what they think their judicial branch
11 of government should be.

12 Several years ago, one of the times
13 that I was interviewed during one of my petty
14 campaigns, I said that Pennsylvanians live only
15 under two-thirds of a democratic government. Now
16 it's only one-third, as I see it.

17 We only live under one branch of
18 government, and we are all subsumed; that is, you
19 and the government is subsumed, in my opinion
20 from my perspective, by the judicial branch.

5 21 So when you are asked to support
22 merit selection, I hope, first of all, you change
23 the name and look at it as something as we might
24 see it, no merit. There is no merit in merit
25 selection because you are going to be asked to

5 1 express your support once more for what I
2 consider a grotesquely authoritative branch of
3 government or the nobility of the judiciary.

4 Our forefathers, as I understand --
5 I wasn't around then -- fought just to get out of
6 this situation, the nobility in this country.

7 I have a few more recommendations.
8 They are brief. I think you should hold these
9 kinds of committee hearings for laymen only
10 because all of ones that I have attended,
11 essentially 90 percent or more were lawyers and
12 judges.

13 If you want to win the public's
14 confidence, you have to listen to them, you have
15 to listen to that barbershop. I am not saying go
16 to the barbershop, but hey, at least you could
17 have a beer there while you are --

18 CHAIRMAN DERMODY: We listen to them
19 every two years.

20 MR. SAGAN: We have a lot to say.
21 We say it to one another, and we complain. It is
22 as if we really don't know who we are complaining
23 about because we don't know who is out there. We
24 just know that these discussions that affect our
25 lives come down the pike.

5

1 I think that the legislature should
2 control the bar association. I don't think
3 judges need a division of troops all of which are
4 officers of the court. No buck privates in
5 there. They are all officers. It used to be
6 that way, and I think that should come back to
7 the legislature. I think it would tend to clean
8 up the politics we don't hear about and the
9 chances are you are familiar with because you are
10 attorneys yourself.

11 I have sat in on Justice Larsen's
12 hearings. I took a lot of time to go out of my
13 way because I have been following him since 1973
14 because for a lot of people, that's the time that
15 the thing hit the fan. We are very sensitive
16 people. A large branch of our Commonwealth were
17 not considered part of a class that would be
18 covered under civil rights protection.

19 But that's what I began to hear. I
20 was away for five years; and as soon as I came
21 back, I heard about his ambition. He might have
22 deserved what he got in terms of going directly
23 from a Common Pleas Court to a Supreme Court
24 justice. I don't know if that has been done
25 before. It might have been, but I am not that

5 1 familiar with it.

2 But anyhow, I think rather than
3 spend so much money on impeachments that we
4 should adopt initiative and recall. We have to
5 become educated as to who the people are as our
6 judges. And if they are lousy, we should have
7 the opportunity to initiate their removal. I
8 know. I have been told many times it will never
9 happen in Pennsylvania, but at least I am
10 offering it as some way to approach judicial
11 reform.

12 I don't know if you legislators in
13 your professional careers will be affected by
14 term limits, but the governor already is. Two
15 terms and he's out, other than Cuomo. He had a
16 chance for a fourth or whatever it was.

17 It just doesn't seem fair to me that
18 the people who represent the public have a free
19 ride essentially for a whole lifetime; that is,
20 when a judge is elected for ten years, in that
21 time if there is anything that happened that was
22 bad that would be a reflection on this judge in a
23 more recent election where he might not be voted
24 again or voted in again, in ten years that's all
25 forgotten.

5

1 So I think, No. 1, that there should
2 be term limits on judges. I don't see that there
3 should be something that would interfere with
4 their professional careers. They are attorneys.
5 What I always here from judges is, that is when
6 they complain about what is going on, I could
7 make a lot more money if I just stayed in the
8 practice.

9 The question is, Why don't you go
10 back out? I've heard that right across the
11 street from a couple of judges. Why don't you go
12 back into the trade and earn an honest living?
13 It's not that it's dishonest. But that's not an
14 appropriate response, not to me. If they are
15 that dissatisfied, you go out and do what you
16 think -- if that's what you want.

17 The question is, Why do they stay in
18 there? A lot of rumors have been flying around
19 in the barbershop, and chances are you know them.
20 They are not very clean. There is nothing
21 honorable about them, and chances are you have
22 heard them yourself.

23 Not only should there be, in my
24 opinion, term limits on our judges, I think that
25 their terms have got to be shorten just for the

5 1 reason I said. Ten years is too long.

2 Ohio -- I don't know what Ohio does;
3 but I think they have four to six years. I don't
4 know that their judges are any better or worse
5 than ours. They probably go to the same law
6 schools. But I don't see anything wrong with
7 that; that is, if you have an attorney, he might
8 be an old man, as well as a young man or a woman,
9 but I don't see anything wrong with a turnover.
10 I think that's healthy.

11 But anyhow, it's too long because
12 then they begin to feel that they are the king,
13 as I have heard some judges say openly and in the
14 newspaper, I am the law. You don't tell me what
15 it is. Not even a lawyer tells me.

16 I think that you've got to demand of
17 the court, Common Pleas all the way through the
18 Supreme Court, financial disclosure that has
19 substance, everything. They should not control
20 any moneys. Why should we have two treasuries
21 within the State?

22 As I understand it -- correct me if
23 I am wrong; but as I understand it, that money
24 that the court collects, however it gets it, is
25 untouchable by the legislature. Is that true?

6

1 CHAIRMAN DERMODY: I don't know if I
2 know what money you mean.

3 MR. SAGAN: Well, whatever money
4 they control.

5 CHAIRMAN DERMODY: Fines and court
6 costs?

7 MR. SAGAN: Well, all of that. I
8 just thought that there was a barrier.

9 CHAIRMAN DERMODY: They are
10 accountable for those moneys that are collected.

11 MR. SAGAN: Well, there has never
12 been an audit, though, has there?

13 CHAIRMAN DERMODY: Sure there has,
14 and it as a matter of public record how those
15 moneys are dispensed, if that is what you are
16 referring to.

17 MR. SAGAN: Okay. The information
18 that I have is that kind of stuff is lax at best
19 and probably unavailable at worst.

20 CHAIRMAN DERMODY: No. It is
21 available, sure.

22 MR. SAGAN: I think we should
23 redefine what judicial immunity is. It's nice
24 for -- go ahead.

25 CHAIRMAN DERMODY: We just pointed

6

1 out that the fines that are collected, even at
2 the district justice level, are accountable but
3 also go back to the general fund in part to the
4 local municipalities.

5 MR. SAGAN: I stand corrected. But
6 I understood from a person that I thought was a
7 reasonable and knowledgeable person that that was
8 not the case.

9 CHAIRMAN DERMODY: I think what you
10 are probably referring to is that the Supreme
11 Court justices had an account of \$25,000 that was
12 unvouchered expenses, and that has since been
13 eliminated by the Supreme Court.

14 MR. SAGAN: \$25,000?

15 CHAIRMAN DERMODY: It's accountable.
16 So there is no --

17 MR. SAGAN: I thought it was more.

18 CHAIRMAN DERMODY: And they have
19 changed that.

20 MR. SAGAN: Did they change it, or
21 did the legislature?

22 CHAIRMAN DERMODY: It was a Supreme
23 Court rule change. The legislature couldn't
24 change that.

25 MR. SAGAN: Why not?

6
1 CHAIRMAN DERMODY: Well, I
2 understand your argument --

3 MR. SAGAN: The point is that if
4 it's money, I understand that it is the
5 legislature's job to handle that; that is,
6 whatever the court needs, I guess they would come
7 to you.

8 CHAIRMAN DERMODY: Your point is
9 well taken.

10 MR. SAGAN: The other thing is
11 judicial immunity. That means a lot of things to
12 a lot of people; and for those who happen to be
13 litigants, it means quite a different thing.

14 So now I understand -- well, it has
15 always been, I assume, there is such a thing as
16 judicial error. It would be nice to have that
17 defined and what the limitations are. I think
18 that you have to reassert the authority that you
19 have constitutionally equal to that of the
20 judiciary.

21 The last thing that I have is
22 something that in my experience, I think, is the
23 key; that is, if this country is going to survive
24 another 200 years as a democratic republic, then
25 we can't do business, first of all, because of

6

1 the population, because of the ethnic groups as
2 now going on in California where people have to
3 take a public initiative to initiate some
4 correction to a serious social problem.

5 When I read this article in Law
6 Review by this judge from Chester County where he
7 really was pounding away at the importance of
8 case overload, that is where the legislature, the
9 judiciary committee should consider how important
10 that is. You are never going to correct that
11 overnight. You are never going to correct that
12 in ten years. It will a take while.

13 As the population grows and whatever
14 other laxity there is in the laws, I don't know
15 if caseload is going to diminish. So his appeal
16 was for more people on the bench. That's not my
17 solution. My solution is also long term; but it
18 represents, I think, the spirit of the whole
19 Commonwealth, as well as the country.

20 I see a reason to have professional
21 people labeled as lawyers. I think there is
22 plenty of work for them. But that does not
23 preclude, in my opinion, an obligation of the
24 Commonwealth or the nation to educate the public
25 in the law; that is, from kindergarten through

6 1 college, I believe that everybody should become
2 so proficient in the law that they know that if
3 they go through a red light, I just pay the damn
4 ticket, no questions asked, so I don't even go to
5 traffic court.

6 But you can extend that to all kinds
7 of things; that is, when you are falsely accused
8 of, let's say, child abuse, then that person
9 should have some recourse and a correction made
10 maybe just by an apology rather than waste two or
11 three clients' time and money to pay the lawyers
12 who would represent them.

13 So the crime that is being committed
14 these days, to me, isn't going to be corrected
15 just by offering these people, kids or older
7 16 people, jobs. It has to do with a conscious. I
17 don't think the courts are doing that today; that
18 is, the courts don't give us a conscious that we
19 would emulate.

20 As a matter of fact, I kind of feel
21 that the courts and lawyers tend to encourage the
22 kind of what would seem to be lawlessness because
23 we would feel -- let's say here on the outside of
24 the bar and the lawyer community, we see these
25 people able to get away with what seem to be

7

1 infractions by just saying, I didn't violate a
2 law. I didn't do anything wrong.

3 But the rest of us, we don't have
4 the confidence that we are protected that way.
5 So I think the education would have to make us
6 better citizens. It would cut down on caseload.
7 To me, we would live whatever the Constitution
8 says that we ought to be as a democratic
9 republic. And I thank you.

10 CHAIRMAN DERMODY: Any questions?

11 (No response.)

12 CHAIRMAN DERMODY: Mr. Sagan, thank
13 you very much.

14 MR. SAGAN: Your welcome.

15 CHAIRMAN DERMODY: Stick around
16 because you will hear from a very good judge
17 shortly.

18 We are very honored to have with us
19 today a very distinguished jurist in the
20 Commonwealth of Pennsylvania, a recently retired
21 president judge of the Commonwealth Court. Our
22 next witness is Judge David Craig.

23 HONORABLE CRAIG: Mr. Chairman,
24 members of the committee, I just want to talk
25 about two matters: (1) the proposal about which

7

1 I am concerned and which I think has not been
2 answered to concentrate appellate court functions
3 in Harrisburg only, and (2) of course, the
4 important issue of so-called merit selection.

5 First, as I think the members of the
6 committee know better than the rest of us from
7 their work in Harrisburg, that a number of
8 Harrisburg voices, chamber of commerce-types and
9 media, have proposed that public court functions
10 be concentrated in Harrisburg. I want to address
11 that because it hasn't been answered.

12 I should give my qualifications with
13 respect to these two issues. I have been a
14 member of the Commonwealth Court for 16 years,
15 the last 4 years as president judge. Secondly,
16 in going on that court, I experienced both
17 so-called merit selection appointment by the
18 governor and then statewide election. So I have
19 had experience in both of those dimensions
20 because I went on at the time the Commonwealth
21 Court was increased from seven to nine members.

22 I was interviewed by a nominating
23 commission now called merit commission. Three
24 names of Democrats and three names of Republicans
25 were recommended to Governor Shapp at that time.

7 1 He named me as the Democratic addition to the
 2 court.

 3 And then I was fortunate enough when
 4 I ran for election in the following year, 1979, I
 5 garnered the nominations of both parties in the
 6 primary but continued to campaign; that is, visit
 7 throughout the state because that was the
 8 significant education for the bench, I felt, that
 9 I was getting.

 10 The third qualification I mention is
 11 that during the 1980's, I was a member and then
 12 faculty chairman of the Institute for Judicial
 13 Administration's summer seminar course, two weeks
 14 at NYU Law School each summer, for intermediate
 15 appellate judges from all over the country, which
 16 gave me a wonderful opportunity to see the
 17 function of appellate courts from all over the
 18 United States and to work with the members of
 19 those courts in teaching and engaging in seminars
 20 with them.

 21 Okay. In this business of moving
 22 the courts to Harrisburg, it comes in three
 23 suggestions as I have got it: first, that the
 24 court have their headquarters only in Harrisburg;
 25 second, that the judges be located only in

7 1 Harrisburg; and thirdly, that appellate argument
 2 and sessions be conducted only in Harrisburg,
 3 which is the extreme suggestion.

 4 Incidentally, I welcome questions at
 5 any time because, as you know, that is pattern of
 6 the Commonwealth Court, too. Nobody gets to
 7 argue unquestioned before the Commonwealth Court.

 8 The headquarters only in Harrisburg
 9 has already been satisfied. Thanks to your body,
 10 the legislature, the Commonwealth Court has its
 11 main headquarters on the sixth floor of your
 12 south office building, as well as a filing office
 13 in Philadelphia. And that's it.

 14 Each judge of the Commonwealth Court
 15 has half of his or her chambers in Harrisburg and
 16 the other half in his or her home county. So I
 17 think we satisfy that desire to be located at the
 18 seat of government as our statute specifically
 19 requires.

 20 The Supreme Court, as you know, has
 21 a very substantial headquarters at Mechanicsburg.
 22 All of their fiscal and electronic data
 23 processing functions are concentrated there in
 24 the Harrisburg area, as well as, of course, their
 25 headquarters in the Administrative Office of

7 1 Pennsylvania Courts in Philadelphia. But the
2 Supreme Court's money business, arguably the most
3 important part, is right there in Mechanicsburg.

8 4 The Superior Court, like the Supreme
5 Court, has prothonotaries' offices in each of the
6 three cities, Pittsburgh, Harrisburg, and
7 Philadelphia. So I think that the headquarters
8 are provided.

9 One editorial writer suggested that
10 the judges be required to themselves have their
11 offices in Harrisburg, which would also mean
12 their residences, on the ground that the judges
13 were thus be removed from the political
14 influences in their home counties.

15 I think that is amusing, the idea
16 that Harrisburg is a politics-free zone and,
17 second, the idea that judges -- forgetting that
18 we have modern means of communication, forgetting
19 that a judge can get a fax from his politician in
20 Harrisburg, as well as telephone calls nowadays.

21 But the one thing that concerns me
22 the most is the idea of stopping the appellate
23 courts from riding the circuit, from holding
24 sessions as they do now, as you know, in
25 Pittsburgh and Philadelphia, as well as

8

1 Harrisburg and the Superior Court sending
2 individual panels to many other county seats
3 around the state where the case volume warrants
4 it.

5 Riding the circuit, as you know, is
6 a traditional pattern of American courts, for the
7 courts to go to the people and not require the
8 people to come to the courts. And of course,
9 concentrating arguments in Harrisburg alone would
10 impose a very substantial financial burden on
11 those of our citizens who have to be litigants in
12 the appellate courts. It would increase the
13 cost.

14 If a Pittsburgher or a
15 Philadelphian -- let's say a Pittsburgher since
16 we are in Pittsburgh right now. If his or her
17 lawyers had to go to Harrisburg to argue the
18 Pittsburgh cases before the appellate courts, it
19 would increase the fee costs justifiably from the
20 lawyer's standpoint eight times as much.

21 Let's say the lawyer charges what
22 would be a low rate today \$50 an hour. And so
23 today a Pittsburgh lawyer can, when the court
24 sits in Pittsburgh, spend an hour to conduct what
25 in the Commonwealth Court is a 15-minute argument

1 and in the other courts a half-an-hour or at most
2 an hour argument. And so the charge would be \$50
3 or so.

4 But if that lawyer of Pittsburgh has
5 to travel to Harrisburg, as we know, it's a
6 three-and-a-half-hour trip even by taking
7 advantage of the -- and again, you know the state
8 police tolerance that lets us drive 69 miles an
9 hour, no more, 69. And I'm not advocating breach
10 of the law. This has been declared as the
11 tolerance of the state police.

12 So there the Pittsburgh lawyer
13 spends eight hours all day, and the charge to the
14 client justifiably is eight times as much. At
15 that low rate what was for the day's work of his
16 lawyer a \$50 charge for the Pittsburgher becomes
17 \$400.

18 The Commonwealth Court in a week's
19 argument conducts a hundred arguments. So we
20 multiply that by a hundred times; and the total
21 cost -- of course, there are at least two lawyers
22 per case. That's 200 attorneys times \$400 is by
23 my calculation \$80,000.

24 If we have half of the judges travel
25 because half of the judges don't have to travel

8 1 already being in Pittsburgh -- the same thing is
2 2 true of Philadelphia -- if half of the judges,
3 3 say seven, with one assistant each travel, the
4 4 day's cost there to the taxpayer is \$5,000.

5 Now, it could be argued, Well, why
6 6 should the taxpayers pay to make things easier
7 7 for litigants? But all taxpayers can become
8 8 litigants; and of course, the courts should be
9 9 conducted as economically as possible for those
10 10 that participate in them.

11 Therefore, continuing to hold
12 12 appellate courts, as the law now allows, in
13 13 Pittsburgh and Philadelphia and other cities,
14 14 Erie and so forth, is certainly indicated from
15 15 the standpoint of efficiency and from the
16 16 standpoint of the expense and convenience, if you
17 17 will, of the litigants and the counsel whom they
18 18 must pay.

19 I think if we look ahead, I think
20 20 the members of the committee would agree that we
21 21 can see that it is not far away when these
22 22 sessions will be conducted by closed circuit
23 23 television.

24 As you may know, the Federal Court
25 25 of Appeals, Third Circuit, Judge Weis, a senior

8 1 member of that body who will be here this
2 afternoon, has conducted a session by closed
3 circuit television and very successfully so.

4 In the Commonwealth Court, we had it
5 set up until the Bell Telephone Company moved
6 their studio out of Pittsburgh. But now there
7 are conference settings available in all of the
8 cities, both commercial and public, so that the
9 judges can be in one city, but the clients'
10 lawyers can remain in their own city and appear
11 in court electronically.

12 Until that day, though, I think that
13 the traditional idea of riding the circuit
14 continues to be important.

15 Turning to probably the central
16 question I know that is before you, so-called
9 17 merit selection. And I say so-called because
18 having been a practicing lawyer for more than 40
19 years, a trial lawyer, a corporation lawyer with
20 two law firms, a city solicitor, a police
21 administrator, and then a member of the court, I
22 have to testify that it would be difficult to
23 find judges of greater merit than you find in
24 Pennsylvania.

25 I really am impressed in comparison,

9 1 in fair comparison with the judges from all over
2 2 the country with whom I have worked in the New
3 3 York seminars, we have excellent judges that we
4 4 have achieved by the elective system.

5 Our Pennsylvania judges I have found
6 6 out from teaching in New York work harder. At
7 7 least the appellate judges -- those are the ones
8 8 I had a chance to compare -- work harder. And
9 9 incidentally, merit selection, I realize, is
10 10 proposed to start with appellate judges only by
11 11 one approach.

12 Pennsylvania judges work harder than
13 13 the appellate judges of any other state. Our
14 14 Superior Court judges file 200 to 220 opinions
15 15 per judge per year. And you stop and realize
16 16 that in terms of workdays, that is one opinion
17 17 per judge per workday with the assistance of that
18 18 judge's law clerks and secretarial staff, one
19 19 appellate opinion per day.

20 The Commonwealth Court is close to
21 21 that, 180 to 200 opinions per judge per year,
22 22 almost one opinion per workday that you are not
23 23 sitting on court and arguments, plus the fact
24 24 that^o the Commonwealth Court has the unique, again
25 25 unique in all of the nation, of being an

1 appellate court that conducts significant trial
2 work whenever the Commonwealth itself is a party
3 to the case with the exception of ordinary tort
4 cases.

5 Our trial judges, I found this out,
6 too, work harder than other states. You may not
7 be aware, but we take it for granted in
8 Pennsylvania that every trial judge under Rule
9 1925 is required to file an opinion whenever
10 there is an appeal. In other states, they are
11 not required. The case goes up on appeal; and
12 unless the judge happens to have written opinions
13 or has made fact findings, the appellate court
14 has an inability to hear from at least one of the
15 significant disinterested parties that has had
16 previous contact with the case.

17 Our trial judges, as I say in being
18 required to file an opinion on every appeal, work
19 hard indeed. And hard work is part of merit.

20 Stop and think. The key
21 qualification for a judge -- sometimes we
22 attribute this view only to so-called
23 conservatives. And I usually don't go into that
24 label. The key qualification for a judge is, I
25 think, being a strict constructionist of adhering

9 1 to the law, not injecting his or her personal
2 2 policy views so as to distort the law as enacted
3 3 by your law-making body.

4 We elect you to make the laws, and
5 5 we expect the courts to interpret the laws in
6 6 accordance with your intention. We know that is
7 7 the official doctrine. We expect the judges to
8 8 be able to do that through professional expertise
9 9 and most importantly through contact with the
10 10 entire Commonwealth. And that brings us into the
11 11 matter of how judges are selected.

12 This really came home to me when in
13 13 1979 I began to campaign statewide for a full
14 14 term on the Commonwealth Court. I remember very
15 15 clearly I went for the first time before the
16 16 board of directors of a labor union. And I sort
17 17 of had it in my mind if they asked me to --
18 18 because I am the son of a laboring steelworker
19 19 and so forth, if they ask me to slant my
20 20 decisions in their favor, of course, I was going
21 21 to say no. But I was never asked that.

22 The only thing that the labor union
23 23 representatives asked me was for assurance in
24 24 effect that as a judge, I would adhere to the
25 25 principle of law that says that the courts do not

9 1 second guess arbitrators.

2 When labor unions and their
3 employers enter into contracts that provide for
4 arbitration or when our statutes provide for
5 arbitration as they now do significantly, of
6 course, in school teacher and police and other
7 public areas, the arbitrators' decision should be
8 final if it is arrived at in a regular manner.
9 And the court should respect that.

10 That is the only thing they asked
11 me, Judge, will you as an appellate judge go by
12 the law?

13 In going around the state, I
14 gained -- and as I say, I was nominated as a
15 Republican as well as a Democrat in the primary.
16 But I continued to go around the state because I
17 found that meeting with all kinds of groups,
18 employer groups, business groups, school groups,
19 it was an education for me that has been
20 invaluable to me in my 16 years on the court.

21 In, of course, an election process,
22 of course, I met other local officials or
23 would-be local officials who did become the heads
24 of their respective municipalities whose business
25 later came before the Commonwealth Court. This

9 1 gave me a perspective that made it, I think,
2 easier for me to do my job of being a strict
3 constructionist.

10 4 As we know, the courts must not
5 follow the statutes if they violate the
6 Constitution; but then we also have the matter of
7 applying the Constitution as written and not
8 injecting personal or party policy views.

9 Let me throw out a counterargument
10 against popular election. One of the best
11 arguments for so-called merit selection might be
12 the way in which the first seven judges of the
13 Commonwealth Court were selected.

14 It is generally not known or it has
15 been forgotten that when the Commonwealth Court
16 began in 1970, the statute, the formative statute
17 then allowed the governor to appoint the first
18 seven judges for staggered terms. And then as
19 the law stood at that time, they did not have to
20 run against an opponent in a contested election.
21 At the end of those staggered terms, they then
22 only had to run for retention.

23 The argument in favor, therefore, of
24 appointment is the sterling quality of those
25 seven judges. I won't go through them, but the

0 1 president judge was Judge Bowman. There were
2 Judge -- well, I won't go through the whole
3 group.

4 They made history, I think, in
5 commencing the Commonwealth Court, an appellate
6 court in which every judge votes on every case in
7 accordance with the rules they laid down. No
8 three-judge panel decision is handed down unless
9 it is in accordance with the views of the
10 majority of all of the elected members of the
11 court.

12 They established the Commonwealth
13 Court as the first hot court in Pennsylvania; and
14 as you know, when I say the court is hot, I'm not
15 referring to its sexual propensities. I'm
16 referring to the fact that these judges with the
17 help of their staffs read the briefs before
18 argument and, therefore, know what the case is
19 about when it comes to a dialogue before the
20 court.

21 They are a good argument for merit
22 selection. Incidentally, later the Supreme Court
23 held that that in a sense, belatedly because the
24 issue was not brought before them, held that that
25 kind of placing of judges on a court without ever

0 1 having a contested election could not happen
2 again under the elective system. But I
3 acknowledge it as an argument for appointive
4 selection.

5 But I have to say that -- well, let
6 me face the other argument against popular
7 election. And that is, as you know and we are
8 all conscious, the cost of campaigning statewide
9 for a statewide judicial office has now gone
10 through the ceiling, as you are well-aware,
11 particularly because of television costs.

12 To run for the Pennsylvania Supreme
13 Court at this time, campaign costs have typically
14 been over \$1 million particularly because of the
15 cost of television. On the Commonwealth Court
16 last year, the contest there involved expenditure
17 of more than, I believe, \$500,000 for the
18 candidates for the Commonwealth Court.

19 Therefore, I think that in retaining
20 popular election for the reasons that I
21 mentioned, the fact that running for popular
22 election gives you a grass-roots education in the
23 state whose laws you are to judge, there should
24 be campaign spending limits. I suggest initially
25 \$300,000 for the appellate court statewide and

0 1 \$100,000 or less in the county.

2 As you know, you changed the law not
3 long ago to provide that candidates for the
4 appellate courts could no longer cross-file and,
5 therefore, could no longer have the benefit of
6 what I enjoyed in 1978, becoming the candidate of
7 both parties.

8 That may well be wise because you
9 can speculate as to why I received the Republican
10 nomination as well as the Democratic nomination.
11 I was well-known in western Pennsylvania from
12 having been a Pittsburgh city official that had
13 administered the police force in last half of the
14 '60s, a very busy time.

15 Did I get the Republican nomination
16 because I have a very Waspish last name? I don't
17 know. You can speculate. But I did get both
18 nominations. That is no longer possible because
19 the legislature amended the law to provide that
20 appellate judges cannot cross-file.

21 And the suggestion there, of course,
22 I suggest was that, therefore, the statewide
23 party committees should assume responsibility as
24 they formerly, I felt, did in saying to the
25 public, When we endorse a candidate, we have

1 found and presented a qualified candidate. I
2 think they are falling down on that, and I think
3 the state committees should readdress themselves
4 to that matter.

5 CHAIRMAN DERMODY: Judge, do you
6 think the state committees -- it would be proper
7 for them to engage in their own type of process
8 of interviews or some kind of selection process
9 before they go for an endorsement?

10 HONORABLE CRAIG: Precisely what is
11 suggested. They should, in addition to being
12 concerned about their own fate, demonstrate a
13 concern for developing a reputation, a political
14 party responsibility of backing qualified
15 candidates. And that will not be credible unless
16 they do precisely as you say, unless they have an
17 open process for examining candidates outside of
18 smoke-filled rooms.

19 You have given them the opportunity
20 now to do that by eliminating cross-filing, and I
21 think they should grab that opportunity.

22 Now, within the counties, the Common
23 Pleas candidates can still cross-file apparently
24 also in the sound theory that within a given
25 county, particular the smaller counties, the

1 candidates are often personally known to the
2 voters by reason of having been local public
3 officials, lawyers in practice in the county, and
4 so forth. And I think that that can work.

5 In 1979, I spent \$40,000 to campaign
6 statewide. That was 15 years ago. It isn't
7 happening today. And for that reason, campaign
8 spending limits and contribution limits also are
9 important and should be in the picture because a
10 candidate should do as I have found very
11 beneficial and as all statewide candidates do,
12 with perhaps the lesser extent, that is with
13 perhaps the judicial candidates doing it less,
14 travel the state.

15 I was in a place called Whiskey
16 Gulch up in the northern tier of counties among
17 many other places and was exposed to a variety of
18 viewpoints. I learned about -- I didn't realize
19 the importance of farming in Pennsylvania until I
20 campaigned in the Pennsylvania Dutch Country.
21 And when on our court there came before me the
22 issue of agricultural zoning, I looked in other
23 states for precedents on it. There were none.

24 The question came up first in
25 Pennsylvania; and therefore, I was able to, with

1 my colleagues in the court, deal with the issue
2 of zoning for preservation of agriculture with a
3 background of knowledge, not with a preconceived
4 agenda as to what should be desired but in the
5 context of a background and knowledge.

6 You enact the laws within a context.
7 We expect the judges to interpret the laws as you
8 enact them but in the same context. And we
9 expect the appellate judges particularly to do so
10 consistently with consistency.

11 When you stop and think of it, there
12 there is hardly any common law anymore. In so
13 many matters, particularly public sector matters,
14 we no longer have judge-made law in the sense of
15 the Old English common law. Most of our law is
16 statutory as you have enacted it. Our
17 descriptions and concepts of crimes now are
18 statutory with only a vestige of the common law
19 left.

20 And therefore, I view the
21 administration of law as a partnership between
22 the legislature laying down the policy, having
23 been elected to do so, having a debate atmosphere
24 in which to arrive at those policy decisions, and
25 then for the court to be in a sense strict

1 constructionists and help us -- consistent
2 constructionists so that the law is one law for
3 the state of Pennsylvania and it is the same
4 unless it is amended by you in one month as in
5 later months to provide the consistency which is
6 almost more important than how the laws read.

7 If a law is consistently good, we
8 can keep it. If it is consistently bad, you can
9 get rid of it.

10 That's my concern, and I think that
11 popular election can be reformed so as to
12 strengthen our judiciary in accomplishing those
13 fundamental duties that they have. And I would
14 be glad to take any questions that you have.

15 CHAIRMAN DERMODY: Judge, thank you
16 very much.

17 Our next witness also sat on the
18 Commonwealth Court of Pennsylvania and is a
19 distinguished attorney from Pittsburgh, Attorney
20 Robert Byer.

21 MR. BYER: Thank you very much, Mr.
22 Chairman, members of the subcommittee. I have
23 brought with me a fairly lengthy prepared
24 statement, which I would prefer not to read.
25 I would ask that my statement be incorporated as

1 a part of the record of this hearing

2 CHAIRMAN DERMODY: It will be.

3 MR. BYER: And what I would like to
4 do is maybe just talk about a few of the points
5 that I raise in the statement. But what I really
6 hope to do is engage in a dialogue with you to
7 the extent that you have questions, to the extent
8 that I can help you in terms of some of the
9 proposals that you might be considering, some of
10 which I really might not be aware of at this
11 time.

12 I know that some of the things I
13 have heard that might be before the committee, I
14 talked in my statement about a few of them. I
15 think a dialogue might be helpful in terms of
16 trying to flush out some of the ideas. And that
17 might be the way in which I can be of the most
18 help to you in considering legislation or
19 proposed constitutional amendments.

20 I do think that recent events have
21 correctly focused the attention of the General
22 Assembly on the need to take a look at judicial
23 reform. Certainly we need always to consider how
24 we can improve the operation of our branches of
25 government.

1 1 The judiciary, which is charged with
2 2 the very important function of deciding disputes
3 3 in a way that is supposed to be impartial, the
4 4 way in which people receive fair and equal
5 5 justice, is one of our most important
6 6 institutions because this is the institution
7 7 which takes care to see that the laws are
8 8 enforced properly and constitutionally. And this
9 9 is where people receive justice, a major function
10 10 of our government.

12 11 My major premise is that the most
12 12 important judicial reform that the legislature
13 13 should be looking at is merit selection. And in
14 14 this respect, I do disagree in large part with my
15 15 former colleague Judge Craig.

16 My experience in running for office
17 17 perhaps is somewhat more recent than Judge
18 18 Craig's, and much of my views are based upon my
19 19 experience as a candidate in statewide elections
20 20 in 1987 and again in 1991.

21 The first time I ran in 1987 I was
22 22 not an incumbent. It was the first year after
23 23 the elimination of cross-filing. In 1991, I was
24 24 an incumbent seeking a full term on the
25 25 Commonwealth Court. And I detail that experience

2

1 in my statement.

2 My experience, along with that of
3 Judge Spaeth's, has been referred to in other
4 testimony, I understand, before this committee
5 and in studies by Professor Madonna and others in
6 terms of looking at the whole question of merit
7 selection.

8 I think, though, that we have to
9 look first at the reputation of the Pennsylvania
10 courts. And I agree with Judge Craig that we do
11 have some excellent judges in Pennsylvania; but
12 recent events have created a perception
13 nationally, perhaps unfairly in some respects,
14 but nevertheless that perception is there and it
15 is very real that Pennsylvania judges are not as
16 qualified or as competent as judges on appellate
17 courts of other states.

18 REPRESENTATIVE FAJT: Are you
19 referring specifically to the Larsen impeachment,
20 or are there other incidents beyond the Larsen
21 impeachment?

22 MR. BYER: I'm referring to the
23 Larsen impeachment and other charges that were
24 floating around with respect to that and the
25 whole reputation that developed nationally as

2 1 people looked at the Pennsylvania court system.

2 REPRESENTATIVE FAJT: That
3 perception, was that the result of --

4 MR. BYER: I think in large part it
5 has been focused as a result of the Larsen
6 affairs.

7 REPRESENTATIVE FAJT: I want to make
8 sure there are not other issues out there.

9 MR. BYER: The Larsen affair goes
10 back to 1980 in terms of when that first started
11 gaining publicity.

12 And I think that that reputation,
13 the reputation that Pennsylvania judges are
14 selected mainly because of partisan politics and
15 not because of competence and a reputation that
16 Pennsylvania judges are dispensing favors for
17 political reasons and deciding cases for
18 political reasons is one which not only
19 undermines public confidence in our judiciary,
20 and again perhaps unfairly, but nevertheless
21 undermines public confidence and also is costing
22 Pennsylvania revenue and jobs.

23 Businesses -- and I represent a lot
24 of businesses. Businesses in looking at whether
25 to locate in Pennsylvania or whether to remain in

2

1 Pennsylvania or conduct operations outside this
2 state are looking at the Pennsylvania judiciary
3 and are concerned.

4 REPRESENTATIVE FAJT: I don't mean
5 to interrupt you, but you said earlier that you
6 wanted to have a dialogue.

7 MR. BYER: Yes.

8 REPRESENTATIVE FAJT: This is an
9 issue that I am obviously very concerned about,
10 one that we will probably be dealing with in the
11 next legislative session.

12 When you talk about dispensing
13 political favors, are you talking about returning
14 favors in the sense maybe for, you know, help
15 during a campaign as opposed to future help,
16 because I think one thing that Judge Craig
17 touched on and Professor Sagan touched on is once
18 a judge is elected to an appellate court in
19 Pennsylvania, for all intents and purposes, that
20 is almost a lifetime appointment or a lifetime
21 job.

22 I know yours was a special
23 circumstance, and you had to come up for
24 re-election shortly after you were appointed.
25 But for all intents and purposes, that's a

1 lifetime appointment. So my thinking is that
2 there would not be a political favor due down the
3 road because it's a done deal and that person is
4 going to get re-elected.

5 MR. BYER: Except to the extent that
6 judges of intermediate courts want to move up to
7 higher courts.

8 REPRESENTATIVE FAJT: Okay.

9 MR. BYER: And that is a problem in
10 terms of perception in our state courts. I can
11 tell you that lawyers have speculated that
12 certain intermediate appellate court decisions
13 might have been motivated as a result of the
14 desire of an authoring judge to move up to the
15 Supreme Court.

16 I even heard an opinion of mine
17 criticized by a bar association group which did
18 not like my opinion in a somewhat controversial
19 case saying that I wrote that opinion because I
20 knew that I had to be running for election.

21 I thought the criticism was unfair,
22 but I am talking about perceptions here and the
23 appearance of justice and the appearance of
24 impropriety is important to maintaining public
25 confidence in the judiciary.

1 CHAIRMAN DERMODY: As long as there
2 is a loser, there is always going to be
3 criticisms of opinions for whatever reasons. And
4 if it wasn't because they thought Rob Byer was
5 running for re-election at that point, could it
6 be some other reason?

7 MR. BYER: It is possible. But yet
8 the reason on the one hand might be viewed as
9 sour grapes; but when one looks at political
10 contributions, all of a sudden the criticism that
11 it's based on politics tends to take on a greater
12 credibility and again particularly in light of
13 recent events in this state.

14 We are only one of eight states now
15 that continue to elect all appellate judges.

16 I heard Professor Sagan refer to our
17 forefathers and how we fought against this. And
18 I have to chuckle because the forefathers of this
19 country wrote Article III of the United States
20 Constitution that provided for the selection of
21 judges by appointment, that provided for lifetime
22 tenure in order to create an independent
23 judiciary.

24 One of the most important functions
25 of the judiciary is to protect the rights of

1 individuals in situations where the exercise of
2 those rights is not politically popular.

3 I have used the example, and others
4 have used it too, that if the federal courts, the
5 federal judges had to run for popular election,,
6 we still would probably have segregated schools
7 in this country. The desegregation process never
8 would have begun in the south in the 1950's if
9 federal judges had to face election.

10 REPRESENTATIVE FAJT: Rob, do you
11 have any statistics -- I know that Chris McNally
12 is coming on at eleven o'clock. And Chris is a
13 colleague of Frank and I's in the legislature.
14 He has done some research or is going to do some
15 research on the problems of the judiciary in
16 Pennsylvania vis-a-vis other states.

17 He and I had a brief conversation
18 one time about Arizona and the fact that
19 Arizona's judges, there was a number of
20 indictments there and political corruption and
21 they are a merit selection state.

22 I was wondering if there is some
23 well-known statistic or survey nationwide that
24 compares the indictments or impeachments of
25 appellate court judges who are merit, the basis

13 1 of merit selection, they got their appointment
2 through merit selection versus those who are
3 elected by the public.

4 That is something that I would like
5 to see, but I have not seen that personally.

6 MR. BYER: I have not seen such
7 statistics. I can tell you that merit selection
8 is not a panacea in the sense that it is not
9 going to protect us against dishonesty or
10 criminal conduct. And I don't think anyone is
11 suggesting that most Pennsylvania judges ever
12 have engaged in such conduct.

13 But I think that in terms of just
14 trying to improve the image of our judiciary and
15 to restore confidence in the ability of the
16 courts to dispense justice in a way that justice
17 will be equal for all, that merit selection will
18 go a long way.

19 Now, obviously much depends upon how
20 the process is conducted, how individuals are
21 selected for the bench.

22 In my statement, I take great pains
23 to point out that I do not endorse the federal
24 system for Pennsylvania because I believe that
25 the way in which federal judges are selected,

f3

1 even though the selection process is preferable
2 to election, nevertheless could be improved
3 because in recent years there tends to be a lot
4 of political qualification in addition to merit.
5 But the federal system does have the benefit of
6 weeding out obviously unqualified individuals.

7 But still I think there is too much
8 attention to politics even in that type of
9 system, and I have suggested ways in which merit
10 selection could be improved in Pennsylvania. For
11 example, in my statement, I talk about let's have
12 a requirement as part of any merit selection bill
13 that no two successive nominees can be from the
14 same political party.

15 That would prevent the governor from
16 selecting mainly members of his or her own party.
17 It would also require a bipartisanship in the
18 selection process, which would fit very nicely
19 with the two-thirds vote requirement for
20 confirmation in the Senate under the
21 Constitution.

22 I think that there are other things
23 that Pennsylvania can do in the way of the use of
24 truly impartial commissions, the members of which
25 are not engaged in elective politics -- that's

1 not a requirement for selection in the federal
2 courts, for example -- and that there can be
3 steps taken to try and minimize politics.

4 I don't think you ever will
5 eliminate it totally because if somebody comes up
6 on a list who happens to be very well qualified
7 and also was a friend of the governor, that
8 person probably will be appointed.

9 You can't eliminate that; but so
10 long as merit as qualifications and experience
11 becomes the chief component of the selection
12 process rather than the random partisanship that
13 we are seeing today in the conduct of popular
14 elections, then I think that that will be a step
15 in the right direction.

16 CHAIRMAN DERMODY: Over the years, I
17 think our courts, our appellate courts have had
18 very good reputations. The Superior Court and
19 the Supreme Court, years ago, etc., and the
20 Commonwealth Court has historically had a very
21 good reputation. And the Commonwealth Court
22 after the original appointment was an elected
23 court.

24 You heard Judge Craig's testimony
25 about having the political parties get a little

3 1 more active and doing their own job in helping to
2 select candidates. Now, you went through that
3 whole process of running.

4 I wonder do you have any opinions
5 and what do you think about that?

6 MR. BYER: I do. I address this in
7 detail in my statement.

8 At a time in the past, in the not
9 too distant past, political parties had strong
10 leadership at the helm. These strong leaders
11 took pride in who might be selected as judicial
12 candidates for those parties.

13 They generally were lawyers or
14 judges that the political party bosses were proud
15 to get behind and say, I helped make this person
16 a judge, because it was a person of obvious
17 ability, people who had paid dues to the party
18 leaders, sure, but also had the qualifications
19 for the job.

20 And that became a priority in
21 addition to which the political party leaders
22 would cross-endorse so that sitting judges in the
23 cross-filing situation that we no longer have
24 would be endorsed by both political parties. And
25 the party bosses had the power to enforce their

4 1 endorsements in the primary election.

2 Now, that situation -- I don't have
3 to tell you gentlemen that situation has broken
4 down. We don't have strong political party
5 leadership in either party.

6 In terms of looking at the
7 endorsement of judicial candidates in political
8 party state committee meetings, qualifications is
9 not even an issue.

10 I point out in my statement that in
11 my own case, I have said in both situations where
12 I have run for election, the fact that I was the
13 only candidate in the field to receive a rating
14 of exceptionally well-qualified from the state
15 bar and the fact that I was endorsed by the
16 Republican state committee were purely
17 coincidental.

18 We have seen time and time again
19 state committees looking over candidates, passing
20 over candidates of obviously greater
21 qualification than individuals who are endorsed.
22 And that is bipartisan. I have criticized
23 Republicans roundly on that, just as I have
24 criticized members of the Democratic Party.

25 I don't know how we can enforce

4

1 party discipline as a matter of legislation.
2 Parties have a First Amendment right to do
3 whatever they want to do in the conduct of
4 elections and in the selection of their
5 candidates. And we could hope that maybe they
6 would engage in some sort of a process that would
7 look at qualifications.

8 I might add that in 1983, I
9 participated in -- I am sorry. In 1985, I
10 participated in such an effort at the request of
11 the then chairman of the Allegheny County
12 Republican Committee where we actually formed a
13 group of lawyers and lay people to examine the
14 qualifications of candidates seeking endorsement
15 for Common Pleas Court positions.

16 Do you know what? The people that
17 we found to be unqualified were endorsed, and the
18 people that we found to be the best qualified,
19 they did get the endorsement, but they lost the
20 primaries. So I just don't think it works.

21 I agree with Judge Craig that there
22 is a benefit to having judges get a well-rounded
23 education to see what the state looks like.

24 And I would have no problem, for
25 example, with a system where the appointments are

4 1 made on the basis of merit subject to a retention
2 vote maybe a few years down the road that would
3 require judges to be on a ballot on a yes/no,
4 nonpartisan basis so that they would have the
5 opportunity to travel around the state and so
6 people could judge their qualifications and
7 ability to remain on the bench.

8 However, that is subject to one
9 danger, and that is a danger of judicial
10 independence. Now, maybe this isn't so much of a
11 problem on a statewide nature, but I will point
12 out an example from 1987 in Bucks County.

13 A very highly regarded judge, Judge
14 Isaac Garb, had rendered some decisions in a case
15 that was called the pump case. It was an
16 environmental case. Every one of his decisions
17 was affirmed by the Commonwealth Court, and the
18 Supreme Court refused to take those cases. The
19 appellate courts reviewing Judge Garb's decisions
20 held that he was correct in everything that he
21 did in that case.

22 But it was a very controversial
23 case, and he ran for retention in 1987. And an
24 effort was made to oppose his retention based
25 upon his decisions in those cases. Now, if that

4 1 is not a threat to judicial independence, I don't
2 know what is.

3 Now, if we can avoid that somehow in
4 the retention process and statewide if we are
5 talking about appellate courts, it becomes so
6 attenuated that maybe that is not a problem so
7 much as it would be on the county level. If we
8 could avoid that, I mean that is the one caveat I
9 have about retention votes.

10 Judge Craig talked about money. I
11 agree that much too much money is being spent in
12 statewide judicial elections. In the
13 Commonwealth Court race last year, the winning
14 candidate spent in excess of \$800,000. And a
15 study by a Penn State University professor who
16 went through the reports confirmed what the
17 newspapers had reported that over \$700,000 of
18 that came from the candidate's family's
19 individual wealth.

20 There is no way under the U.S.
21 Supreme Court's decision in Buckley v. Valeo that
22 spending limits can be imposed which would
23 prohibit a candidate from spending his or her own
24 money.

25 In addition, under Buckley v. Valeo,

'5

1 if recall it correctly -- and it has been a
2 little while since I have read that decision --
3 you can't prohibit independent expenditures
4 because people have a First Amendment right to
5 express themselves.

6 So the idea of having spending
7 limits might go to a certain point, but on the
8 other hand, that is not going to be a perfect
9 solution because you have then created
10 opportunities for people of wealth to take
11 advantage of that situation.

12 We have seen it in Senate races this
13 year throughout the country where wealthy
14 individuals are spending a lot more money than
15 ever could be the case -- in the federal system
16 there aren't spending limits actually. There are
17 contribution limits with the exception of
18 presidential elections. But even if you tried to
19 impose contribution limits, it's not going to
20 solve the problem.

21 In fact, contribution limits which
22 have been proposed, I think, would worsen the
23 problem given the current selection system
24 because you then would have the potential of
25 preventing qualified candidates who are not

5 1 people of great financial means from raising the
2 money necessary to get their message and
3 qualifications before the voters. So you then
4 turn it over more so to political party
5 organizations and primary election processes and
6 special interest groups.

7 In traveling around the state in my
8 two elections, I did encounter a trend in special
9 interest groups, not the labor unions, I might
10 add. But there were other special interest
11 groups out there that are becoming more prevalent
12 that really are looking for an edge in the
13 process.

14 They are looking for judges who will
15 tell them that they will rule in certain ways on
16 certain controversial issues. And that is wholly
17 improper. We are talking about the selection of
18 impartial decision makers. I have never yet seen
19 an argument which would fulfill the logical
20 requirement of explaining why it makes sense to
21 select impartial decision makers by a process of
22 political partisanship.

23 Judges are not supposed to be
24 representative of people. Judges are not
25 legislators. Legislators are supposed to be

5

1 lobbied. People have a right to come before
2 legislators and members of the executive branch
3 to express their opinions. And nobody would want
4 an impartial senator, an impartial
5 representative, or an impartial governor.

6 We elect them because we believe
7 they are partial, and that is what they are
8 supposed to be. Judges, on the other hand, are
9 supposed to decide cases solely on the basis of
10 law and evidence.

11 And once we have judicial candidates
12 going around trying to curry favor with special
13 interest groups, receiving special interest money
14 to support their candidacies, and expressing
15 opinions sometimes off the record in terms of how
16 they would view certain types of issues, then I
17 think that we have gone a long way again to
18 destroying the perception that justice is being
19 dispensed in an equal manner.

20 I often worried about the fact that
21 while I did not know most of the people who
22 contributed to my campaign and deliberately
23 stayed away from that process while I was an
24 incumbent, I really fretted over the problem that
25 would exist if somebody before me on a case maybe

5 1 had made a contribution or their lawyer had
2 contributed to my campaign without my knowledge
3 and the other side hadn't.

4 Then whichever way I rule, whichever
5 way I rule, somebody is going to think that I
6 acted politically either to avoid a problem or to
7 favor someone where one side had given money and
8 the other hadn't. I don't think a system can
9 exist of that nature.

10 REPRESENTATIVE FAJT: Rob, just to
11 throw a little twist, what is your feeling about
12 public financing of campaigns? I mean that is an
13 issue that we are dealing with in the legislature
14 right now along with capping contribution limits
15 in the so-called campaign finance reform.

16 And obviously that assumes for
17 judicial races that we would have to have a
18 pretty big pot of money if we look at the public
19 financing along with the legislative branch and
20 those races and statewide races.

21 But I guess as a question, What
22 would be your position on public financing for
23 judicial appellate court races?

24 MR. BYER: I see advantages and
25 disadvantages to it. The advantage would be if

5 1 you could design a public finance system that
2 would prevent people from going outside that
3 system, it would eliminate the problem of a
4 perception of corruption through the political
5 contribution process.

6 But how do you deal with primary
7 elections? Do you distribute that money to every
8 candidate in a primary?

9 For example, in presidential
10 elections where there is public financing, the
11 primaries are outside the public financing
12 aspects of the Federal Election Campaign Act. It
13 is only the general election where there is
14 public financing.

15 Primary elections, if we have public
16 financing, I think you are going to have an
17 increase in the number of candidates running.
18 And that does not necessarily mean an increase in
19 quality because all of a sudden endorsements are
20 not important in terms of raising money.

16 21 And to the extent that there are
22 groups that endorse based upon perceptions of
23 quality, well, you have not equalized everybody
24 in the process. And I think you could be
25 creating a situation where even more marginal

1.6

1 candidates would have the same opportunity of
2 being placed on the bench through a political
3 election process as your better qualified
4 candidates.

5 It also doesn't solve the problem of
6 candidates appealing for support, political
7 support to special interest groups and doing
8 other things that are really inconsistent with
9 the notion of an impartial judiciary, which not
10 only dispenses equal justice but is perceived to
11 be doing so by litigants, by businesses that
12 might want to locate in this state, and so on.

13 So it might solve part of the
14 problem, but I believe it will create as many
15 problems as it will solve. So I don't favor that
16 type of tinkering with the election system as a
17 substitute for bringing in true merit selection
18 in Pennsylvania.

19 There are other proposals. For
20 example, Senator Greenleaf wanted to eliminate
21 the so-called gag rule. When I was campaigning
22 for the Commonwealth Court, Judge Newcomer in the
23 Eastern District of Pennsylvania rendered a
24 decision in the middle of my campaign that said
25 that the restriction in Cannon 7 of the Code of

6

1 Judicial Conduct that prohibited me from speaking
2 out on contested political or legal issues was
3 unconstitutional and was infringing my First
4 Amendment rights.

5 The day after he announced that
6 decision and I learned about it, I issued a
7 statement that I was not going to take advantage
8 of the rights that Judge Newcomer was giving me
9 because I thought it was most unwise to have
10 judges doing that.

11 And I was happy that the U.S. Court
12 of Appeals in an opinion by Judge Weis reversed
13 that decision on very sound logic, I might add.
14 So I would not favor that type of tinkering.

15 With respect to rotating ballot
16 positions and so on, I think you are injecting a
17 level of fortuitousness and complication into the
18 system that I don't think is offset by any
19 corresponding benefit.

20 If you wanted to talk about
21 reforming the election process, let's take
22 political parties out of it altogether. Let's
23 run judges on a nonpartisan basis following
24 appointment by the governor. Let the public have
25 a chance to perceive how they performed on the

6

1 bench.

2 So if you want to have some room for
3 an election process, do it on a retention basis
4 on a nonpartisan way where we don't have
5 candidates campaigning against each other in
6 these expensive campaigns that are becoming
7 increasingly negative and dwelling on issues that
8 have nothing to do with judicial performance.

9 Look at last year's races for the
10 appellate courts, for example. I have heard
11 nothing but disgust from voters at the ads that
12 were run on television and radio during the 1993
13 elections for our three appellate courts:
14 Supreme, Superior, and Commonwealth.

15 I think that voters are not being
16 given information that they need upon which to
17 make decisions in any sound way. And you might
18 as well elect engineers who are going to design
19 PennDOT bridges under the current system as elect
20 judges. If we are going to have democracy
21 carried to that extent, then let's elect the
22 engineers as well.

23 There is a place for elective
24 politics. It has to do with people who are
25 making decisions in ways that are supposed to be

6 1 responsive to the concerns of a participatory
2 democracy. But those who founded this country
3 rightly took the judiciary out of that.

4 The judiciary was something
5 different because of its function, and I think
6 it's time that Pennsylvania join the overwhelming
7 majority of states.

8 CHAIRMAN DERMODY: Can I change
9 gears with you a minute?

10 MR. BYER: Sure.

11 CHAIRMAN DERMODY: I think there is
12 a part in your statement, and I haven't read it,
13 that deals with judicial administration, Article
14 V, and the Supreme Court's power in judicial
15 administration under Article V.

16 Do you have any thoughts about that?

17 MR. BYER: Yes, I do. And I do
18 address that in the statement on pages 16 and 17.

19 I believe that Article V places too
20 much of an administrative burden on the members
21 of the Supreme Court. Individual members of the
22 Supreme Court are supposed to be involved in
23 deciding cases, not micromanaging all aspects of
24 the judicial system.

25 Yet because Article V places that

6 1 administrative responsibility in the Supreme
2 Court, individual justices have responsibilities
3 that I think interfere with their ability to
4 spend their time doing what it is they should be
5 doing.

6 I have pointed out some examples
7 from my experiences as a Commonwealth Court judge
8 where I had to go to individual justices of the
9 Supreme Court to have them consider whether my
10 secretary was entitled to an increase in her
11 starting salary because of her prior experience,
12 whether a law clerk of mine should be given
13 credit for prior years' service with another
14 judge, and so on.

15 To me, it is ludicrous that members
16 of the Supreme Court should be involved in that
17 type of decision-making.

18 I favor Representative McNally's
19 proposal to reactivate the judicial council of
20 Pennsylvania. I think it would be a good idea to
21 place the administration of the courts in the
22 hands of the chief justice combined with the
23 judicial council.

24 I would change the selection process
25 of the chief justice so that the chief justice is

17 1 nominated by the governor and confirmed by the
2 Senate. The chief justice may or may not under
3 that type of scenario, as I see it at least, as I
4 envision it, be an existing member of the Supreme
5 Court.

6 Certainly selecting the chief
7 justice by virtue of seniority only makes very
8 little sense. In terms of the rule-making power,
9 I think that the rule-making power should be
10 changed to a system similar to that under the
11 Federal Rules Enabling Act.

12 I pointed out on pages 18 and 19 of
13 my statement several episodes where the Supreme
14 Court of Pennsylvania used its rule-making power
15 to suspend legislation under the guise that this
16 legislation regulated the practice of law or
17 involved matters of practice and procedure within
18 its exclusive purview. And I think that that
19 interpretation was a stretch.

20 I am talking about the invalidation
21 of the Sentencing Code, suspending provisions of
22 the Open Meeting Law, prohibiting the Ethics
23 Act's financial disclosure provisions from
24 applying to municipal solicitors, the
25 Commonwealth's right to a trial by jury. These

7

1 are matters that are legislative in nature and
2 that the legislature should have the right to
3 deal with.

4 For that reason, I have suggested --
5 I disagree with Representative McNally that the
6 rule should emanate from the judicial council,
7 although I think the judicial council should have
8 a role in that process.

9 I believe that the rule should
10 emanate with the Supreme Court; but like the
11 federal system, I believe that the legislative
12 branch should have the right to amend or suspend
13 court rules, not the other way around.

14 One other proposal I will speak to
15 briefly -- and my time and just about up -- but
16 the Commerce Court proposal, which has recently
17 been changed.

18 I used to favor the creation of a
19 court of chancery in Pennsylvania because I
20 thought there was a need or at least some benefit
21 to be gained by having a specialized court to
22 consider complex issues of corporate and business
23 law where you would have a group of judges
24 selected by a merit selection process, who would
25 have the requisite experience and ability in

7 1 those areas.

2 I have changed my mind on that
3 proposal because its sponsors now have sought to
4 make the Commerce Court an elected court rather
5 than a merit selection court. That being the
6 case, I fail to see the need for it.

7 Those cases are being decided now by
8 judges of the Courts of Common Pleas and decided
9 on appeal by the Superior and Commonwealth Court
10 in the first instance. And if we aren't going to
11 have a specialized tribunal made up of
12 specialized appointees but instead a system where
13 any lawyer regardless of experience or
14 qualifications can run for election, then we
15 don't need the new court. The concept doesn't
16 make sense anymore.

17 With that, I would be happy to
18 answer any further questions.

19 CHAIRMAN DERMODY: Thank you very
20 much.

21 MR. BYER: Thank you very much. It
22 was a pleasure to be here.

23 CHAIRMAN DERMODY: We will take a
24 five-minute break.

25 (Brief recess from the record.)

P 7

1 CHAIRMAN DERMODY: We will call the
2 hearing back to order

3 Our next witness is Professor Arthur
4 Hellman of the University of Pittsburgh School of
5 Law.

6 MR. HELLMAN: Thank you, Mr.
7 Chairman. It's a great pleasure to be here this
8 morning.

9 As I indicate in my statement, I
10 come to judicial reform on basically two tracks.
11 As a scholar of the courts, I write primarily
12 about appellate courts. But I have also become
13 involved with the American Judicature Society as
14 a member of their board of directors for a while,
15 more recently as chair of the subcommittee on
16 civil justice reform.

17 This is a good time to be talking
18 about judicial reform. The Larsen impeachment is
19 now behind us. We have a futures commission that
20 is looking forward, and everywhere there is a
21 renewed interest in making the legal system more
22 effective and more responsive.

23 Now, I recognize that judicial
24 reform means different things to different
25 people. At the turn of the century, Roscoe Pound

7 1 delivered a famous speech called, The Causes of
2 Popular Dissatisfaction with the Administration
3 of Justice.

4 I'm not the first person to point
5 out that the causes of popular dissatisfaction as
6 Pound perceived them bore an uncanny resemblance
7 to Pound's own agenda for court reform. Well,
8 that's okay as long as we recognize what is going
9 on because in a diverse and pluralistic society
10 such as ours, there will be different views about
11 what courts ought to be doing and what reform
12 should have priority.

13 In particular, if you look at what
14 is being written and said about judicial reform
15 today -- and that itself could be a full-time
16 career. But if you did that, I think you would
17 find two major themes that run through a lot of
18 what is being said.

19 One theme is that of access. Here
20 the focus is on disputes that do not go to court
21 but that perhaps should be there. Access is
22 concerned with barriers to litigation, economic
23 barriers, language barriers, even physical
24 barriers.

25 The other theme is one that might be

8

1 summed up as excess. Excess concentrates on the
2 cases that do go to the court. Its concerns are
3 that some of the cases don't belong there at all,
4 some of them take too much time or cost too much
5 money.

6 These concerns, the excess concerns,
7 are not limited to their effect on courts or
8 litigants. There's a further concern that
9 overlitigation deters productive activity in
10 society whether it be the delivering of babies --
11 that seems to be one of major things that comes
12 up -- or the development of new drugs.

13 For the most part, those who are
14 concerned about access tend not to be concerned
15 about excess and vice versa.

16 Not long ago I was at one of these
17 conferences on legal reform. As the proceedings
18 were drawing to a close, one of the organizers
19 went up to the platform and announced to
20 everybody there with great satisfaction how
21 pleased he was that there was such a consensus on
22 identifying the problems.

23 Well, that isn't what I heard. What
24 I heard was two groups of speakers who were
25 largely talking past one another. Nevertheless

8 1 there is some overlap between the two themes and
2 some common ground.

3 Both of them focus in different ways
4 and with different emphases on the cost of
5 litigation, particularly costs that are
6 disproportionate to what is at stake. In that
7 light, I would like to suggest one area that is
8 worth some attention, and that is fee shifting.

9 I am going to use that general term
10 rather than talking about a loser pays rule
11 because a simple loser pays rule is only one
12 approach and one that might cause more harm than
13 good.

14 Now, you may associate fee shifting
15 or proposals for fee shifting with corporate
16 interests and others who tend to be defendants;
17 but that isn't necessarily right. One of the
18 earliest articles in support of a loser pays rule
19 was made by the late Professor Albert Ehrenzweig
20 who was an unabashed liberal.

21 Professor Ehrenzweig saw fee
22 shifting as it seems today as a way of
23 implementing the promise of Lyndon Johnson's
24 Great Society. He thought that it would enable
25 people to seek redress through the courts for

8 1 grievances where the stakes are just too small to
2 attract counsel under the present system.

3 Now, there has been a recent article
4 by a younger professor, Professor Gregory Maggs,
5 that was in the Houston Law Review, Volume 30,
6 the spring 1994 issue. I just came across it,
7 and indeed it was just published.

8 But he has a number of specific
9 suggestions or proposals there which he reviews.
10 He talks about some of the pros and cons, and I
11 think it is a very useful starting place if you
12 are interested in pursuing this.

13 He mentions, for example, the Alaska
14 system, the system that is in place in Alaska
15 today for two-way fee shifting.

16 There's a proposal which has come
17 from a Judge William Schwartz (phonetic) that
18 centers on offers of settlement. And although it
19 is also based on some English rules, it's not the
20 English loser pays rule but something called a
21 payment into court rule. And its purpose is to
22 limit liability for attorney's fees.

23 Yet another proposal would be one
24 that would focus on lawyers, make lawyers
25 responsible in particular for filing claims that

1 are more likely than not to lose.

2 Now, all of those are controversial,
3 and I'm not endorsing any of them. What I would
4 like to do is to suggest a few points that I
5 think ought to be kept in mind when any proposals
6 of this sort are debated.

7 First, we should recognize that very
8 few reforms, if any, are cost free. And what we
9 should be doing, what those who are considering
10 them should be doing, is candidly analyzing and
11 weighing the competing interests.

12 That is the point that I made in a
13 memorandum which I drafted initially for the
14 American Judicature Society Justice Reform
15 Committee. It was later turned into an editorial
16 that was published in Judicature magazine. I
17 have attached it to my statement, and I am sort
18 of incorporating that by reference here. And I
19 will be happy to talk about any of those points.

20 Second, I do think that these are
21 issues for the legislature. Some of my academic
22 colleagues believe that most such matters should
23 be handled outside the legislative process,
24 outside the political process by rule-making.

25 Certainly there is room for

1 rule-making by courts and court-run institutions.
2 But here when we move to issues that involve
3 fundamental decisions about the allocation of
4 resources and how far to go in protecting
5 particular interests, I do think that that's a
6 matter for the political system and it's
7 appropriate to be determined through political
8 processes.

9 That leads me to a third point.
10 There is a limit to how far judicial reform can
11 go in improving the operation of courts. In the
12 end, how well the judicial system performs will
13 depend on the resources that the legislature
14 provides, the quality of the judges who are
15 elected or appointed, and the substantive rules
16 and claims that the legislature establishes or
17 fails to establish and simply allows court
18 decisions to hold and sway.

19 Now, having said that, I don't want
20 to minimize the importance of incremental, modest
21 reforms. I have made one such suggestion in my
22 prepared statement, and that is for legislation
23 adopted now apparently by 38 states that would
24 enable federal courts to certify questions of
25 state law to state appellate courts presumably to

9

1 the Supreme Court.

2 Perhaps Judge Weis will talk about
3 that a little bit more. But it is a problem
4 today when the federal courts have to predict
5 state law, and often they end up doing it wrong
6 with consequences that are unfortunate for the
7 particular litigants and also for the development
8 of the law in the states.

9 The chief judge of the third
10 circuit, Judge Sloviter, has written an article
11 about that; and without endorsing everything in
12 that article, this particular suggestion is one,
13 modest, incremental. It is not going to change
14 the overall picture of the judicial system, but
15 it is something that I think would be useful.

16 I will stop there. Again, I
17 appreciate the chance to voice these thoughts,
18 and I would be happy to answer any questions.

19 CHAIRMAN DERMODY: There have been
20 bills introduced and some discussions this
21 session on the certification process you have
22 just mentioned. There have been bills introduced
23 on that issue. They haven't gone very far. They
24 are still in the judiciary committee. I don't
25 know what will happen with those the next session

- 9

1 either.

2 MR. HELLMAN: Is that something that
3 there is opposition to, or is it something that
4 just tends to die for lack of interest?

5 CHAIRMAN DERMODY: Most of it, from
6 my experience, has been lack of interest; but
7 obviously there is enough out there to have some
8 bills introduced. We discussed one several
9 months ago, and that was the end of it.

10 MR. HELLMAN: I do recognize that
11 there is a comment that, I think, the late
12 Professor Paul Batto (phonetic) once made. He
13 was talking about federal legislative reform, but
14 it applies equally in the states, I am sure.

15 He said that even some of these
16 modest reforms all you need is one or two lawyers
17 to call a congressman or a senator and the
18 reforms die because these reforms don't have
19 constituencies. There is nobody pushing for
20 these incremental, often technical reforms.

21 I recognize that if there is a group
22 that thinks that somehow it's going to hurt, it
23 is often enough to stop it. But this one looks
24 to me like something that is more likely to die,
25 if it does die, for lack of interest because some

1 group of lawyers or litigants is out there
2 picketing the state house to stop it from
3 becoming law.

4 CHAIRMAN DERMODY: We will take a
5 closer look at that and also to the Law Review
6 article by Professor Maggs that you mentioned.

7 MR. HELLMAN: Yes. That article is
8 just published in the Houston Law Review. I have
9 the citation here. It is in the spring 1994,
10 Volume 30.

11 What he was proposing was some
12 reforms specifically aimed at Texas. Texas is a
13 state where judicial reform has taken some
14 different -- or concerns about judicial reform
15 have taken on a different cast from our state
16 here.

17 But in some ways, the problems may
18 be very similar in the sense that the interplay
19 of legislation and the judiciary has been quite
20 active there. But what he has done is he has
21 gone through the literature and reviewed some of
22 the existing proposals.

23 One point he makes, which I think is
24 perhaps worth reiterating, is this: None of
25 these systems are ideal. None of them are

1 perfect. And if we go about looking for reform
2 or improvement with the aim of finding a system
3 that has no flaws, we are never going to find
4 that. The best we can hope for is that we can
5 come up with something that is better than what
6 we have now.

7 And one of the reasons why fee
8 shifting, I think, is attractive is that it can
9 bring together both sides of the divide that I
10 mentioned, the people who think that the problem
11 with the courts system is the people who can't
12 get in and the people who think that the problem
13 with the court system is the cases that stay
14 there or drag on too much or shouldn't be there
15 in the first place.

16 CHAIRMAN DERMODY: When you say "fee
17 shifting," where are we shifting, who is going to
18 end up paying what?

19 MR. HELLMAN: Under current
20 practice, unless the legislature has passed a
21 specific statute that otherwise authorizes it,
22 the cost of litigation remains with each
23 litigant. And the concern, for example, is that
24 if somebody ultimately wins, the victory will not
25 be complete because the person will have to pay

2.0

1 his or her legal costs.

2 CHAIRMAN DERMODY: Will have
3 expended so much money.

4 MR. HELLMAN: And the other concern
5 and the one that Professor Ehrenzweig so many
6 years ago was concerned about is that for modest
7 claims, it just may not be worth the time of the
8 lawyer to take the case and so that somebody who
9 has a modest claim may not be able to find any
10 redress at all through the courts.

11 Now, having said that, I think we do
12 have to ask the question, Should those claims
13 necessarily be in the court system? We would not
14 want to put in place a system that would create
15 incentives for litigation over matters that are
16 just not worth society's resources to bring into
17 the court system. And I do have some concerns
18 about that.

19 CHAIRMAN DERMODY: Yes, I think we
20 all do. You mentioned attorneys also should be
21 conscious of the cases they are filing and doing
22 a better job of screening because attorneys have
23 taken some criticism over the years about filing
24 frivolous claims and jamming up the system.

25 MR. HELLMAN: Yes, there is

20

1 certainly criticism of that.

2 It's one of those things again that
3 there is a lot of anecdotal evidence around.
4 Sometimes it's not as solid as it might be when
5 you start looking at the figures; but certainly
6 you read about some of these cases and ask, How
7 can a lawyer in good faith file that?

8 Now, as you may know, the federal
9 courts have recently cut back on their sanctions,
10 the standards for sanctioning attorneys who file
11 frivolous claim.

12 And it will be interesting to see
13 how that works because there was concern that the
14 rule that was in effect, I guess, for about ten
15 years was too effective in discouraging some
16 litigation that maybe should have been in the
17 courts or at least was causing too much in the
18 way of satellite litigation over fees.

19 And again, that's another
20 consequence that one would want to avoid in
21 designing any such system. Litigation over fees
22 should not become a second litigation in itself.

23 CHAIRMAN DERMODY: Any other
24 questions.

25 (No response.)

1 CHAIRMAN DERMODY: Professor, thank
2 you very much for appearing.

3 MR. HELLMAN: Thank you. It has
4 been a pleasure.

5 CHAIRMAN DERMODY: Our next witness
6 will be out of order. We are very honored to
7 have with us here today Judge Joseph Weis of the
8 Third Circuit Court of Appeals. He was scheduled
9 to testify this afternoon, but he has graciously
10 agreed to appear before us this morning.

11 HONORABLE WEIS: I'm very honored to
12 have been asked to testify before this committee
13 on a subject which I find of deep personal
14 interest. I hope that I am not considered as an
15 outsider, even though I have been in the federal
16 judiciary for 25 years now.

17 I started my judicial careers as an
18 elected judge of the Court of Common Pleas. So I
19 have had the experience of being in both an
20 appointive and an elective system.

21 In addition to that, I was chairman
22 of the Appellate Judges Conference of the
23 American Bar Association. I participated in many
24 of the appellate judges' seminars of that
25 organization and others over the years.

1 I have been privileged to conduct
2 seminars with judges of the United Kingdom in
3 1985, with the Canadian judges of the American
4 Legal Exchange a few years ago. And I have had
5 close personal relationships with the judges of
6 the federal court of Australia in the course of
7 preparing the report of the Federal Court Study
8 Committee.

9 So I'm not quite an outsider,
10 although I'm not familiar with all of the details
11 of the administration of the court system in
12 Pennsylvania today.

13 I would like to commend to your
14 consideration, though, the efforts of the Federal
15 Court Study Committee of which I served as
16 chairman. It was authorized by Congress in 1988
17 and directed to file a report by April 1990. We
18 met that deadline after much hard work, I might
19 add.

20 The committee was composed of
21 members of the Senate and House Judiciary
22 Committees, appellate judges from both the
23 federal and state systems, trial judges, and
24 members of the bar, as well as representatives
25 from the Attorney General's Office of the United

20 1 States.

1 2 We thus had a combination of the
3 three branches of government. And I found that
4 it was a very interesting experience. And I
5 commend a commission to you if you are engaged in
6 any far-reaching judicial reform experiment
7 because it is very important that the members of
8 the three branches understand the problems of the
9 other.

10 Judges sometimes are unrealistic in
11 what they ask for, and legislators simply are
12 often not aware of the needs of the court system.
13 Conflicts are often marked by good faith on both
14 sides and dissent led by ignorance of the other's
15 capabilities and limitations.

16 I learned a lot about the
17 legislative process in working with the
18 committee, and it gave me a new respect for the
19 members of the legislative body.

20 I actually had some idea of the
21 tremendous workload that they had, but there is
22 nothing like being there day in and day out and
23 working with them to understand the pressures
24 that are imposed on legislators and, I might add,
25 members of the executive branch as well. So I

1 think we all profited by that experience.

2 If you decide to go that route in
3 Pennsylvania, you already have some precedents to
4 go on. The Pomeroy Commission, I think, handed
5 in a very intelligent report some years ago, and
6 it seems to have been largely ignored since.

7 The Beck Commission also came up
8 with some very fine recommendations particularly
9 in the disciplinary organizational field. I
10 believe they have been implemented, but many of
11 the others still remain to be discussed
12 seriously.

13 As I mentioned, I have participated
14 in both the elective and the appointive systems,
15 and my support goes unqualifiedly to the merit
16 selection process. I concede that there are many
17 fine judges in the state system, but I don't
18 quite understand why they bristle so much at the
19 talk of changing the system.

20 People like President Judge Craig,
21 for example, would be at the top of the list of
22 any merit selection commission that I have ever
23 heard of. And there are many, many other fine
24 judges in the state system who are there not
25 because of the elective system but in spite of

1 1 it.

2 So I don't understand the opposition
3 from that quarter. To change the system would
4 not be a reflection on the fine men and women we
5 have in the system now.

6 The chief disadvantage of the
7 present system is that there is absolutely no
8 screening. Any unqualified person can get on the
9 ballot and might by happenstance be elected.
10 There is no protection against that.

11 The needs of financing have already
12 been referred to, and I can see that only
13 becoming worse in the future.

14 On a balance, I think the merit
15 selection proposals are better. They aren't
16 foolproof, as Professor Hellman just mentioned.
17 There is no absolute way to predict human
18 behavior, and that's in effect what you are doing
19 when you appoint someone to a position.

20 But I think the chances of getting a
21 few clinkers, if you will, are less in the merit
22 selection process than they are in the elective
23 system. And we do remove that area of perception
24 of corruption, not actual, but perception of
25 corruption in the campaign financing end of it.

1 1 The last campaign that as just
2 2 thankfully been concluded, reached, I think, new
3 3 depths in negative advertising and the
4 4 disillusionment of the electorate. That process
5 5 unfortunately is going to carry over into the
6 6 judicial election field as well.

7 7 One columnist made, I thought, a
8 8 very apt statement just before the election. He
9 9 said, No matter who wins, the people who sit in
10 10 the next Congress of the United States will be
11 11 the most vilified group of people ever to have
12 12 been there.

13 13 Most of the negative advertising was
14 14 unfair; and if it's going to make a group of
15 15 vilified people in Congress, what are the people
16 16 of the Commonwealth going to think of judges who
17 17 have been vilified unjustly? And it's the old
18 18 story, you know. Once the ink is in the milk,
19 19 you can't get it out.

20 20 Well, let me pass on to another
21 21 topic, the governance and administration of the
22 22 system of the courts in this Commonwealth. Of
23 23 course, the legislative function is somewhat
24 24 restricted because of the constitutional
25 25 provision that puts all of the administrative

1 control of the courts in the Supreme Court of
2 this Commonwealth.

3 I think you might be interested in
4 hearing a little bit about works in the federal
5 system. I know you have heard from Professor
6 Levin already and have some general idea of how
7 it works.

8 But generally governance in the
9 federal system is under the control of the
10 Judicial Conference of the United States composed
11 of the chief judges of each of the circuits and
12 one judge from each of the circuits elected by
13 the judges within that area.

14 There are 26 judges in the
15 conference, but most of the work is done by
2 committees of judges appointed by the conference
16 itself. About 300 judges in the federal system
17 participate in this committee system.
18

19 Let me run down the topics that
20 these committees work on: procedural rules,
21 standards of conduct of the judges, the budget,
22 automation, case management, long-range planning,
23 administration of the bankruptcy system,
24 administration of the magistrate judges system,
25 relations with state courts and international

2 1 tribunals, space and facilities problems,
2 financial disclosure, intercircuit assignments,
3 defender services, operation of the
4 administrative office.

5 Now, each one of these topics
6 represents the work of one committee. As I
7 understand now, the Supreme Court of this
8 Commonwealth handles all of those matters itself
9 or to a large extent.

10 CHAIRMAN DERMODY: That's correct.

11 HONORABLE WEIS: I can see virtue in
12 the delegation of many of these responsibilities,
13 with the Supreme Court still retaining overall
14 supervisory authority.

15 For example, the personnel system in
16 the federal system is well organized. I heard
17 Judge Byer this morning discuss the problem of
18 having his secretary and law clerk get raises.
19 That is all laid out in general principles by the
20 judicial conference.

21 Every judge's secretary receives the
22 same salary, has the same provisions for
23 increases based on merit and based on length of
24 service.

25 Law clerks enter the system at the

2 1 same rate of pay, and they progress according to
2 the same schedule all across the country. So
3 there is no such thing as a chief justice of the
4 United States being called upon to decide whether
5 my secretary should get a raise next week.

6 Obviously in a system as large as
7 the federal, we couldn't run a railroad in that
8 fashion. And I submit that in this Commonwealth,
9 the system is large enough too that some sort of
10 decentralized authority and perhaps more
11 conferring a power on the administrative office
12 on the courts in this Commonwealth would help the
13 Supreme Court escape some of the chores of
14 administration and allow it to devote more time
15 to the work of judging.

16 I say this with some diffidence
17 because I don't like to butt in the affairs of
18 anybody else. I don't mean to say that we don't
19 have our own problems. Of course, we do; but I
20 don't know that enough attention has been given
21 to this concept of involving more of the Common
22 Pleas judges and the Superior and the
23 Commonwealth Courts in the problems of
24 administration of the State's judiciary as a
25 whole.

2

1 There are very many talented people
2 there who do a very fine job. And in addition to
3 taking care of the administrative matters, it
4 would also, I think, bring a feeling of
5 participation in the whole system to those
6 judges, which would help them do their own work
7 perhaps more efficiently and also be able to
8 understand the problems of administration that
9 the Supreme Court now has for itself.

10 There was one other topic that I
11 thought I would touch on briefly. It is not new
12 with me. In 1970, I wrote an article for the
13 Pennsylvania Bar Quarterly suggesting it was time
14 for the State in implementing the new Article V
15 of the state Constitution to start financing the
16 courts.

17 I still think that's what should be
18 done. It's incongruous to me that the State pays
19 the salaries of state judges but has nothing to
20 say about the salaries of their tipstaffs, their
21 law clerks, their secretaries. The Counties
22 provide all of the space and provide all of the
23 facilities for the courts, and yet we call this a
24 unified state system.

25 Some of the administrative reforms

2

1 that I have suggested probably could not be
2 carried out in the decentralized system that we
3 have today.

4 I realize that there is a large
5 problem for the legislature; namely, financing
6 and money. Where is it coming from? But of
7 course, the money is being spent today by the
8 Counties, the same money that really should come
9 from the state coffers.

10 Theoretically, therefore, relieving
11 the Counties of the burden of providing for the
12 courts would simply transfer the responsibility
13 to the State. And again, theoretically a dollar
14 should equal a dollar so that the citizen ends up
15 in the same financial position he is today.

16 I realize that in theory there are
17 many slippages back and forth and so forth; but
18 even today, I understand that the State provides
19 some 30 percent of the budget for the state
20 courts. I think it should be upped by steps to
21 be practical as we go along.

22 For example, I see no reason why a
23 County should be required to pay for the chambers
24 of a state appellate judge. Obviously he is a
25 statewide officer, and the State should directly

2 1 pick up all of the expenses connected with his or
2 her office.

3 I don't see any real problem with
4 spreading the process over a number of years. It
5 would make it easier for everybody concerned, and
6 the shock perhaps wouldn't be as great. In the
7 long range, I think that has to be the aim of the
8 court system.

3 9 A few other small points, I'm a
10 senior judge on the federal system, which means
11 that I am at liberty to sit in any federal court
12 in the United States if I am requested to sit.
13 And since I don't cost anything, the request for
14 my services are many and varied. Everybody likes
15 to get slave labor.

16 But the point is that there are many
17 judges who are forced to retire under the 70-year
18 limit in Pennsylvania who have useful years of
19 service left, who are anxious to help out the
20 courts and relieve some of the caseload burdens.

21 I don't think that the present
22 system adequately meets that need, and your
23 committee might want to address ways of making
24 that work more efficiently. I think that is an
25 area where obviously there could be legislation

3

1 to improve the situation.

2 Professor Hellman has mentioned the
3 certification of state law questions. That would
4 be a help certainly. And I would hope that your
5 committee might give serious thought to it.

6 I can recall one instance two years
7 ago where our court had four or five cases
8 involving strictly state law interpretation of
9 insurance questions under the Motor Vehicle Act.

10 We were set to decide it, and then
11 we found that cases were working their way up
12 through the state system. So instead of coming
13 out with an opinion that might have been
14 overruled by the state Supreme Court, we simply
15 held those cases. We held them for about a year
16 and a half, something we don't like to do.

17 But it would have been so much
18 easier if we could have certified the question
19 over to the state Supreme Court to resolve then
20 and there with some dispatch.

21 And incidentally, along that line, I
22 found an interesting situation in Australia
23 talking with their judges. They have what they
24 call a cross-vesting system.

25 If a case is filed in the Australian

3 1 state court and the judges think it is properly a
2 2 matter for their federal court, they simply
3 3 certify it over to the federal court. And the
4 4 same thing applies if a suit is filed in the
5 5 federal court, properly in the state court, the
6 6 judges simply send it over to the appropriate
7 7 place.

8 Another example of the cooperation
9 9 is sharing of facilities between the state and
10 10 federal courts in Australia.

11 And you know, it's heretical to talk
12 12 about this; but I could conceive of a situation
13 13 where there could be one building in Harrisburg
14 14 where the Court of Appeals for the Third Circuit
15 15 would have its quarters, where the Supreme Court
16 16 of Pennsylvania and the Superior and Commonwealth
17 17 Court would have their headquarters, and all
18 18 would share in a common library and facilities,
19 19 which would save money for the taxpayers both
20 20 nationally and in the state.

21 I frankly don't expect to be around
22 22 long enough that that would take place, but it's
23 23 a vision of the cooperation that might happen in
24 24 the future.

25 One other topic which is of some

3

1 interest to federal courts, as well as the state
2 courts, are civil right claims brought by state
3 prisoners. They are a real burden in the federal
4 system and the state system as well. Our pro se
5 docket, which is mostly state prisoners, is over
6 30 percent of our total workload. It's an
7 unbelievable --

8 CHAIRMAN DERMODY: 30 percent?

9 HONORABLE WEIS: 30 percent, and
10 that's true nationally.

11 One of the recommendations of the
12 Federal Court Study Committee was that Congress
13 amend the law which would allow a federal court
14 to hold a state prisoner civil rights case for 90
15 days, since at large, to 180 days, during which
16 time the prisoner would be required to go through
17 an administrative process in the state prison.

18 The provisions of the act were
19 rather onerous; and many states did not elect to
20 have an administrative process because among
21 other things, the statute and the regulations
22 required that prisoners participate in the
23 administrative process.

24 We recommended that provision be
25 dropped; and I'm pleased to report that in the

3 1 last two months, the statute has been amended so
2 that now if a federal judge finds that the
3 administrative system within any prison is fair
4 and effective, the prisoner must go through that
5 system.

6 Pennsylvania does not have such an
7 administrative system in its prisons, and I think
8 you should give serious thought to implementing
9 it. It would save time and money for not only
10 the federal system but the state as well because
11 the state Attorney General has to participate in
12 these cases in federal court and it must be a
13 drain on his resources.

14 And some of the cases are ending up
15 in the state courts, and it's a burden on their
16 docket as well.

4 17 Many, many of these cases could be
18 resolved by an ombudsman type of proceeding. Let
19 me give you one example.

20 When I was in the district court, I
21 got about the sixth petition from a certain
22 prisoner we will call X. He was a regular
23 customer of ours, always complaining about
24 something in the prison.

25 On this one day, he filed this

4

1 petition saying he was being denied his
2 constitutional rights because he couldn't play
3 the piano in the rec hall. I became a bit
4 irritated and told my clerk to call the warden
5 and say, What's going on?

6 So he did. And the warden said,
7 Well, he's absolutely right. When he sent that
8 petition in, he was not allowed to play the piano
9 because it was closed down for a day while it was
10 being tuned. He said, He is over there right now
11 playing it.

12 Now, how much effort and time was
13 wasted by clerical personnel and by my chambers
14 to root out an absolutely worthless complaint.
15 And that unfortunately happens too many times.
16 An administrative process would solve that.

17 I'm through talking.

18 CHAIRMAN DERMODY: There are some
19 good ideas that you covered, which we haven't
20 talked about. There are a few things. Were you
21 here when Judge Craig was talking about the court
22 headquarters?

23 HONORABLE WEIS: No, I missed that.
24 I came in when he was talking about the merit
25 selection process.

4 1 CHAIRMAN DERMODY: There have been
2 2 various bills introduced and recommendations made
3 3 by the grand jury and previous groups. One was
4 4 having a general headquarters in Harrisburg while
5 5 judges still ride the circuit; that is, have the
6 6 appellate courts meet in various cities
7 7 throughout the Commonwealth.

8 And the other suggestion is to have
9 9 a headquarters in Harrisburg and have the courts
10 10 just meet in Harrisburg. It does make a lot of
11 11 sense to have one building that would house all
12 12 of the courts and even the federal courts with a
13 13 centralized library.

14 Do you have any feelings about
15 15 riding the circuit and having the courts meet in
16 16 various parts of the Commonwealth?

17 One provision that has gotten indeed
18 18 some editorial support is at least having the
19 19 Pennsylvania state and appellate court judges
20 20 headquartered and sitting only in Harrisburg.

21 HONORABLE WEIS: I have mixed
22 22 feelings on that. In the Court of Appeals for
23 23 the Seventh Circuit in Chicago for many years,
24 24 the rule was that the judges would all come into
25 25 Chicago and make their homes there.

4 1 This went on for 10 or 15 years, and
2 eventually the judges rebelled because they
3 didn't want to move from Indiana or Wisconsin or
4 whatever and leave their homes, pull their
5 families out of school, and have to go to
6 Chicago. So ultimately it stopped.

7 In the Court of Appeals for the
8 Third Circuit, we have our headquarters in
9 Philadelphia. And all of our arguments are held
10 there with the exceptions of the times that we
11 travel to the Virgin Islands for hearings there.

12 So in some years, we had come to
13 Pittsburgh to hear arguments. There has been
14 pressure from some members of the bar that we
15 should go to Newark and hear arguments from New
16 Jersey cases.

17 It is more efficient frankly to have
18 the court headquarters in one place. So even
19 though I have my home and my chambers here in
20 Pittsburgh, I travel to Philadelphia to hear
21 arguments and cases and go to committee meetings
22 there.

23 It used to be a problem because we
24 had to communicate with each other by mail. We
25 had judges, for example, in Wilkes-Barre. We had

4

1 them in New Jersey. We had them in Delaware and
2 other places in Pennsylvania. But since we
3 instituted a system of electrical mail some ten
4 years ago -- incidentally we were the first in
5 the country to do that -- our communications are
6 instantaneous.

7 Judge Craig mentioned, too, the use
8 of the video conferencing device. I first
9 started experimenting with that in 1976, and we
10 had a trial experiment when Bell Telephone had
11 the picture phone system here in Pittsburgh and
12 Philadelphia.

13 And we tried it again next year
14 using a new compression technique, which is not
15 as expensive, and we thought it was very
16 satisfactory.

17 The members of the bar were very
18 pleased with the idea of not losing time to
19 travel to Philadelphia, that they could simply go
20 to the courthouse here in Pittsburgh and argue
21 their cases as effectively as if they had gone to
22 Philadelphia.

23 So that technology might argue, I
24 think, in favor of having a centralized
25 headquarters in Harrisburg. And I believe that

4 1 the Pomeroy Report recommended that.

2 CHAIRMAN DERMODY: That's right.
3 I think that the Pomeroy Report did and several
4 others. That's one of the things obviously we
5 are looking at it and has been generating some
6 controversy.

7 HONORABLE WEIS: I think the
8 Superior Court has also been considering the use
9 of video conferencing arguments. Judge Reilly
10 came to see our system and indicated he thought
11 there was some use that could be made of it.

12 CHAIRMAN DERMODY: Technology makes
13 riding the circuit obsolete.

14 HONORABLE WEIS: Yes.

15 CHAIRMAN DERMODY: Senior judge
16 status, we have senior judge status now. It is
17 basically driven by how much money the Counties
18 can afford to pay. So therefore, we are letting
19 a lot of talent go to waste because the money
20 just isn't there.

21 HONORABLE WEIS: It's a real bargain
22 for the taxpayers.

23 CHAIRMAN DERMODY: As you mentioned,
24 the whole problem is that there's a decision out
25 there that says the State has to fund the court

5 1 system; but because the legislature hasn't found
2 the money to do that, it hasn't done that.

3 You make a lot of sense. It's not
4 going to happen next year either.

5 HONORABLE WEIS: Well, Justice
6 Vanderbilt said that court reform was no sport
7 for the short-winded, and that's certainly an
8 understatement. You don't speak in terms of
9 months or years. You speak in terms of
10 generations.

11 CHAIRMAN DERMODY: You talk about
12 the Judicial Conference of the United States and
13 I think the various responsibilities they have
14 through a committee system for the procedural
15 rules, the budget, automation, those types of
16 things.

17 The budget committee, they devise a
18 plan, a spending plan for the moneys that have
19 been allocated. Is that correct?

20 HONORABLE WEIS: No. They actually
21 prepare the request to Congress for the amount of
22 money that we needed and question the process
23 allocated to areas where they think it would be.

24 Some of the appropriation is in line
25 items and some is a general appropriation, as you

5 1 have.

2 CHAIRMAN DERMODY: Who has final
3 approval over what will be presented to Congress?
4 Would that committee or would all of the judges
5 appointed to the conference have the final
6 approval of that?

7 HONORABLE WEIS: The conference
8 theoretically gives the financial approval; but
9 in actuality, it's the budget committee itself
10 which submits it to the conference for it's
11 approval.

12 Of course, it's a very complicated
13 process. And the conference, I don't think,
14 would, except in rare, rare, instances and in
15 highly specific matters, ever overrule the budget
16 committee.

17 CHAIRMAN DERMODY: As you know,
18 there was a judicial conference in Pennsylvania
19 for short a period of time, and that law was
20 repelled.

21 HONORABLE WEIS: We also have the
22 Conference of State Trial Judges active in
23 Pennsylvania, which I think perhaps does some of
24 the administrative work or offers some
25 opportunities for it that isn't official.

5

1 CHAIRMAN DERMODY: It's not
2 official. But there also has been some input,
3 obviously some talk and proposals, actually a
4 bill introduced to renew it and to start a new
5 judicial conference.

6 HONORABLE WEIS: I think that would
7 be helpful.

8 CHAIRMAN DERMODY: I think so, too.
9 Thank you very much. I don't have
10 any more questions. Thank you very much, judge.

11 HONORABLE WEIS: I have a copy of my
12 study committee report if you would like to have
13 it.

14 CHAIRMAN DERMODY: We would like to
15 have it.

16 It is five after twelve. We are
17 going to recess for lunch until one-thirty. We
18 will have several witnesses this afternoon, and
19 we will be back here at one-thirty.

20 (At or about 12:10 p.m., a short
21 recess occurred for lunch.)

22 * * * *

23 (At or about 1:30 p.m., the hearing
24 reconvened.)

25 CHAIRMAN DERMODY: I would like to

5 1 call the hearing to order for this afternoon's
 2 session.

 3 Our first witness this afternoon
 4 will be Guy Zoghby, President of the American
 5 Judicature Society. Paul Titus is also part of
 6 the American Judicature Society. He is here with
 7 us today and will join Mr. Zoghby.

 8 Unfortunately, we don't have
 9 microphones. So if you can try to speak up so
 10 everyone can hear you, we would appreciate it.

 11 MR. ZOGHBY: I would like to begin,
 12 Representative Dermody and members of the
 13 commission, to thank you for holding these
 14 hearings. I think it's very important that these
 15 hearings get held and that the information get
 16 out to the public in the broadest way possible.

 17 I would like to thank you for having
 18 me here to testify today. I am here in my
 19 capacity as president of the American Judicature
 20 Society and to explain why the society supports
 21 merit selection as a preferred method of judicial
 22 selection.

 23 Before I do that, just a word that
 24 the society is a national, nonprofit, independent
 25 court improvement organization founded in 1913,

5 1 81 years ago. And it has been working for merit
2 2 selection in the 50 states for these 81 years.

3 The one thing we have learned in the
4 4 past is that it's not a race for the
5 5 short-winded. You have to be able to stay the
6 6 course if you expect to have the thing come out
7 7 right.

8 To begin with, let me define my term
9 9 merit selection. This is a selection process
10 10 that employs a nominating commission composed of
11 11 attorneys and members of the public which
12 12 recruits, investigates, interviews, and evaluates
13 13 applicants for judgeships. The genius of this
14 14 sort of commission is that it is inclusive and
15 15 diverse and truly represents the communities that
16 16 are involved.

6 17 The commission then sends a short
18 18 list of the best qualified people to the
19 19 governor. The governor appoints from that list.
20 20 He must appoint from that list. After an initial
21 21 term, the merit-appointed judge faces the
22 22 electorate in an uncontested retention election.

23 Merit selection is used today in 34
24 24 states and the District of Columbia. Rhode
25 25 Island this year adopted such a plan in the face

6

1 of a rather unfortunate judicial scandal.
2 Tennessee expanded its plan to include all
3 appellate judges this year and to fill interim
4 vacancies in that way.

5 AJS supports merits selection really
6 for three reasons. First, it's the only method
7 that is focused on the quality and the
8 qualifications of the people selected. The focus
9 is qualification and competence, not political
10 competence, if you will.

11 When we consider that judicial
12 decisions affect all aspects of our lives, we
13 must not settle for less than the best judges.
14 And popular elections are not designed to seek
15 the best qualified candidate. It's designed to
16 seek the candidate who can run the best race.

17 Second, the method is most suited to
18 the judges in our system of government. Unlike
19 the legislative branch and the executive branch,
20 which is representative in a broad sense, it
21 represents a constituency, the judicial branch is
22 meant to be antimajoritarian; that is, it's meant
23 to protect the minority from the excesses of the
24 majority.

25 It doesn't necessarily follow the

6

1 popular will. It's meant to follow the law.
2 Merit selection allows us hopefully to choose
3 judges who can best carry out that difficult role
4 when those two things diverge.

5 Third, merit selection with
6 retention elections seeks a balance between
7 judicial independence and accountability; and
8 both of those are important values. We want
9 judges who are independent, who will make the
10 decision on the merits of the case; but we also
11 want judges to be accountable.

12 The retention elections, when they
13 occur, occur with an informed public because
14 prior to retention elections, as you will see in
15 our model code, there is a judicial evaluation
16 process that is geared to inform the public about
17 the judge's competence, about his behavior in
18 office, about his ability to do his job or her
19 job.

20 And having done that, the public
21 goes to the polls and votes with knowledge
22 instead of the current situation where by and
23 large most people who vote in contested judicial
24 elections don't quite know who they are voting
25 for or why.

6

1 Finally, we believe in a diverse
2 judiciary. We are a diverse community. We are a
3 diverse country, and a diverse judiciary fairly
4 represents and reflects that.

5 Merit selection, and we have the
6 data that I want to leave with you, where we are
7 able to get it, to compare merit selection areas
8 with nonmerit selection areas and show that the
9 percentage of both minority, African-American,
10 and women judges are enhanced by merit selection,
11 not disadvantaged.

12 Merit selection produces a greater
13 proportion of women and African-American judges
14 than any other system.

15 Our experience in the 35
16 jurisdictions that use the merit selection plan
17 bears out the contention of the society that
18 merit selection is the best way to choose judges,
19 contrary to claims of elitist, which is always, I
20 think, the worry you have. Am I creating an
21 elitist system?

22 75 percent of the merit-appointed
23 judges come from solo or small-practice law
24 firms, not from the big law firms. Again, there
25 are studies to show that both in New York and

6 1 Florida, where we have both sorts of ventures to
2 compare. And I will be able to turn papers in on
3 that as well.

4 The best thing you can say, I think,
5 in the end for merit selection is that it works.
6 It has been tried in 34 states and the District
7 of Columbia. It works.

8 It produces better judges. It
9 produces a higher percentage of minority and
10 African-American judges. It produces judges who
11 by and large are less often disciplined than
12 comparable judges who are selected by election.

13 So I believe it is an idea whose
14 time has come for Pennsylvania. It's
15 unfortunate, I think, in many respects that we
16 come to the idea at a time when we are dealing
17 from a past of some great dissatisfaction. But
18 often the catalyst for change is exactly that
19 way, and we should take advantage of it now.

20 It is going to take time, but we
21 ought to stay the course and finish it. Thank
22 you, sir.

23 CHAIRMAN DERMODY: Paul, do you have
24 anything?

25 MR. TITUS: I don't have any formal

6 1 statement. Maybe, if it's appropriate, just a
2 few observations.

3 Reforms of one era oftentimes turn
4 out to need to be re-reformed in a new era. They
5 come on to be problems. And I believe this state
6 started with judges who were appointed, and it
7 was approximately 1850 or the 1840's that we went
8 to an elected judge.

9 That was viewed to be a reform
10 because the complaint was that the governor's
7 11 cronies were the only ones who were getting to be
12 judges, and they went to elected judges to have a
13 reform.

14 I think in many ways the elected
15 judiciary has served this state well. We have
16 had some excellent judges under this system.

17 I had a conversation years ago as a
18 very young lawyer with Governor Lawrence, and I
19 was just telling someone of it. I happened to go
20 to a meeting, and I was there early. And he
21 learned that I was a lawyer just starting, and we
22 started to talk.

23 He had just read an opinion by one
24 of our good Common Pleas judges. And he said,
25 You know, I tell the lord chairman you need to

7 1 appoint good judges. Otherwise, you are going to
2 be embarrassed. And there was a certain
3 discipline to party organizations in both parties
4 at that time; but there was a selection process
5 that went on that, I think, produced some very
6 good judges.

7 That has changed. And with
8 wide-open primaries, with the growth of special
9 interest politics in both parties, you tend to
10 get single-issue candidates. You tend to get
11 people coming into the primaries with no
12 selection, getting their names out to the public.
13 And the public is in no position to know whether
14 they really are or are not qualified to be
15 judges.

16 I think having some system -- any
17 system that we have in our society has to be
18 political because we are a free society. The
19 question is, Who is best able to do the
20 screening?

21 A panel selected by the elected
22 representatives of the people to do the screening
23 with the governor, who is elected, approval by
24 the state Senate, who is elected, and then
25 ultimately coming to the voters, you are not

7 1 keeping the public out of the process.

2 I think we would be putting in a
3 system that will help screen and assure that we
4 have qualified people. And I think that is the
5 goal.

6 CHAIRMAN DERMODY: We have had
7 several witnesses throughout the morning on both
8 sides of the issue, and I expect we will hear
9 some more. And it is one, I think, that will be
10 addressed in the next legislative session.

11 I have a question, Mr. Zoghby. You
12 mentioned that there would be an appointment made
13 and at some period of time, there would be a
14 retention election. But before that retention
15 election took place, there would be a method for
16 the public to find out about the people they were
17 voting on?

18 MR. ZOGHBY: Yes, sir.

19 CHAIRMAN DERMODY: Can you describe
20 that for us a little bit, what that might entail?

21 MR. ZOGHBY: Sure.

22 In fact, what I have with me is a
23 model code for judicial selection that involves
24 how you might put together the statute and the
25 policies for that kind of a commission, which I

7 1 will be glad to leave. Let me just try to
2 2 describe it briefly, though.

3 Much in the way that you select a
4 4 commission for selection, you might give that
5 5 duty to the same commission. If you didn't give
6 6 it and you wanted a separate judicial evaluation
7 7 body, it would be selected the same way,
8 8 inclusive, diverse, broadly representative of the
9 9 community.

10 That body would have the ability to
11 11 get information from other judges, from lawyers,
12 12 to collect information about the judges'
13 13 performance in office.

14 It would then have a hearing. It
15 15 might, if there are serious problems, advise the
16 16 judge about them privately first. But in the
17 17 end, it would propose to the public an
18 18 evaluation: good performance, boom, boom, boom;
19 19 difficulties; not difficulties. It would be open
20 20 and on the record.

21 Our model rules require it to go out
22 22 at least 60 days prior to the election for two
23 23 things to happen. The judge can respond if he or
24 24 she feels it's appropriate. But in any event, an
25 25 evaluation by an independent commission would go

7 1 to the public, and the public would have that
2 information before voting in a retention
3 election.

4 CHAIRMAN DERMODY: Is that similar
5 to what they are doing in New Jersey?

6 MR. ZOGHBY: I think it may be.

7 I have another chart in here that is
8 so busy it's embarrassing. It has the
9 information on every one of the 34 states that
10 AJS has collected. And it tells you how the
11 commissions operate, how the nominees are
12 submitted, how the procedures apply.

13 It's a tremendous piece of work by
14 our staff that will enable you, I think, to see
15 everything that is happening in the 34 states and
16 the District of Columbia.

17 CHAIRMAN DERMODY: I appreciate both
18 of you coming by, and thank you very much for
19 your testimony -- one second before you go.

20 We have had a lot of testimony today
21 too about court administration, the role of
22 judicial conferences and judicial administration.

23 Do you have any studies or
24 information on that?

25 MR. ZOGHBY: We don't. I would tell

7 1 you that the society's focus is really on merit
2 selection and on judicial conduct and ethics. We
3 do a lot with judicial conduct commissions, but
8 4 we generally haven't dealt as much with
5 administration as otherwise.

6 MR. TITUS: The American Judicature
7 produces a magazine six times a year. There have
8 been I know -- and Guy would know also from
9 reading -- there have been a number of articles
10 on judicial administration.

11 What we could do is ask the staff to
12 call and make available to you some of the
13 articles over the last five years so that you
14 would have some of that information.

15 I know there was some questioning of
16 the executive director a year ago at a Senate
17 committee hearing on the notion of having a
18 judicial council that would take over some of the
19 functions currently assigned to the Supreme Court
20 under Article V.

21 I believe that it will serve you in
22 the view of the staff that that would not be wise
23 to do so, that it is better to leave with the
24 Supreme Court that authority.

25 Now, there are questions. Should it

8 1 be the chief justice who is the principal
2 administrative officer or not?

3 Currently the way the Constitution
4 is, as you know, it is left to the Supreme Court
5 and the chief justice isn't named as such to be
6 the chief administrator. And that may make sense
7 because under the Constitution, the chief justice
8 is the most senior justice.

9 Some justices have some skills as
10 administrators. Others may not. And it may be
11 better to leave it to the court under each chief
12 justice to devise how best to do that.

13 CHAIRMAN DERMODY: I would
14 appreciate that, and I would appreciate the
15 articles.

16 MR. ZOGHBY: I would offer as well
17 our organization and staff has, I think, the only
18 full collection of judicial discipline in the
19 country. We have records of that, and we can
20 provide -- if we can provide assistance to you or
21 provide information or even staff help if it is
22 needed, I would like to see us do it.

23 CHAIRMAN DERMODY: We will avail
24 ourselves.

25 MR. ZOGHBY: They will complain when

8 1 I get home when I tell them I made that offer.
2 But it's an offer that I mean, and I will do my
3 best to back it up.

4 CHAIRMAN DERMODY: We appreciate
5 that. Thank you very much.

6 We are running a little early. I
7 think I would like to announce to the people that
8 are here in the audience that this legislative
9 session ends November 30. And it's clear that we
10 are not going to be able to have these hearings
11 in as many cities as we would like or to obtain
12 as much information as we would like.

13 But if you are interested in having
14 these hearings continue, if you think they are
15 beneficial or would be helpful and would help us
16 make better decisions, then please contact your
17 people in Harrisburg that have some input on
18 that.

19 John Perzel would be a leader in
20 Harrisburg you would want to talk to and to Dan
21 Clark, who would be my counterpart, the
22 Republican chairman of the Subcommittee on
23 Courts. They would be in a position to authorize
24 additional hearings next session.

25 Dan Clark is the minority chairman

8 1 now. It looks like he will be the majority
2 chairman next session of the Subcommittee on
3 Courts.

4 John Perzel is the leader -- and I
5 think we can give you his name and address
6 later -- on the Republican side, the majority
7 leader, who will have some decision on whether or
8 not hearings can be held and where they can be
9 held. We finish up our ability to conduct
10 hearings on November 30.

11 There are two very distinguished
12 witnesses that are next on the list. We have
13 with us today Mr. William Caroselli, Former
14 President of the Pennsylvania Trial Lawyers
15 Association, and William Goodrich, who will be
16 President of the Pennsylvania Trial Lawyers
17 Association and is currently the president of the
18 Western Pennsylvania Trial Lawyers Association.

19 MR. GOODRICH: Thank you, gentlemen,
20 for the honor of inviting us to speak before this
21 commission relative to judicial reform.

22 I want to go back a little bit over
23 some of the things that I have heard today while
24 I have been sitting here considering the
25 necessity of what they often refer to as merit

8 1 selection and having been ordained or endorsed by
 2 our Constitution federally when it was first
 3 formed that this is the best way and it must have
 4 been the best way because it was initially done
 5 this way and that our federal courts still follow
 6 that system.

 7 I would also like to remind the
 8 board at this time, the committee, that that same
 9 Constitution also endorsed slavery as a means of
10 10 government and as a means of keeping those who
11 11 disenfranchise from a vote.

12 I believe the thing that makes this
13 13 country different than all other countries and
14 14 the thing that allows us to grow as a people and
15 15 as a nation is that right to vote, that right to
16 16 vote for whomever we wish to govern us in terms
17 17 of our legislators, that right to vote for
18 18 whomever we feel should be in charge of the
19 19 executive part of our government such as our
20 20 governors.

21 I think the right to vote for those
22 22 who judge us all is an integral part of our
23 23 system here in Pennsylvania and in this country.

24 The appointment of judges, I have
25 25 read no statistical survey, contrary to what I

1 may have heard here today, that the appointment
2 of judges works any better in any state or in any
3 other system.

4 The appointment of federal
5 judiciary, I think, is the most political of all
6 systems in terms of who is appointed and who is
7 made a judge.

8 I sit here today, and I think back
9 as to, Do we get the most qualified candidate as
10 a federal district judge, as a federal circuit
11 court judge? Or do we get an individual who has
12 worked more closely or has more friends in the
13 federal legislative process or the federal
14 political process?

15 No one here can convince me today
16 that Clarence Thomas was the best candidate for
17 the job of Supreme Court, let alone the best
18 black candidate. What we saw there in his
19 confirmation process was nothing more than an
20 extension of the political process, probably to
21 the nth degree, in terms of who was to be made a
22 judge and on what basis he was to be made a
23 judge.

24 This week, as I was preparing to
25 appear before this committee, I glanced across

9

1 the newspaper and saw what happens sometimes not
2 necessarily in this country but in another
3 country with the appointment of a judge.

4 The government of Ireland this week
5 fell because of the appointment of the president
6 judge of the Supreme Court of Ireland, an
7 individual who had been the Attorney General of
8 that country and was generally thought of well
9 until certain aspects of his, say, political
10 expertise came into judgment.

11 This was brought up to the
12 government, to the prime minister, and requested
13 not to appoint this man. Instead they appointed
14 this man. The government fell when the Labour
15 Party coalition refused to stay with the party in
16 power.

17 Now, we do not have a parliamentary
18 form of government in this state; but the
19 confirmation process in this state requiring the
20 Senate confirmation I see as a similar
21 methodology of, Do we appoint this person? Do we
22 not appoint this person? Do we follow our
23 political lines? I mean that process is nothing
24 but a political process.

25 Now, what we have here by this term

9 1 merit selection, anytime I hear anything of merit
2 2 or reform, automatically we can point to the fact
3 3 that somebody is trying to take somebody's rights
4 4 away.

5 Merit selection means we are going
6 6 to take your vote away. We are going to take
7 7 that vote, and we are going to put it in the
8 8 hands of a few people. And they are going to be
9 9 the ones who can tell you who can be your judges.

10 Tort reform, we are going to take
11 11 away your rights under law to redress for
12 12 injuries sustained. Is that a reform, or is that
13 13 a restriction? Are your rights being extended,
14 14 or are your rights being retracted? This is what
15 15 merit selection is about.

16 What is wrong with merit election?
17 17 The individuals who are elected to the judiciary
18 18 in this state go through a rigorous process of
19 19 being looked at, of being questioned, of having
20 20 to go through numerous, numerous accountability
21 21 with the individual electorate before they are
22 22 chosen by their party to run.

23 Maybe what might happen and might be
24 24 a better offer for the whole system is not to
25 25 throw everything out the window because maybe you

9 1 don't like Judge A or Judge B. I mean how many
2 2 judges are elected throughout this state who have
3 3 performed admirably and have been some of the
4 4 finest justices in this country?

5 Justice Musmanno, well thought of
6 6 throughout the world, not just this country, was
7 7 elected by the electorate of this state.

8 When we go to a, quote, merit
9 9 selection, you have now taken that right that
10 10 many people have fought and died for throughout
11 11 the 200-some years this country has been alive
12 12 and saying, You, the electorate, are too dumb to
13 13 know who you want to judge you.

14 This right of vote is not something
15 15 that is relatively new. This came about after
16 16 the alleged enlightened thought of merit
17 17 selection was already in place for some 100 or 90
18 18 years in Pennsylvania.

19 It wasn't until 1850 and 1860 that
20 20 right to elect your judges came about. And that
21 21 was after we had already experimented with that
22 22 enlightened period in which time we had more
23 23 judges removed from office for impropriety than
24 24 ever in the history of this state.

25 Only one since then, and that is

9 1 only our most recent past experiences, which
2 2 admittedly were distasteful to us all. But do we
3 3 can the whole system, or do we change it to
4 4 effect the changes that have occurred in society?

5 Do we still have the same
6 6 Constitution that the federal government
7 7 initiated back in 1789? No, we don't. That has
8 8 been amended. It has been changed to reflect the
9 9 growing interest of this country, to reflect that
10 10 the country grows in thought and process, not
11 11 just in material reason.

12 We have no longer slavery. That is
13 13 enlightened. We have direct election of our
14 14 representatives. That is enlightened. And let
15 15 me just remind everyone that the right to vote
16 16 was not to everyone, every free man. Remember,
17 17 as a free man, that right to vote depended upon
18 18 your ability and financial wherewithal to own
19 19 land.

20 If you didn't own land, you didn't
21 21 have the right to vote. Now, is that an
22 22 enlightened thought process as ones who have
23 23 spoken before us would think it is in terms of
24 24 the federal judiciary? No. I would hope not. I
25 25 would hope that no one on this board would agree

0 1 that that was enlightened.

2 Why is it that every time there is a
3 problem, there has be a wherewithal, total throw
4 everything out the window? What is wrong with
5 some modification of the electoral process?

6 What is wrong with allowing those
7 individuals who stand for judges to speak out on
8 some topics in which people have interest in so
9 that they know what this person stands for, what
10 this person's thought process is, and whether or
11 not the philosophy of that individual is the type
12 of philosophy that I as a voter and as a citizen
13 of this state want that person to be sitting in
14 judgement of myself?

15 What is wrong with that thought?
16 Why do we have to prevent our justices and our
17 judges and our candidates from speaking out about
18 topics which everyone wants to know?

19 Everybody says, Well, maybe it will
20 become a one-issue situation. Well, if people
21 are going to vote for a person because of one
22 issue, they are going to vote for that person
23 whether or not there are three or four things
24 that this person speaks out on anyway.

25 I mean that would be one of the

0 1 items of interest that I think people should have
2 an opportunity to know about.

3 When we elect our candidates, is
4 there a reason why there cannot be some
5 limitations, at least on contributions, not from
6 the individual themselves, of course. If a
7 person has money and they want to spend it to get
8 elected judge, that's up to them.

9 Of course, that would also be
10 something that could be countered by the
11 opposition saying, This guy is trying to buy the
12 judgeship or this woman is trying to buy the
13 judgeship.

14 Why can there not be some
15 restrictions? Why can there not be an
16 opportunity at least in the ballot section
17 process that the ballots be rotated in county to
18 county, that people have an opportunity so that
19 it is not the first guy on the list gets elected
20 just because his name is sitting there or the
21 last guy on the list because his name is last?

22 Maybe some of the people who would
23 be more qualified are located within the pack.
24 To be more qualified is in the mind of the voter
25 themselves. What is quality for one may not be

10 1 quality for the other.

2 Why should we give our right to vote
3 to a small select group of people? And who is
4 going to choose those people? Isn't that
5 politics in and of itself? And in fact, it
6 disenfranchises the rest of us because now we
7 have a fewer group of people now in power able to
8 control who is to be nominated, who is to be
9 appointed.

10 Now, the idea now that well, we will
11 appoint them only for a little bit and then we
12 will see how they went and how they did. And
13 then we have to run for retention. What is wrong
14 with them initially being permitted?

15 Are we going to lift the gag rule on
16 that retention? It doesn't sound to me as if
17 they are talking about lifting the gag rule on
18 the candidates and their ability to speak out.

19 We are going to review what
20 decisions they made? We are going to read their
21 opinions? What is different than having that
22 person explain what they think about in terms of
23 the philosophy of the law as it stands when they
24 are being elected or chosen to stand for
25 election?

10

1 I think one of the ways that could
2 help maybe get people who are per se more
3 qualified -- and believe me that term is so
4 ambiguous to start with. It is subject to many
5 meanings depending on who is talking to you about
6 it.

7 But in terms of having people who
8 their peers feel may have a certain ability to
9 sit as a judge and be impartial, what about the
10 bar associations and the committees that give
11 qualifications as to whether that person is
12 qualified or unqualified explain to electorate?
13 What does that mean?

14 What factors went into that? These
15 committees are able to question these candidates
16 much more than the candidates are permitted to
17 say open to the electorate. Why don't we open
18 that process up?

19 Why don't they have more of an
20 opportunity to explain that when we have someone
21 we say is qualified, we think that person is
22 qualified because of A, B, C, D? Now all we see
23 is certain bar associations say, Candidate A is
24 qualified. Candidate B is qualified. Candidate
25 C is qualified. Everybody is qualified.

20
1
2
3
4
5
Those committees themselves are very political to start with. If you have ever seen them or gone before them or been a part of them, I mean nothing changes in terms of the political process.

6
7
8
9
10
11
12
13
14
Politics are a way of life in this country. It is the lifeblood of this country. It is how we operate as a nation. It is what ensures the democratic ideals in this country, that everyone has a right to say and think and do as they feel and to project that through the ballot box in terms of who they want to sit in judgment of them and who they want to sit as their leaders.

15
16
17
18
19
20
21
22
23
24
25
I hope that this board when they sit and contemplate all that they have heard in the day here -- and I am sure you are conducting these hearings throughout the state -- realizes that when this merit selection process takes place, there will be less people involved and fewer people consolidated in control as to who will sit on that seat behind you in judgment of us all, not that that person will be under any guarantee to be any better than that person that would be elected.

'1 1 It is just that that will be a
2 person that the person at the top has pulled the
3 string for. This idea of the governor receiving
4 a select group of individuals and has to choose
5 from that person to be the judicial candidate,
6 that is something very easily manipulated.

7 I believe statistical studies have
8 shown that throughout this country, 90 percent of
9 all of the judges appointed by gubernatorial
10 directives have been from the same party as the
11 governor in all of the states.

12 One of the ways this can be easily
13 handled is we sent three people to the governor.
14 We sent Candidate A. We sent Candidate B. We
15 sent Candidate C. Candidate C also happened to
16 be one of the governor's choices.

17 The governor got A, B, and C. My
18 goodness, the governor chose C, but he was
19 amongst that committee. This is even more
20 political than any possible process in the
21 electoral situation could exceed.

22 I believe that my father, who was
23 nothing more than a city fireman, never graduated
24 from high school, but spent days and weeks before
25 every election counseling his children, sitting

f1

1 with them, talking with them about who are we
2 going to vote for in this family, because every
3 vote from our household by my father and my
4 mother was a family vote.

5 We would talk about everyone and
6 what candidates, not just legislatively and not
7 just gubernatorial but also judicially and why
8 that person was qualified or not qualified. That
9 was the way we learned to vote.

10 That was the way the vote was taken
11 in our house, and that is a vote that I do not
12 wish to give up. Thank you.

13 CHAIRMAN DERMODY: Thank you. Bill,
14 do you have anything to add?

15 MR. CAROSELLI: Yes, I have a couple
16 of things.

17 Let me, first of all, try to give
18 you a little different perspective and try to at
19 least tell some of you who don't know me very
20 well what some of my experiences have been other
21 than being president of the Pennsylvania Trial
22 Lawyers Association.

23 I have been fortunate enough to be
24 the chairman of the Allegheny County Judiciary
25 Committee. I was on the committee for three

1 years. Then I was on the committee again, and I
2 was then the chairperson.

3 I am not speaking in that capacity,
4 and I am not speaking on behalf of the Allegheny
5 County Bar Association. But I think that that
6 experience there has given me some insight into
7 some things that perhaps I should tell you about.

8 I have also been fortunate enough
9 have been appointed by Governor Casey to the
10 local committee, which consists of five people,
11 three of whom are lawyers and two of whom are
12 laypersons, who make recommendations to the
13 governor when a vacancy occurs.

14 So I have sort of been on the inside
15 of a quasi-merit selection system, and I have
16 been on the inside of a system where committees
17 determine who is qualified and who is not
18 qualified according to what the particular
19 culture of the times is.

20 I can tell you that in my tenure on
21 the Allegheny County Bar Association when I was
22 there for the first three years and when I was
23 there for the next three years, the culture of
24 what was a good judge and what was not a good
25 judge changed drastically in that seven-year

'1 1 period.

2 I have also found on those two
3 committees that it is much easier for people who
4 have an agenda -- and I guess I'm cynical enough
5 to believe that most everybody has an agenda --
6 but the people who do have an agenda and the
7 people who do have a particular point of view,
8 that it is far easier to affect that agenda and
9 to promote that particular point of view in a
10 smaller group of people than it is among a large
11 group of people, particularly when you are
12 dealing with people who come with professional
13 attitudes and ideas and generally don't leave
14 them outside of the room where the committee is
15 having its hearings and which are supposed to be
16 sacrosanct.

12 17 I have also found that even though
18 we had rules of confidentiality in both of those
19 committees that within days of the committee's
20 having met, things that I had said naively when I
21 first came to the committees were on Grant Street
22 within a matter of 48 hours.

23 So with those perspectives in mind,
24 I come to you and I suggest to you that I am not
25 in favor of having a small group of people

f2

1 determine who are going to be our judges on the
2 appellate level in Pennsylvania.

3 And as I understand it, although the
4 general topic of election versus appointment is
5 being discussed that specifically we are talking
6 about the appellate court judges being appointed
7 as opposed to those who are on the district
8 level, the district judge level or the Common
9 Pleas level.

10 I also find it difficult
11 intellectually to quite understand why it is
12 necessary that one group of judges be appointed
13 and another group of judges be elected. If there
14 is some reason why persons believe that everyone
15 should be appointed, then everyone should be
16 appointed.

17 I have heard the argument, Well, we
18 want to ensure that at the trial court level that
19 there are judges who are sensitive and know the
20 particular geographic area of the state and,
21 therefore, they are going to be much more
22 sensitive to the issues and to the persons and to
23 the general culture.

24 Let me suggest to you that there are
25 a whole number of cases in Pennsylvania that if

1 you reach the point where you appoint your
2 appellate court judges that there are many
3 litigants who will never see an elected judge.

4 I happen to deal in one particular
5 area and so does my firm in workmen's
6 compensation. All judges who hear workers'
7 compensation cases on the administrative level,
8 who are both the finders of fact and concluders
9 of law, are now appointed. And they are civil
10 servants.

11 As you wind your way through the
12 workers' compensation system and a lot of other
13 administrative adjudicatory systems in this
14 state, you go directly from that particular
15 administrative body to an appellate court. You
16 do not stop in the middle. You do not go to a
17 Court of Common Pleas. You go directly to the
18 Commonwealth Court.

19 Those people who are in that
20 particular system and that administrative level
21 will never, ever see their case adjudicated by
22 anybody who has been elected.

23 As Bill alluded to, yes, we have had
24 an unfortunate experience in the last couple of
25 years with the impeachment of Justice Larsen.

2
1 But let me suggest to you that they have had a
2 recent bad experience in New York State as well,
3 and that particular justice was appointed.

4 There has been a federal court judge
5 from Florida who was impeached, and ironically
6 enough the electorate re-elected him to go to
7 Congress rather than rejecting him outright.

8 It's much easier -- going back to an
9 earlier statement, it's much easier to carry
10 forth an ideological agenda with a smaller group
11 of people than it is with a larger group of
12 people.

13 I agree that there should be some
14 changes, and I hesitate to use the word reform
15 because when you say reform, it brings in all
16 sorts of impacts and sensitivities that shouldn't
17 be there. Yes, we should have some changes.

18 We know as a fact that we have a
19 number of judges who are on the appellate courts
20 in Pennsylvania who come from where we are today.
21 They come from Allegheny County. Perhaps there
22 are reasons for that. Perhaps the electorate
23 feels comfortable with Allegheny County people.

24 I happen to not think that it is
25 because of any great political force that we have

'2

1 in Allegheny County. And if you look at the most
2 recent elections, I think I will be born out.
3 But I think that one can do some fine tuning
4 particularly in view of the fact that I think
5 that the electorate today is perhaps a little
6 more cynical than they have been.

7 We went through this process in 1969
8 with the constitutional convention. It's an
9 expensive proposition to try to decide what you
10 are going to do as far as changing the
11 Constitution.

12 My sensitivity is that the
13 electorate today doesn't want us to be spending
14 any more money, and they don't particularly want
15 us to be spending money on things that they are
16 going to vote down.

17 One thing that this past election
18 also taught me, and I think some others, is that
19 people are willing to vote change if they think
20 change is necessary. But I think they want to
21 vote. I don't think whether you happen to be a
22 moderate, a conservative, or a liberal that
23 anybody wants to put the vote that they have in
24 the hands of somebody else to make these ultimate
25 decisions.

2
13
1 Surely we should have some curbs on
2 funding in Pennsylvania. I say that from two
3 perspectives, one a very selfish one because it
4 is indeed the lawyers who are the largest
5 contributors to the funding for the judicial
6 campaigns.

7 But I can also tell you that in my
8 almost 30 years of practicing law that I don't
9 know of a single lawyer or a single case that I
10 have ever been involved in where I have
11 absolutely or even thought to think that the
12 other side won or that my side won because of any
13 contribution that we made.

14 Perhaps that may be something that
15 the public may view; but in actuality, it doesn't
16 work that way. I have never thought that justice
17 has been done badly because of contributions.
18 But there have to be curbs.

19 It's too expensive, and it's almost
20 obscene that someone who is running for the
21 office that pays what the judicial spots do spend
22 that kind of money.

23 While I have said that, I think that
24 one of the ways that we can get better candidates
25 to run for judicial positions is to increase the

3 1 salaries. I believe that they are inadequate. I
2 think you will get better qualified individuals
3 who are willing to give up their practices to go
4 onto the bench.

5 We should eliminate cross-filing.
6 Even though I am comfortable with the county
7 designation being there, I think that as a matter
8 of good politics, it is probably not a good idea.
9 We should rotate the people on the ballots.

10 One thing that I think should be
11 done on all levels, whether it be district
12 magistrate or whether it be Common Pleas Court or
13 whether it be the appellate courts of
14 Pennsylvania, there should be some sort of
15 minimal qualifications that you must meet before
16 you can go on the ballot.

17 And perhaps the number of signatures
18 that one has to get before they can go on the
19 ballot, whether it be in Common Pleas Court or
20 statewide, should also be increased.

21 Those are basically my points. I
22 think that an elected judiciary is a judiciary
23 which stays more in touch, stays more sensitive
24 to the needs of the people. And that's basically
25 what I have to say. Thank you.

3 1 CHAIRMAN DERMODY: Thank you. I
2 thank both of you. We have had a lot of
3 testimony today about merit selection and about
4 electing our judges.

5 We haven't had much testimony about
6 setting some minimum qualifications before you
7 should be able to seek a judgeship at a certain
8 level; that is, should there be qualifications, a
9 certain level of qualifications of jury trial
10 before you become a judge of the Court of Common
11 Pleas? Should you have a certain number of years
12 of experience before you are allowed on an
13 appellate court?

14 MR. CAROSELLI: Mr. Dermody, this
15 has always been something that has been argued
16 back and forth and particularly one of the issues
17 jury trials versus -- how many jury trials have
18 you had.

19 I know when I sat on the judiciary
20 committee, there was a group of people who were
21 absolutely enamored with the idea that unless you
22 had had jury trial experience, somehow you could
23 not be a good jurist. I personally -- I am
24 speaking on a very personal basis -- do not
25 necessarily adhere to that thought, to that idea.

1 I think that a good lawyer can be a
2 good judge regardless of the type of law that
3 that person practiced. I think it has to do with
4 life experiences. I think it has to do with the
5 ability to think legally and logically.

6 We had had many years ago a jurist
7 in Allegheny County by the name of David Olbum.
8 And Judge Olbum had -- I am not sure he had ever
9 practiced law really, but he was a very bright,
10 capable man.

11 He had been on city council, and I
12 think he had had some other political positions.
13 He was originally appointed to the bench and then
14 ran. Judge Olbum had turned out to be an
15 excellent jurist.

16 We have had a number of jurists here
17 in Allegheny County who had very little in the
18 way of jury trial experience who have turned out
19 to be to good jurists. That is one of the
20 criteria. I think that what you have got to do
21 is look at it in kind of an overview and make it
22 kind of alternative criteria.

23 I, for example, would not want to
24 see any system put into effect where in order to
25 be an appellate court judge, you had to be a

L3 1 trial judge. I don't think that we should be
2 creating a track like they do Europe where you
3 decide very early on in your career that you
4 going to become either a judge or you are going
5 to stay as a lawyer.

6 I think people who have been good
7 lawyers can become judges, appellate court or
8 trial court; but I think something should be
9 done. I think that there ought to be some kind
10 of criteria.

11 CHAIRMAN DERMODY: A number of years
12 of experience as being a lawyer?

13 MR. CAROSELLI: I have always been
14 offended when I have sat on these merit or
15 quasi-merit committees and see people that come
16 in with minimal number of years at the bar,
17 minimal life experiences.

14 18 There are people who come in as very
19 mature people who have only been lawyers for a
20 few years who have the qualifications that are
21 necessary to become a judge in my humble opinion,
22 but it has to be a mixture.

23 MR. GOODRICH: A number of years of
24 practice is not necessarily the criteria. As Mr.
25 Caroselli mentioned, I think it's the experience

4 1 of that person during that time period that they
2 have been practicing that really is the criteria
3 that has to be used and does not necessarily, as
4 he indicated, have to be as a trial lawyer.

5 One of what I see now as being one
6 of the finer appellate court judges sitting on
7 the bench right now Judge Kate Ford-Elliott was
8 not a trial lawyer. And she won an election, and
9 I doubt very seriously if this state under a
10 merit selection program would have seen an
11 individual such as Judge Kate Ford-Elliott as a
12 Superior Court judge.

13 The fact that we have presently the
14 only black Supreme Court judge president,
15 president of the Supreme Court, in the United
16 States I think bodes well for the electoral
17 process. The fact that we have many women as
18 appellate court judges at the present time bodes
19 well for the electoral process.

20 The people who sit on these
21 committees or would be designated to sit on these
22 committees, that is really going to determine as
23 to whether or not you are going to see minorities
24 elected or appointed under this merit -- and I
25 deign to use that word -- merit selection

24 1 process.

2 The process of who gets to be where,
3 what, and when has normally been determined by
4 that white male, and I do not necessarily believe
5 that the white male is the one who I want to look
6 to all of the time for direction and guidance in
7 life.

8 I just wanted to touch upon one
9 other thing that was mentioned earlier by some of
10 the other speakers, and it essentially deals with
11 this English rule of the loser pays the costs
12 that is now being bandied about this state.

13 That type of rule, I guarantee you,
14 will do nothing more than freeze the rights of
15 individuals and force the individual who would
16 normally be able to take their complaint and
17 bring their grievance to a court away from the
18 court system.

19 I believe that type of rule will
20 promote more self-help and more lawlessness.
21 When someone feels that they cannot get a fair
22 shake at the courthouse because they don't have
23 the money or that the possibility of losing the
24 case will completely destroy themselves and their
25 family, they will look for another avenue. And

4 1 that avenue is not necessarily one that is within
2 the judicial system. Thank you.

3 CHAIRMAN DERMODY: Before you go,
4 one question. We talked about campaign
5 finance -- I don't want to use that word reform.
6 I don't like it much either myself because it
7 usually does mean that someone is taking
8 something away.

9 We had some testimony this morning
10 regarding public financing of campaigns. I
11 wonder if you had any thoughts about that at all.

12 MR. CAROSELLI: Only personal
13 thoughts, I don't think that any of the
14 organizations that we are representing and the
15 organization that we are representing today.

16 I think in an ideal world that that
17 would be marvelous. I think that as a pragmatic
18 person, I'm not sure that the electorate is at
19 the point where they want public financing. And
20 when you start mixing too many issues in, what
21 changes that you are -- what changes that are
22 needed are going to be lost because you have got
23 too many concepts in there.

24 I would think that that would be
25 marvelous as an ideal, but in the pragmatic world

4 1 as we are in 1994, I don't think that it's there
2 yet. I would rather see some kind of curbs to
3 start with and then ultimately get into that.

4 CHAIRMAN DERMODY: Thank you very
5 much.

6 MR. CAROSELLI: Thank you.

7 MR. GOODRICH: Thank you.

8 CHAIRMAN DERMODY: We will take a
9 five-minute recess, and we will begin at about
10 2:30.

11 (Brief recess from the record.)

12 CHAIRMAN DERMODY: We will reconvene
13 the hearing.

14 Our next witness is Mary Sue
15 Johnston, citizen.

16 MS. JOHNSTON: I'll read from my
17 written testimony.

18 I want to thank the committee for
19 allowing me the opportunity to give my testimony
20 on judicial reform issues and the problems and
21 abuses occurring in many of our courts in
22 Pennsylvania.

23 My involvement in judicial reform
24 began as a result of my domestic litigation that
25 began in 1985 as I became aware of the

4 1 irregularities and the violations of the
2 Pennsylvania Rules of Court and the law that
3 occurred in my case.

4 As soon as I was involved, I
5 discovered there were many, many others across
6 the state who felt as helpless as I, women in
7 particular but also men who had become victims to
8 the improprieties because the courts did not
9 follow their own rules or the Supreme Court
10 rules, and laws were not being adhered to by the
11 attorneys and judges involved.

12 The horror stories of people who
13 called and told me how the courts treated them
14 followed a similar pattern. When they sought
15 help from legislators and other elected
16 officials, they were told to file their
17 complaints on the violations with the judicial
18 inquiry and review board, now the judicial
19 conduct board.

15 20 But their complaints were routinely
21 dismissed by the board with the explanation that
22 failure to follow court rules and procedures is a
23 legal error and is not considered ethical
24 misconduct.

25 Litigants are told they have to

'5

1 appeal these so-called legal errors for
2 consideration by the appellate court rather than
3 the board. It is not legal error when
4 documentation clearly shows that a judge or
5 attorney knowingly and continually violates
6 Supreme Court rules, local rules, or when there
7 is criminal conduct.

8 It is not legal error when there is
9 criminal conduct such as tampering with public
10 records and information such as transcripts,
11 abuse of process, perjury, collusion with
12 conspiracy to defraud, obstruction of justice,
13 official oppression, and fraud.

14 Who decides what constitutes legal
15 error? The new judicial board operates under the
16 same principal of the former judicial inquiry and
17 review board. The whole concept was to make it a
18 two-tier system where the complaints are still
19 dismissed at the first level and it is still
20 secret.

21 In fact, the new judicial conduct
22 board also calls these legal errors when they
23 fail to follow the proper procedure.

24 All the new judicial conduct board
25 did was add more people at taxpayers' expense.

5

1 Some of the conduct complained of would put the
2 average citizen in prison, but there is no
3 accountability by judges and attorneys when they
4 violate the rules and the law.

5 Complaints filed with the
6 disciplinary board of the Supreme Court are also
7 routinely dismissed even when documented evidence
8 has been given to warrant disciplinary action.
9 This fact was recently pointed out in a letter to
10 the editor of the Pittsburgh Post Gazette titled
11 How Bad Lawyers Stay Bad.

12 Ironically this letter was sent in
13 by an attorney. It seems that even some of the
14 attorneys are aware of the growing problems and
15 want something to be done.

16 In 1989, I took my complaints and
17 documentation of numerous cases to my
18 representative, Timothy Pesci, and he responded
19 by introducing Resolution No. 8 that called for a
20 task force to be set up to investigate the
21 violations and injustices.

22 In 1991, public hearings were held
23 before the House Judiciary Committee, and I
24 believe you were probably a part of that.

25 CHAIRMAN DERMODY: We had a hearing

5

1 at the grade school in Oakmont.

2 MS. JOHNSTON: Right. And I had
3 read a lot of the testimony from the hearings,
4 and they did point out a lot of the problems that
5 had taken place.

6 There were almost 40 people who
7 testified for three days first in Harrisburg,
8 though. I don't know if you were --

9 CHAIRMAN DERMODY: I was there.

10 MS. JOHNSTON: -- in Harrisburg.

11 And they testified how they were
12 abused by the judicial system and how the laws
13 and rules were being ignored by the courts. And
14 then it was three more days of public hearings,
15 and that's when they had the one in Oakmont that
16 I had attended that you were there.

17 Even though shocking testimony was
18 given and documentation presented, the task force
19 was never implemented. And it is my
20 understanding just of recently there should have
21 been a report and recommendation after these
22 hearings to see what needed to be done and what
23 steps should be taken to resolve the problems.

24 However, I just talked to
25 Representative Caltagirone's office recently, and

- 5

1 they told me there was never a report and
2 recommendation on this. Nothing was ever done
3 after the hearings.

4 I would just like to know what was
5 the purpose of hearings in 1991 if they didn't
6 set up the task force and they didn't investigate
7 and resolve any of these problems? That was
8 almost four years ago, and nothing has been done.

9 Not only were the problems not
10 resolved, the litigants who testified found
11 themselves in a more precarious position in their
12 litigation for speaking out publicly about court
13 abuses and violations.

14 Then as they continued to complain,
15 just recently the Senate passed Resolution 43, I
16 believe in February 1994. And this directed the
17 Joint State Government Commission to study on an
18 ongoing basis legislative proposals involving
19 certain areas of domestic relations law. The
20 problems are not exclusive to domestic relations
21 cases and must be addressed as a whole.

22 Also the task force set up by
23 Resolution 43 is composed basically of people on
24 the judiciary committee who already know what the
25 problems are from the testimonies given at the

5 1 1991 hearings on Resolution 8.

2 And I do think that if they have any
3 kind of a task force set up, it should be as it
4 was in Resolution 8. They need to have lay
5 people on the task force, people who have gone
6 through it and know where the problems exist.

7 CHAIRMAN DERMODY: If you can
8 remember, we had -- the days of hearings that we
9 had, and I think we were at the one in Oakmont.
10 And I know --

6 11 MS. JOHNSTON: I attended the one in
12 Oakmont. I had submitted testimony at the 1991
13 hearings. I was scheduled to testify on
14 September 13. And as it turned out, my sister
15 was terminally ill, and I was unable to go. My
16 testimony was given orally by someone who had
17 gone and given it for me.

18 CHAIRMAN DERMODY: We had testimony
19 from lawyers who were practicing in the family
20 division throughout the state. And the one in
21 Oakmont dealt with mostly Allegheny County,
22 Washington County, the western Pennsylvania
23 counties from all over the Commonwealth.

24 We had attorneys. We had people who
25 had been involved in the process and felt that

6

1 the system didn't do right by them. And we had
2 judges who are working within the system.

3 Some of them are very sympathetic to
4 your complaints.

5 MS. JOHNSTON: I might add I do have
6 the testimony of the three days of the hearings
7 of the judges and attorneys and have read through
8 it, and it is very glaring what some of the
9 problems are.

10 So after the hearings were held, I
11 don't know of anything that was done to correct
12 some of the things.

13 CHAIRMAN DERMODY: I think if you
14 recall, a lot of testimony from particularly the
15 attorneys and the judges had a lot to do with
16 people are frustrated with the delays within the
17 system, problems getting their cases before the
18 proper -- the judge or anybody to hear it.

19 People are frustrated, I think, to a
20 certain extent dealing with masters, dealing with
21 they were never in a courtroom, they never saw
22 the inside of a courtroom.

23 A lot of it came down with having
24 problems with being able to have enough court
25 personnel, being able to pay a sufficient number

6

1 of judges to hear the cases in a timely fashion,
2 and frankly the way they were treated when they
3 were in the system; that is, the family division
4 doesn't treat people very well.

5 If you walk across the street here
6 to the city and county building and you get up on
7 the sixth floor, there is a tremendous amount of
8 delay and confusion and frustration.

9 Does that jive with your
10 recollection?

11 MS. JOHNSTON: No. I believe from
12 people that I speak with it is more than the
13 delays. I mean that is part of the problem.

14 CHAIRMAN DERMODY: I'm not saying it
15 was all of it.

16 MS. JOHNSTON: The biggest problem
17 and the reason for Resolution 8 was the fact that
18 in many, many cases, the courts were in violation
19 of the Rules of Civil Procedure and the people
20 could not proceed in their cases.

21 What it would do is it would
22 complicate your case so badly that it just caused
23 more court hearings, if anything.

24 CHAIRMAN DERMODY: Some lawyers
25 testified that in an adversary system, it was

6

1 advantageous to their clients' position to drag
2 it out to make it difficult.

3 MS. JOHNSTON: That's right. I did
4 read that.

5 I also recall testimony by one
6 attorney who said that they will do that and the
7 judges will not issue sanctions when they do it.

8 I have a letter that says -- it's
9 another litigant's letter -- where the attorney
10 who testified that sanctions weren't issued said
11 that he would appeal every ruling and take the
12 case for years. And that isn't right.

13 CHAIRMAN DERMODY: No, it's not. I
14 agree with you.

15 MS. JOHNSTON: The particular person
16 I am talking about you probably know because she
17 has been in court for 25 years, and he did appeal
18 every case to keep it in court for years. But
19 there is 25 years of her life down the drain.

20 So this is the problem, and this is
21 why the hearings were held. There were various
22 numbers of reason, not just the fact that there
23 were delays. The delays are just a part of it.

24 CHAIRMAN DERMODY: Right.

25 MS. JOHNSTON: And I also think if

6

1 there is going to be any meaningful reform, it's
2 important for the legislators to acknowledge that
3 more laws will not correct the problems if the
4 judges and attorneys can continue to ignore and
5 circumvent the existing laws and the rules.

6 I spoke with Conrad Arensberg, and
7 he is in charge of putting together the study
8 under -- that is Resolution 43. He informed me
9 that this will be an ongoing thing and will last
10 for decades.

11 It may take decades, but I doubt
12 that there will be any continuity as to the
13 testimony and the causes. I appreciate it takes
14 time; but while they are taking decades, there
15 are people who are losing large sums of money,
16 their homes, their children, their businesses.
17 And all we have done to date will just be lost in
18 the shuffle.

19 On August 19, 1993, another
20 concerned citizen and I met with a respected
21 member of the judiciary committee seeking answers
22 and solutions. He admitted it's an ugly mess
23 that nobody wants to deal with, that it was the
24 cancer of the judiciary.

25 He arranged for us to meet with

6 1 State Court Administrator Nancy Sobolevitch and
2 members of her staff on September 8, 1993. I and
3 two others attended this meeting with Nancy and
4 staff members, Tom Darr, Director of
5 Administration and Communications and Timothy
6 McVay, staff attorney.

7 When we complained of the widespread
8 violations of the Pennsylvania Rules of Court and
9 Rules of Judicial Administration, Nancy
17 10 Sobolevitch's response was, The rules are not
11 black and white. It's the way of interpreting
12 them.

13 We disagreed with her that the Rules
14 of Court could be interpreted when they are very
15 plain in their intent. One specific area we
16 discussed was Judicial Rules of Administration
17 with regard to Supreme Court rules governing
18 court reporting and transcripts.

19 Transcripts in Armstrong County were
20 typed by attorneys' secretaries who were not
21 present at the hearings and were not qualified
22 court reporters in violation of both state rules
23 and their own local rules, which I do have an
24 exhibit. You can see that they had a local rule
25 that they were supposed to have a court

7 1 stenographer.

2 They used small home tape recorders
3 to record these hearings, and it could be run by
4 master who heard the case. Or I talked to one
5 person, and I said, Who ran the tape recorder?
6 And she said her husband's attorney ran the tape
7 recorder.

8 Then after the tapes were
9 transcribed by the secretaries, they erased them
10 and just totally destroyed them. And that was
11 within days after they were transcribed. So if
12 you ever wanted a copy of the original tape,
13 there was no way that you could get it.

14 In fact, it took me almost two years
15 to get a copy of my transcript. I couldn't get
16 it for almost two years, and I did have that in
17 my testimony in 1991. Because they were not
18 certified, they weren't legal verbatim
19 transcripts and they couldn't even be utilized in
20 a higher court.

21 At the time of the meeting with Ms.
22 Sobolevitch, she and her staff all agreed it was
23 not acceptable for the transcripts to be done
24 this way. And I am also aware of people in other
25 counties with serious complaints about their

7

1 transcripts.

2 After this meeting, we sent a letter
3 to Nancy Sobolevitch on September 20. And I do
4 have that letter with the exhibits. We wanted to
5 know the progress of the issues we discussed.
6 And in view of the documented cases in Armstrong
7 County of the violations regarding court
8 transcripts, we indicated she had an obligation
9 to investigate how many hearings in Armstrong
10 County were conducted in this manner.

11 She responded, and I have a copy of
12 her response, her letter of September 28 as an
13 exhibit.

14 In that letter, she stated the
15 administrative staff is not sufficiently staffed
16 to engage in any in-depth review, even if such a
17 review seemed appropriate, that the judicial
18 conduct board and the disciplinary board are
19 empowered to consider complaints and the
20 appellate process is also available when actions
21 by the lower court are not consistent with the
22 law or proper procedures.

23 Her reply contradicted the
24 information given to us by a Pennsylvania Supreme
25 Court justice, who met with us on February 27,

1 1991, for the purpose of addressing our
2 complaints of numerous violations of the
3 Pennsylvania Rules of Court under the unified
4 judicial system.

5 The justice told us at this meeting
6 that if it was a vexatious and pervasive problem
7 and applied in more than one case, it should be
8 referred to the state court administrator's
9 office to go out and investigate, that Nancy
10 Sobolevitch was under him.

11 Is Nancy Sobolevitch not there to
12 respond to these formal complaints then? If that
13 is not one of her functions, why isn't it?

14 Ms. Sobolevitch did refer our
15 complaints to the Pennsylvania Conference of
16 State Trial Judges. And on January 10, 1994, we
17 met with one of the trial judges of western
18 Pennsylvania. He was to take this matter up at a
19 meeting that was scheduled for February 1994; but
20 we haven't been informed of what, if anything,
21 has been done by the trial judges to address our
22 complaints.

23 Recently I urgently sought the help
24 of my representative, Timothy Pesci, as I had an
25 upcoming hearing on August 15, 1994, and would be

7

1 severely hindered in proceeding, especially as a
2 pro se litigant, due to the many court violations
3 from the onset of my case.

4 Representative Pesci's office called
5 Nancy Sobolevitch, who told them it was necessary
6 for me to write a letter to the president judge
7 listing all of the violations in order for their
8 office to act on it. I complied with her request
9 by writing a letter to the president judge on
10 August 10, 1994, and this letter is enclosed as
11 an exhibit also.

12 I also made a request in this letter
13 for a copy of the tapes used to record the
14 December 1985 master's hearing. The president
15 judge's secretary informed me that they couldn't
16 give me a copy of the tapes that I requested as
17 they were erased after the secretaries typed the
18 transcript.

19 The master who presided at the
20 hearing also verified this when he testified at a
21 hearing on November 9, 1994.

22 This master's hearing was in
23 violation of both Supreme Court Rules of Judicial
24 Administration and Armstrong County local rules.
25 I have to accept these violations are not unique

8

1 to Armstrong County, and it is one sad commentary
2 for our judicial system. And I might add that if
3 my case was done this way, from what I
4 understand, they were all done this way.

5 She said on all the cases where they
6 had a master's hearing, they used the tape
7 recorder. The person wasn't there who
8 transcribed it. It was the secretaries of the
9 attorney, and they just simply destroyed the
10 tapes.

11 CHAIRMAN DERMODY: If you go to a
12 master's hearing in Armstrong County, there is
13 not a court reporter like there is here today?

14 MS. JOHNSTON: No.

15 CHAIRMAN DERMODY: And there is a
16 tape recording of the proceeding?

17 MS. JOHNSTON: That's right.

18 CHAIRMAN DERMODY: Does the master
19 run the tape recorder?

20 MS. JOHNSTON: The master runs it or
21 one of the attorneys.

22 CHAIRMAN DERMODY: Does the master
23 do it, or does one of the attorneys?

24 MS. JOHNSTON: Well, in my case, the
25 master did it. I might add that when he did it,

8 1 I had only a half day's oral notice to go to that
 2 hearing. I never got written notice, and I went
 3 to try to protect my property rights. So I
 4 wasn't aware of how the hearing was going to be
 5 held.

 6 I did have an attorney at the time,
 7 I might add. At the hearing, he did not have the
 8 tape recorder on. He gave instructions before he
 9 put it on. So it's really not verbatim; and when
 10 you don't have a copy of the transcript for
 11 almost two years, how do you remember?

 12 CHAIRMAN DERMODY: That's another
 13 issue. Did he give some preliminary instructions
 14 prior to putting the tape on?

 15 MS. JOHNSTON: The preliminary
 16 instructions were what valuation dates that he
 17 would only accept, which misrepresented the
 18 assets at the hearing.

 19 CHAIRMAN DERMODY: The master took
 20 the tape recording. After the hearing, he had it
 21 transcribed?

 22 MS. JOHNSTON: Yes.

 23 CHAIRMAN DERMODY: Who transcribed
 24 it?

 25 MS. JOHNSTON: There was no name on

1 the transcript. It was not certified.

2 CHAIRMAN DERMODY: So somebody from
3 his office?

4 MS. JOHNSTON: I would assume it was
5 his secretary, but she wasn't there. And I would
6 say she would not be qualified as a court
7 reporter if she didn't know how to type a
8 transcript.

9 CHAIRMAN DERMODY: That's another
10 issue.

11 MS. JOHNSTON: I would like to give
12 you this transcript. That's my transcript. It
13 doesn't even have 25 lines, which is a national
14 standard. And it was kind of funny because if
15 you would appeal it and you would refer to a line
16 on appeal, I just can't see a judge counting down
17 with his finger what line you are on.

18 CHAIRMAN DERMODY: Is this copy for
19 us, or do you need this back?

20 MS. JOHNSTON: You can keep that
21 part of it. I have more. Those are just certain
22 pages of it.

23 CHAIRMAN DERMODY: Go ahead.

24 MS. JOHNSTON: But I do understand
25 that there is another county where they maybe use

1 a multi-track recording device, but there's no
2 court stenographer. I believe it is Westmoreland
3 County.

4 And I don't know. They might use
5 the proper format; but according to the Rules of
6 Judicial Administration on court reporting, it
7 seems to me that there should be a court reporter
8 there.

9 CHAIRMAN DERMODY: Are master's
10 hearings of record?

11 MS. JOHNSTON: This was the basis
12 for my equitable distribution. It would be like
13 any other hearing, I would think.

14 After this took place with writing
15 the letter to Judge Nickleach, Marni Sommer, who
16 is assistant to Nancy Sobolevitch, sent me a
17 letter on September 20, and I have enclosed that
18 as an exhibit, and asked me to keep her informed
19 of the results of my August 15, 1994, hearing and
20 also my request for copies of tapes.

21 I sent her a letter on October 31,
22 1994, and I have included that as an exhibit, and
23 gave her the information she requested and again
24 asked for a reply as to what action their office
25 would take.

8

1 Nancy Sobolevitch sent a
2 three-sentence reply stating, "I regret to inform
3 you that there is no further action I can take in
4 regards to your specific case." And she wished
5 me luck at my hearing that was coming up. And I
6 have her letter enclosed as an exhibit. November
7 4, 1994, is the date of her letter.

8 I am unaware of any action that
9 Nancy Sobolevitch's office has taken in my case
10 or anyone else's case where there have been
11 legitimate complaints to her office. Why did her
12 office mislead me into thinking their office
13 would act on this matter if I sent the president
14 judge a letter and then do nothing?

15 This is a perfect example of the
16 runaround not only I but others have gotten and
17 how we are caused additional expense and time
18 with nothing resolved.

19 I would ask that this committee
20 answer the question many of us have tried to get
21 an answer to: Who is responsible for enforcing
22 the rules and the laws when they are blatantly
23 violated?

24 Litigants no longer will accept that
25 it is their responsibility to go through the

8 1 appeals process when the rules and the law are
19 2 violated by the courts. The courts' failure to
3 follow the rules and proper procedures violates a
4 person's basic due process and constitutional
5 rights.

6 Why should the litigant be burdened at
7 great financial expense, time, and the
8 destruction of their lives and their families
9 when the courts have committed the violations and
10 should be held accountable?

11 Even when they do go through the
12 appeals process, more rules are broken to hinder
13 them and many times their cases are never heard
14 at the higher level.

15 Everyone tries to dismiss the
16 problems by saying, They are just disgruntled
17 litigants. We are more than disgruntled. We are
18 knowledgeable, and we are fed up with the courts.
19 Not only are we being abused by the courts, we
20 have to pay them to abuse us.

21 I have not as yet responded to Nancy
22 Sobolevitch's letter in which she wished me the
23 best of luck at my hearing but would like her to
24 know that luck was not with me. In fact, I was
25 massacred. I believed cases were decided by

9 1 facts, not luck.

2 I was prevented from even presenting
3 the facts of my case. Everything I said was
4 irrelevant according to Judge Snyder. Most of
5 the time it was irrelevant even before I had a
6 chance to say it.

7 To inject some humor into this
8 serious situation, I would like to refer to a
9 hearing held August 15, 1994. At this hearing,
10 Judge Snyder told me they couldn't change civil
11 procedure simply to enable someone not trained in
12 the law to work outside the established rules of
13 procedure of law and evidence and they were not
14 going to depart from good established rules and
15 evidence. And I put the part of the transcript
16 where he said that.

17 But when I later cross-examined
18 Judge House about his failure to follow Court
19 Rule 1910.11 and asked if he was exempt from this
20 rule, his reply was that he did to say he was
21 exempt but that they did not follow it because he
22 felt it was something simply designed to be an
23 assistance to the court.

24 He testified conference reports were
25 not routinely prepared. They simply dispensed

9 1 with that. They did not have the personnel to
2 2 handle things with that amount of formality.

3 In other words, litigants must
4 4 strictly adhere to the established rules, but the
5 5 courts can do whatever they want. And when the
6 6 courts do not follow the established rules, the
7 7 litigant is shut out from being able to proceed
8 8 properly within the system.

9 We keep hearing that the system is
10 10 overloaded, that we need more judges. We don't
11 11 need more judges added to the system at
12 12 taxpayers' expense. What we need are judges who
13 13 adhere to the rules and law and see that lawyers
14 14 who practice before them are ethical to prevent
15 15 extended litigation and cases churning in the
16 16 courts.

17 I realize all of the problems that
18 18 have gone unchecked for years will not be solved
19 19 overnight; but on behalf of myself and others, I
20 20 am making an urgent appeal to the legislators to
21 21 act promptly to set up some type of a select
22 22 committee where people can get immediate relief
23 23 when there is gross abuse by the courts.

24 They should be able to get immediate
25 25 help before they are forced into expensive and

9

1 time-consuming appeals through no fault of their
2 own. The appeals process is of no help when you
3 are losing everything you have, and the damage
4 can never be undone. Thousands of families
5 across the state have already been destroyed by a
6 system that is not held accountable.

7 Too much power was given to the
8 Supreme Court in 1968 under Article V, Section 10
9 of the Pennsylvania Constitution. And this
10 article should be repelled so our three branches
11 of government can work as intended.

12 I do have a letter from -- it's a
13 member of your judiciary committee where one
14 person said, The law would work better if there
15 could be discovery. And he said, Well, there's a
16 Supreme Court rule, and we have to check with the
17 rules committee to see if we can do that.

18 Well, the rules committee said,
19 Well, we have no intention of changing that. So
20 the representative wrote a letter back saying, We
21 cannot enact legislation because there's a
22 Supreme Court rule. And it's just what I was
23 hearing earlier. You should be able to enact
24 legislation.

25 When I first went to, I believe it

9 1 was Representative Livengood, when I had
2 problems, he said to me, I can't get involved in
3 your case legally, but we could change the law if
4 it's not working. Well, I find out now that
5 isn't true because if the Supreme Court has a
6 rule, it could prevent your legislator from
7 trying to enact legislation.

8 In the meantime, local rules should
9 be abolished. Local rules are not submitted for
10 public comment and in many instances conflict
11 with state rules.

12 For example, Westmoreland County
13 voided a state rule and replaced it with their
14 own local rule, and I do believe that state rule
20 15 supersedes any local rule. I don't think they
16 can just void a state rule and decide to put in
17 their own local rule.

18 Armstrong County had a local rule
19 that required all divorce litigants to pay the
20 Armstrong County Local Bar \$20 for their divorce.
21 I have to question if this is even legal.

22 I am sure this committee has heard
23 many complaints regarding the use of masters to
24 act as judges in divorce. As one attorney
25 testified at the 1991 hearings, divorce litigants

0 1 are treated like second-class citizens. They
2 have to pay for justice when no one else does.
3 This discrimination against one segment of
4 litigants should be considered unconstitutional
5 and dealt with immediately.

6 My testimony touches only the
7 surface. Instead of just consulting with each
8 other, I would hope this committee would start
9 consulting with the victims of the court who have
10 in the past been ignored. They all have valuable
11 input.

12 On September 27, 1994, over 200
13 people from all parts of this state went to
14 Harrisburg and held a press conference and rally
15 for judicial reform. This problem will not go
16 away. A Pandora's box has been opened, and it
17 can no longer be business as usual.

18 I hope this committee will have
19 heard testimony that I have given with sincerity.
20 I feel I am not ever going to reap much benefit
21 as the court system has already taken away nine
22 years of my life and caused me irreparable harm,
23 both personally and financially.

24 I hope the next generation will
25 benefit if what I say is taken completely serious

0 1 by this committee and needed corrections are made
2 not to please judges but rather to protect and do
3 what is right for the citizens of the
4 Commonwealth so there is justice for all with
5 fair play to restore public confidence in our
6 courts.

7 If you have any questions, I will be
8 glad to answer them.

9 MR. BRAIN: I have been an attorney
10 for 40 years. My name is Brain. I am the brain
11 of the bar, C.D. Brain if you need legal advice;
12 but I can't go to court anymore because they've
13 got an administrative agency that won't let me
14 practice unless I study ethics for them. I've
15 studied ethics at Duquesne University for over a
16 year, and I can teach your ethics teachers.

17 I'm going to tell you something.
18 She is absolutely right, 100 percent right. I've
19 been studying rightly what's going on in our
20 courts. Federal court, 50 cases against the
21 University of Pittsburgh, not one of them reached
22 a jury, not one of them. That is American
23 justice today. What we need is another
24 revolution.

25 MS. JOHNSTON: That is what it is

0 1 coming to.

2 CHAIRMAN DERMODY: I have known Mary
3 Sue for a lot of years, and she has done a good
4 job presenting her case.

5 I think several of you have been in
6 contact with my office, and we have been in touch
7 since these hearings in 1991. And a lot of those
8 problems that you mentioned in 1991 are still
9 there. I can't guarantee that we are going to be
10 able to solve all of these problems or address
11 them.

12 MR. BRAIN: Not without a
13 revolution.

14 CHAIRMAN DERMODY: Well, that may
15 be.

16 We hear many people today talking
17 about Article V and what we can do if that should
18 be changed, whether or not there should be a
19 constitutional amendment to change some of the
20 administrative responsibilities of the Supreme
21 Court.

22 I think for the first time people
23 are taking a very serious look at that. You have
24 heard from people who have great experience in
25 judicial administration who feel that that should

0 1 take place and that would solve or at least start
2 2 to alleviate some of the problems that Mary Sue
3 3 Johnston has had.

4 I can tell you that we take your
5 5 testimony very seriously.

6 MS. JOHNSTON: May I ask you a
7 7 question?

8 CHAIRMAN DERMODY: Sure.

9 MS. JOHNSTON: What is the role of
10 10 Nancy Sobolevitch as court administrator if it is
11 11 not to see that the rules are followed?

12 It's my understanding that the
13 13 Supreme Court makes the rules. They should see
14 14 that they are followed, and this is what has
15 15 caused everybody the most problems.

16 CHAIRMAN DERMODY: Nancy's role as
17 17 the court administrator is she is a layperson.
18 18 She has administrative responsibilities of
19 19 overseeing that the offices are run correctly,
20 20 that they have the facilities, and that they have
21 21 the materials they need to operate. Ms.
22 22 Sobolevitch's responsibilities do not include
23 23 enforcing the Supreme Court Rules of Court.

24 Now, I mean when they suggested to
25 25 you that you go to the new court of judicial

0 1 discipline with those types of things, the only
2 people who can enforce the rules are the judges.

3 MS. KRAMER: I would like to really
4 focus in on the real critical thing that she
5 said. We don't need more judges or more court
6 personnel because all they do is make a bigger
7 bureaucracy, a bigger octopus to ensnare
8 everybody in.

9 We need to do with what we have and
10 make sure that those are enforced. We don't need
11 any more tricky law. We need to get back to
12 basics. This is the time to get back to basics.

13 MS. JOHNSTON: We need
14 accountability.

15 MR. BRAIN: One thing I could
16 suggest is get a group of lawyers to file a class
17 action suit against the administrative board and
18 find out what they have done with all of the
19 money that the attorneys have paid into that
20 organization since it first started.

21 I would like to see that happen.
22 What are they doing with our money?

23 CHAIRMAN DERMODY: That's the client
24 security fund.

25 MR. BRAIN: That's right.

1 CHAIRMAN DERMODY: I think there is
2 probably a public accounting of that.

3 MR. BRAIN: They don't use it. They
4 cheat us out of it. They get higher salaries.
5 That's all.

6 MS. KRAMER: Did I hear her say that
7 the divorced people in Armstrong County have to
8 pay the bar 20 bucks?

9 MS. JOHNSTON: That's correct.
10 They discontinued it as soon as I
11 complained about it and started to look into it,
12 which was just within the last year or so.

13 They had that rule effective, I
14 believe it was '80 or '81. And every divorce
15 litigant was required to pay the Armstrong County
16 Local Bar \$20 when they got a divorce. I don't
17 even think that's legal.

18 CHAIRMAN DERMODY: What was the
19 purpose?

20 MS. JOHNSTON: They just made a
21 local rule. This is the problem. Local rules
22 are not -- I checked. They are not put out for
23 public comment. They can make whatever rule they
24 want.

25 In fact, I was in another county in

1 1 litigation. The attorney was supposed to send me
2 2 a copy of the local rule. He never did. So what
3 3 was the purpose of the local rule? They don't
4 4 follow their own local rules.

5 The whole purpose of the rules is to
6 6 follow them. As Nancy Sobolevitch said, They are
7 7 not black and white. It's the way of
8 8 interpreting them. They are plain in their
9 9 intent.

10 CHAIRMAN DERMODY: Any rule the
11 11 judge has to interpret based on the facts that
12 12 are presented to him or her.

13 MS. JOHNSTON: If you have judicial
14 14 rules of administration that say they are
15 15 supposed to keep the tapes for safekeeping, that
16 16 doesn't mean to destroy them.

17 And when you need a copy of your
18 18 transcript, every litigant should be entitled to
19 19 get a copy of their transcript. You should not
20 20 have to beg for it for two years.

21 In fact, in the testimony that I had
22 22 given you an exhibit of, if you will read it,
23 23 Judge House admitted because he had told the
24 24 prothonotary's office that I couldn't have a
25 25 copy, that I would have to go to my attorney.

.1 1 I went to my attorney. He wouldn't
2 give me a copy of the transcript; and it was his
3 associate that said -- I had gone first to
4 Representative Steighner's office. And I said, I
5 can't get a copy of my transcript. He said,
6 Absolutely, you are entitled to it.

7 So I went back to my attorney's
8 office; and his associate said, Well, it's not
9 wise for you to have a copy now. And I said,
10 Well, Representative Steighner says I am entitled
11 to it. And he said, Well, Representative
12 Steighner is not an attorney, and we govern
13 ourselves.

14 So where do you go? I mean it just
15 an obstruction of justice to have to go through
16 all of this. How can you act within the required
17 time whatever you do when you are hindered by
18 everybody within the court system? Even on your
19 appeal, you can't appeal things properly.

20 My time is probably --

21 CHAIRMAN DERMODY: No. We have some
22 extra time.

23 MS. JOHNSTON: Good.

24 CHAIRMAN DERMODY: I think the next
25 witnesses are here, but I will take a few

1 1 questions. We are going to have to move on
2 2 pretty soon, though.

3 MS. SMITH: My name is Dr. Smith. I
4 4 only heard the last part of your presentation,
5 5 but I can't agree more wholeheartedly with you
6 6 for many reasons.

7 My own experiences without an
8 8 attorney in the courtroom have shown me that the
9 9 judicial system is extremely biased against
10 10 people who try to exercise their constitutional
11 11 rights. That should not be. Are we not living
12 12 in a country of laws and order and justice?

13 The second comment I would like to
14 14 make is that I would like to ask you to expand
15 15 your hearing so that more people like me can
16 16 testify before you and show you that this is not
17 17 just the tip of the iceberg -- I mean that this
18 18 is just the tip of the iceberg.

19 CHAIRMAN DERMODY: As I said
20 20 earlier, we have an agenda. We try to make it a
21 21 diverse one and get points of view from all
22 22 areas.

23 MS. SMITH: But we didn't know about
24 24 your hearing, and there are so many more people
25 25 who would be here to help you revamp what you are

1 1 doing.

2 CHAIRMAN DERMODY: Let me say this
3 to you. Before November 30, this subcommittee
4 will only be able to have one more hearing.
5 After November 30, a new legislature takes office
6 in January.

7 I think I mentioned earlier -- I
8 don't know if you were here -- that you should
9 contact John Perzel in Harrisburg and Dan Clark,
10 who was the minority chairman of this
11 subcommittee who will likely be the majority
12 chairman when we reorganize in January, so that
13 these hearings can be continued.

14 Look, I don't know if we are going
15 to answer all of your problems. We plan on
16 issuing a report. We plan on drafting
17 legislation and recommendations to the Supreme
18 Court and legislation for the whole legislature
19 to consider as a result of the information we
20 have been able to gather through the course of
21 the hearings.

22 I don't think we have heard enough
23 yet. We have been to Philadelphia, Harrisburg,
24 and Pittsburgh. We are going to go to
25 Wilkes-Barre. We would like to go to Erie. We

1 would like to go to Johnstown. But that will
2 only happen if Representative Perzel and
3 Representative Clark approve additional hearings.

4 MS. SMITH: There is one other
5 aspect, if I may comment and then I will
6 relinquish my time to someone else.

7 Whenever the judicial and the legal
8 profession have made gross errors either
9 intentional or politically or otherwise and a
10 person makes a complaint about it, there seems to
11 be a reluctance to chastise, at the very least,
12 those people who have made the error.

13 There needs to be, I believe, an
14 advisory committee that is involved from a
15 layperson's standpoint to be involved with the
16 legal profession and the judicial profession, who
17 are assessing their own people, who are assessing
18 their own people and the mistakes that they are
19 making. And they are making gross mistakes.

20 All of us can read the laws that
21 have been set down by the legislature, and all of
22 us can interpret them in accordance to what we
23 read and present them, if we are allowed to
24 present them, in the court system. But so often
25 we are thwarted because if you are not

2 1 represented by an attorney, then you are
2 considered an outcast.

3 CHAIRMAN DERMODY: Let me say this:
4 If there are problems, if you feel you have been
5 wronged or a judge has misbehaved or a lawyer has
6 misbehaved, there are --

7 MS. KRAMER: They don't work.

8 CHAIRMAN DERMODY: They have
9 revamped. The board of judicial discipline has
10 lay people on it. It has judges and it has
11 lawyers on it.

12 MS. JOHNSTON: May I ask a question?

13 MS. SMITH: But it doesn't --

14 CHAIRMAN DERMODY: Now, look, the
15 board of judicial discipline just started. It
16 just went into business, and I think you have to
17 give it a little bit of time before you can say
18 it's no good.

19 It's an expanded board. It's a much
20 more public process and procedure than the last
21 one. It includes lay people. I think you ought
22 to give it a chance before we throw it out. You
23 have to do that. You have to see if it works,
24 and then we will make a decision whether it
25 should be revamped

2

1 MS. KRAMER: The selective
2 persecution and prosecution by the disciplinary
3 board are only against the attorneys that have
4 gone against the power structure. That is what
5 we are up against here in this firm.

6 Anybody who takes a case against the
7 University of Pittsburgh is persecuted by the
8 disciplinary board, and the charges don't stick
9 again and again. And when they see that you are
10 ready to win a case, the next day they bring
11 another case. I have seen two instances of that.

12 Now, what do we do? And then they
13 say, Well, we don't have the manpower to
14 prosecute legitimate cases where attorneys do
15 outrageous things. They don't have the time to
16 do that, but they have the time to persecute
17 these other people who have gone against the
18 power structure.

19 MR. BRAIN: Well, they are not legal
20 eagles. They are legal buzzards.

21 MS. JOHNSTON: May I bring a point
22 up about the new judicial conduct board?

23 You will see on the letter that I
24 have enclosed as an exhibit to Judge Nickleach
25 that I sent a copy of that letter to the new

1 judicial conduct board showing all of the
2 violations.

3 The response was the same, that
4 failure to follow procedures is a legal error
5 that you would have to take -- it is not cause
6 for disciplinary action. So they operate on the
7 same principle as the judicial inquiry and review
8 board.

9 I recently talked to somebody who is
10 an investigator for that board, and he said they
11 have a list of what constitutes legal error.
12 Now, who decides what a legal error is? Does it
13 go to the full board? Or does one person first
14 decide this a legal error, it is not even going
15 to go to the board that has lay people on it?

16 And if the lay people on the
17 judicial conduct board -- and I know there is a
18 nun on the board -- are they going to say to her,
19 Well, oh, no, this is just a legal error, and she
20 has to appeal it? Could she say, Well, I'm not
21 an attorney so you are probably right?

22 CHAIRMAN DERMODY: I think that the
23 reason they put lay people on there is to get the
24 input, not to defer to the attorneys but to get a
25 different perspective. I don't think they are

2 1 just going to go along with what an attorney or a
2 judge says.

3 I don't know who is making all of
4 those final decisions, but I think that there is
5 probably one of the very first cases that was
6 presented to that board and we ought to see how
7 they react.

8 MS. JOHNSTON: I think I have had
9 several other people tell me that they did the
10 same thing to the new judicial conduct board. It
11 is like a set reply: Failure to follow proper
12 procedures is a legal error.

13 CHAIRMAN DERMODY: Well, you know
14 the procedure is -- as you well know, Mary Sue,
15 because you have been through this system long
16 enough -- that if you get a lower court ruling
17 that you take issue with, you have to appeal it.

18 Now, the board can't prevent you
19 from getting a decision that you don't like.

20 Now, not everybody -- I mean when
21 you are involved the adversary system -- as many
22 of you have said, we should get rid of the
23 adversary system just for the family division and
24 divorce problems. However, right now that is
25 what we have. There is going to be one side that

2 1 wins and one side that loses. When you lose, you
2 don't feel really good about it.

3 We have to move on.

4 MS. McCHESNEY: Joyce McChesney,
5 Warren County. I took a case to appeals, and
6 thank God I overturned a \$70,000 punitive damage
7 award. I didn't have \$70,000.

3 8 I realized after it went to appeals
9 court that some of the exhibits has been tampered
10 with, and so I requested at the prothonotary's
11 office that I be allowed to see those exhibits
12 when they were returned. I waited a long time.
13 I went in several times, and they told me they
14 hadn't been returned.

15 I called a higher court and learned
16 that they had been returned eight months earlier.
17 So I went in and I said, I know they are here.
18 So they said, Well, they are at the warehouse.
19 If you want to see them, you have to get a lawyer
20 to see my exhibits after they were returned.

21 So I did get a lawyer at some great
22 expense, and they are gone, disappeared. They
23 are nowhere. So I called the Attorney General's
24 office. They said they would look into it, but I
25 never heard anything about it.

3

1 So that's what we are up against,
2 today, a stone wall everywhere we go. These
3 judges take an oath of office, and I really think
4 that it is up to the State to enforce
5 constitutional conformity.

6 CHAIRMAN DERMODY: How long ago did
7 you make a complaint to the Attorney General's
8 office.

9 MS. McCHESNEY: It's in there. It
10 was 1991 I think I finally gave up because it was
11 obvious they weren't going to do anything. They
12 didn't even return my phone calls.

13 We have a judge who has a fondness
14 for the bottle, and I think anybody who has been
15 around him very much have seen him falling down
16 drunk. So he is often hung over.

17 The state police, when he gets
18 drunk, the state police come and get him and take
19 him home. Everybody knows this. This is very
20 demoralizing for our county. He is now a senior
21 judge, but I don't feel that he should be a judge
22 at all.

23 The majority of the bar association
24 before his last retention, they voted, and they
25 found that he was incompetent. They felt he

3 1 should not be retained, but he was retained. And
 2 he's our only judge.

3 CHAIRMAN DERMODY: I was going to
4 say you don't have many judges in Warren County.

5 MS. MITCHELL: I'm a perfect example
6 here and my daughter of just how very outrageous
7 the judicial system has become, how very out of
8 control they have become.

9 I'm just going to summarize it.
10 I've sent in my information. I know you don't
11 have a lot of time.

12 I will begin by saying my daughter
13 is 19 years old now; but when she was 14, she had
14 a medical condition. It was misdiagnosed. We
15 ended up with trouble with the school district.
16 She wasn't being treated right. She was missing
17 school. I didn't know what was wrong.

18 I had to hold a job, working, a sick
19 kid; and if you are parents and have a sick kid,
20 you know how bad that can be when you are trying
21 to hold a job.

22 We ended up in juvenile court
23 because the school district filed truancy charges
24 against my daughter. I am running around from a
25 general practitioner to an allergist, finally to

3 1 a specialist, and my daughter is taken away from
2 me.

3 I am told at this hearing, the
4 attorney says, They are not going to take her.
5 You show them this diagram from the specialist,
6 the chronic sinus condition she had. I put it
7 up. You could have drawn that. It looks like a
8 computer drawing to me. She has an imaginary
9 condition. She doesn't have asthma. You're the
10 problem.

11 She is my only child, and I love
12 her. They took her immediately and placed her in
13 a group home. Two weeks later the director from
14 the group home comes with my daughter, who is
15 crying, to the specialist's office and follows us
16 in to verify the fact that, yes, I was telling
17 the truth. My kid needed surgery, \$10,000 worth,
18 because that was causing her asthma.

19 So she goes back to the group home.
20 I make arrangements for her surgery. They were
21 generous enough to allow her stay with me for two
22 weeks while she recovered from her surgery. Of
23 course, they didn't want to be responsible for
24 anything that happened.

25 Meanwhile, the judge had had his own

3 1 medical problems. He finally came back to the
2 bench and realized that, yes, she did have a
3 medical condition and Mom wasn't the cause of it.
4 So instead of a six-month hearing, she got her
5 four-month hearing, which was an early review
6 hearing.

7 She was allowed to come back home
8 with me; and if she was sick, she had to have a
9 medical note. Fine. Okay. She goes back to the
10 school. She wanted to go back to the same school
11 because her friends were there.

12 She goes back there. They started
13 harassing her. I have a letter from a lawyer
14 stating all of this about the harassment she
15 received from teachers, a principal, a social
16 worker.

17 A social worker followed us to the
18 allergist's office. He says, with a little smirk
19 on his face, Maybe I will follow you into the
20 doctor's room.

21 He pulled my daughter out of her
22 classroom, as this letter states from the
23 attorney. Do you know how that feels when you
24 are teenager, when you have been pulled in -- the
25 trauma of surgery, the trauma of being pulled out

4 1 because the judge says, Marla, is a bright girl
2 2 here. Her grades are terrible. What is wrong?
3 3 It must be Mom. So she can't come home on
4 4 weekends. She can't come home on holidays.

5 Marla is 16 by then. I celebrated
6 6 her 16th birthday with her. It was supervised,
7 7 one-hour visits, which went on for two months
8 8 until the court psychiatrist finally examined
9 9 Marla and said, I don't know why she's not
10 10 getting good grades.

11 How do you study? I had a hard time
12 12 holding my job, which I have had for ten years.
13 13 I am a technical librarian. I am a stable
14 14 person. I work for a very reputable company.
15 15 How do you expect a teenager to study and to do
16 16 well under those situations?

17 She ran away. I ended up in a psych
18 18 ward for three weeks. I have never had any more
19 19 psychological problems than the normal person. I
20 20 was out of work for three months.

21 A social worker comes by. And he
22 22 says, Well, if your daughter is found, she is
23 23 going to be put in a detention center for 30 days
24 24 and then she will be put on a wagon train.

25 Of course, this didn't help me any.

4 1 I thought, oh, my God, what's going to -- you
2 know, that kid, out of all of this, I know what
3 great strength she has. She was put in an awful
4 environment. She had a friend who helped her
5 that she stayed with.

6 She was released from the court
7 system on May 23, 1993, one month before her 18th
8 birthday. And she is with me. She is finishing
9 her high school through home study courses
10 because there is no way she could go back.

11 The school she was sent to, at least
12 if they had really been concerned about her
13 education and provided her with the best, with
14 what she needed -- gifted students are very
15 neglected in the public school systems. And I
16 would have found that out if they had given us a
17 little bit of time to get through the medical
18 stuff.

19 I was told this went from a truancy
20 issue to grades. How can -- this judge says to
21 me and my daughter, if she wants to come home, if
22 she really wants to come home, Marla has to
23 improve her grades. She can come home one
24 weekend -- I have it all on paper. I'm not
25 making it up -- one weekend a month. If she

4 1 wants to come home, she's got to improve her
2 grades.

3 He didn't even have her in the right
4 educational program. If he was that dammed
5 concerned about her, he would have found -- he
6 never talked to either one of us.

7 CHAIRMAN DERMODY: Can you tell us
8 us your name and what county you are from?

9 MS. MITCHELL: My name is Rose Marie
10 Mitchell. I am from Erie County.

11 CHAIRMAN DERMODY: We have your
12 testimony. You already submitted it. Right?

13 MS. MITCHELL: I submitted it. And
14 you know, the kid is just getting on her feet
15 now. Tell me, who is going to help her now? Who
16 is going to get her that career? She is a very
17 bright person. I never held my daughter back. I
18 don't have a sick love for my daughter.

19 I love her very much. As anyone who
20 is a parent does, I want the best for her and I
21 always did. There was no reason to do this.
22 I'll have the scars forever. She's very bright
23 and very strong, but what kind of -- what kind of
24 an impression does this give to a young person?

25 CHAIRMAN DERMODY: Thank you. We

4 1 are going to take five minutes. We have some
2 other witnesses. We appreciate your coming, and
3 we will take a five-minute recess.

4 MS. SMITH: Are you accepting
5 written testimony?

6 CHAIRMAN DERMODY: Yes, we will
7 accept written testimony for the record.

8 MS. SMITH: Later I mean.

9 CHAIRMAN DERMODY: Yes, you can mail
10 it. Mr. Fulton here will give you a card, and
11 you can submit it.

12 We will take five minutes.

13 (Brief recess from the record.)

14 CHAIRMAN DERMODY: We will call the
15 hearing back to order, please.

16 Our final witness today, last but
17 not least, is Judge Jeffrey Manning of the
18 Allegheny County Court of Common Pleas.

19 HONORABLE MANNING: Thank you,
20 Representative Chairman Dermody.

21 I am at somewhat of a loss here.
22 Let me explain, first of all, that Eric Springer,
23 the president of the Allegheny County Bar
24 Association designated Samuel J. Rich, Esquire,
25 who is the president-elect of our association,

5 1 of the numerous issues raised for the reform of
2 the judiciary that fall under the headings of
3 financial accountability and judicial selection.

4 At the outset, I believe the
5 committee should be aware that the Board of
6 Governors of the Allegheny County Bar Association
7 approved a resolution several years ago endorsing
8 the report of the governor's judicial reform
9 commission or what is commonly referred to as the
10 Beck Report.

11 Both the Allegheny County Bar
12 Association and the Pennsylvania Conference of
13 State Trial Judges, although I do not speak for
14 them here today, endorsed the proposal that the
15 expenses of Pennsylvania's unified judicial
16 system be borne by the Commonwealth.

17 While I recognize that any proposal
18 that would require additional funding would
19 likely be unpopular in the legislature, our
20 unified judicial system presently exists in a
21 state of dependency upon local government and is
22 mired in the competition for scarce resources.

23 The committee only has to look at
24 the lawsuit filed by the commissioners of this
25 very county to recognize the potential for

5

1 political tension and divisiveness between trial
2 courts and local governments on which they depend
3 for their funding.

4 I recognize, as I said, that this
5 position may be significantly unpopular in the
6 House of Representatives, but it is of primordial
7 importance in maintaining the independence of the
8 third branch of state government.

9 I also must add to that plea that
10 this committee and the House of Representatives
11 reconsider the funding of the statewide
12 automation project of the administrative office
13 of Pennsylvania courts, which was terminated this
14 year.

15 I served for over two and a half
16 years on this project to modernize our state
17 trial courts with the computerization of court
18 documents and functions as has already been done
19 at the minor judiciary level.

20 I cannot tell you how important this
21 is to what judges do other than to show you
22 these. These are 3 of the 57 rubber stamps used
23 by my minute clerk to affix orders of court on
24 the backs of information charging offenses in our
25 criminal division. Where the stamps are

5 1 incomplete and, of course, where they have blank
2 spaces in them, the orders are handwritten.

3 If Abraham Lincoln were to return to
4 Gettysburg today, not to eulogize but to try a
5 case, he would walk into a courthouse where, with
6 the exception of electric light, everything is
7 done exactly as it was done in 1863. Before we
8 slip into the 21st Century, we drastically need
9 to bring our court system into the 20th.

10 I believe I represent a clear
11 majority of the members of the bar association
12 when I urge you, as the Beck Commission did, to
13 adopt a plan for the funding of our statewide
14 judicial system.

15 The second issue that I wish to
16 address -- and this is the issue at which Mr.
17 Rich and I were going to differ and demonstrate
18 differing opinions -- is that of judicial
19 selection.

20 I can report to the committee, as
21 Mr. Rich would have, that the hierarchy of the
22 Allegheny County Bar Association has endorsed the
23 concept of what is referred to as merit selection
24 or appointment of appellate court judges and
25 justices.

5

1 Having served on the judiciary
2 committee of the Allegheny County Bar Association
3 from 1981 through 1983 and on the board of
4 governors from 1984 through 1987 and again from
5 1992 to the present, I must frankly inform you
6 that at all times, a majority of the lawyers
7 elected to those bodies of the bar association
8 endorsed the concept of merit selection, not only
9 for appellate courts but for the entire
10 judiciary, including the Court of Common Pleas.

11 Despite that continuous support for
12 an appointive rather than elective judiciary,
13 however, the board of judges has rejected
14 proposed resolutions calling for support of
15 recent drafts of merit selection bills. The sole
16 reason for that rejection, I believe, was the
17 fact that the proposed legislation called for the
18 creation of a selection panel that did not
19 consist of a clear majority of members of the
20 bar.

21 A recent resolution for support of a
22 proposed Senate bill was rejected by the
23 Allegheny County Bar Association Board of
24 Governors because it called for the creation of a
25 panel of 11 members only 5 of whom were required

5 1 to be admitted to the practice of law.

2 While I do not wish these comments
3 to sound elitist, it has been my personal
4 experience having appeared before a good half
5 dozen of these selection committees and from
6 conversations with other lawyers and committee
7 members that nonlawyers contribute very little to
8 the selection process due to a lack of knowledge
9 or understanding of judicial procedure and what a
10 judge's role is or should be.

6 11 This is not to say that nonlawyers
12 cannot be knowledgeable of the judicial process
13 and competent to participate in the selection of
14 judges; but any selection committee, we believe,
15 should be heavily weighted in favor of the legal
16 profession.

17 MS. KRAMER: Oh, no.

18 HONORABLE MANNING: I sat quietly
19 while you spoke. I only expect the same
20 courtesy.

21 As an example, the federal court
22 nominating commission set up by our Pennsylvania
23 senators to evaluate individuals for the United
24 States District Court have traditionally been
25 composed of two-thirds to three-quarters members

6 1 of the bar.

2 That aside, please permit me to move
3 on to what I suggest is the minority view of the
4 members of the Allegheny County Bar Association
5 on judicial selection. I say probably the
6 minority view because we have never conducted a
7 poll of the membership to determine whether they
8 favor appointment or election of judges.

9 I would suspect that perhaps the
10 majority favors the appointment of judges if for
11 no other reason than it would free them of the
12 perceived requirement and necessity of
13 contributing to judicial campaigns.

14 There are, however, many lawyers who
15 believe we should continue to elect our judges.
16 The downside of merit selection, they argue, is
17 that it is simply not merit selection. What it
18 is is selection by a few rather than selection by
19 the many and getting appointed often involves far
20 more pure politics than getting elected.

21 A lawyer friend of mine and member
22 of the bar association, who has been active in
23 politics, recently told me a story that goes
24 this: Three candidates were recommended by the
25 governor's merit selection committee for

6

1 appointment to a vacancy on the Supreme Court.

2 One was a prominent lawyer who was
3 past president of the state bar association. The
4 second was a prominent lawyer who for four terms
5 had been the District Attorney of the state's
6 largest city. The third was a renowned and
7 well-respected judge of the State's intermediate
8 appellate court.

9 So which one got the job, he asked.
10 The one who was the governor's brother-in-law was
11 the satirical answer.

12 Quite frankly, I was a, quote, merit
13 selection candidate. I was deemed qualified and
14 exceptionally qualified for the bench by the bar
15 association judiciary committee and made the list
16 of recommended candidates submitted by two
17 different nominating commissions to two governors
18 no fewer than five times.

19 I was never in the running. I was
20 never considered until I received largely the
21 strong support of a member of the Pennsylvania
22 Senate who championed my cause.

23 From that point on, I ran, of
24 course, as you know, and I was elected as a
25 nominee of both the Republican and the Democratic

6

1 Parties in the general election.

2 That is why I say the appointive
3 process involves more pure politics than elective
4 politics. I also suggest that so-called merit
5 selection yields no fewer scoundrels than
6 elections do.

7 Sol Wachter, who resigned from the
8 the State of New York's highest court after being
9 charged with extortion, was an appointed justice.
10 Alcee Hastings, impeached and convicted by the
11 United States Congress, only to be elected to
12 that very body from the state of Florida, was an
13 appointed federal judge.

14 Former governor and ultimately
15 federal prisoner, Otto Kerner, was appointed to
16 the United States Court of Appeals.

17 There is also something humbling and
18 maturing in requiring judicial candidates to
19 campaign. As someone once said, Oliver Wendell
20 Holmes couldn't get elected judge in Pennsylvania
21 unless he went out and met the people.

22 Election requires future judges to
23 travel the length and breadth of their
24 jurisdiction and to come in touch with the common
25 man, a learning experience that appointment does

6

1 not provide.

2 I also suggested some special
3 interest groups that are lobbying hard for a
4 merit selection process do so with a
5 self-serving, righteous attitude that they rather
6 than the people of this Commonwealth are better
7 equipped to decide who the judges should be.
8 Perhaps if they are successful, they might
9 propose merit selection of the governor or
10 members of the legislature for that matter.

11 The judiciary of this state and
12 clearly the members of your committee have been
13 through some very troubled times. I urge you
14 that the minority view is that the canker has
15 been removed and the ranker should now go with
16 it.

17 We need only to look at the
18 elections of 1989, 1991, and 1993 when appellate
19 court judges were elected in this state. Each
20 and every one of the successful candidates in the
21 primary on both sides of the ballot and the
22 winners in the general elections, despite the
23 degradation of campaign attack ads, were persons
24 rated qualified or exceptionally qualified by the
25 judiciary committee of the Pennsylvania Bar

6

1 Association.

2 I don't want this committee to
3 believe that the minority view is solely a
4 negative one, offering nothing more than an
5 admonition to not trade the politics of the
6 ballot box for the politics of the smoke-filled
7 room.

8 There are many intermediate options
9 and other recommendations for improving the
10 system short of changing it entirely. An option
11 for all levels of the judiciary including Common
12 Pleas Court and perhaps even the minor judiciary
13 would be to impose mandatory minimum requirements
14 for those eligible to run for elected office.

15 These are not new. Many of them
16 have been proposed before. And in fact, several
17 are gleaned from the American Bar Association's
18 standard in evaluating candidates for the federal
19 judiciary. Some of these well may be capable of
20 being imposed with simple legislation not
21 requiring a constitutional amendment.

7

22 Some examples: A candidate for
23 judge must be a practicing attorney of at least
24 10 or 15 years' experience. A candidate for
25 judge must have tried ten cases or more to jury

7

1 verdict in his or her career. A candidate for
2 appellate court must be a judge of the Court of
3 Common Pleas duly elected to office.

4 A candidate for judge must have been
5 found qualified by either the county bar
6 association judiciary committee, the state bar
7 association judiciary committee, or by a merit
8 selection committee designed to review candidates
9 on the basis of minimum standards and qualify
10 them or disqualify them to run for office.

11 There is an expression among lawyers
12 that bad cases make bad law. The House and
13 Senate of this great state have had to deal with
14 a bad case. I respectfully urge the minority
15 view that that case not be followed by bad laws.

16 Thank you, sir.

17 CHAIRMAN DERMODY: We just had some
18 research done on the criteria about comparing the
19 disciplining of judges in merit selection states
20 and states where they are elected. And there is
21 virtually no difference. The numbers are the
22 same. The example of the impeachments in the
23 federal system, there are 2 in 10 years and 1 in
24 183 in the Commonwealth.

25 HONORABLE MANNING: Thank you very

7

1 much.

2

3

CHAIRMAN DERMODY: Thank you very
much. With that, the hearing is concluded.

4

5

6

Thank you all for coming. We
appreciate your input and your attendance here
today.

7

8

(At or about 4:50 p.m., the hearing
adjourned.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me during the hearing of the foregoing cause and that this is a correct transcript of the same.


Denise L. McClintock, Reporter

Notary Public in and for the Commonwealth of Pennsylvania

My commission expires April 20, 1998