House Judiciary Committee
Subcommittee on Courts
Hearing on Judicial Reform
November 18, 1994

Prepared Statement of
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I appreciate this opportunity to present my views on judicial reform to the Subcommittee. By way of background, I'm a Professor of Law at the University of Pittsburgh School of Law, where I teach courses in Civil Procedure, Federal Jurisdiction, and Constitutional Law. My activities in the realm of judicial reform run on two tracks. As a scholar and researcher, I have conducted numerous studies on the operation of appellate courts. My publications include *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press 1990) and *Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem*, a report prepared for the Federal Judicial Center in response to a request in an Act of Congress.

I have also been active in judicial reform activities generally, primarily through my involvement with the American Judicature Society (AJS). Currently I am a member of the AJS Committee on Justice Reform and Chair of its Subcommittee on Civil Justice Reform. Earlier, I served on the Executive Drafting Committee for the AJS Judicial Elections Project. Over the last several years, I have participated in several conferences on justice reform, including the Conference on State-Federal Judicial Relationships sponsored by the State Justice Institute and the "Just Solutions" Conference sponsored by the American Bar Association. Of course, I speak only for myself in these remarks.

An Opportune Moment for Justice Reform

Your committee's hearings are taking place at a particularly opportune moment for pursuing judicial reform in Pennsylvania. This is so because of several developments that have occurred nationally and within the Commonwealth. Among them:

- The conclusion of the impeachment proceedings against Justice Larsen has removed a cloud that has been hanging over Pennsylvania's judicial system.
- The Pennsylvania Futures Commission on Justice in the Twenty-First Century (Futures Commission) has begun the task of drafting a long-range plan for improving the state judicial system in the decades to come.
- The draft report of the Long Range Planning Committee of the Federal Courts, just issued, emphasizes the importance of state courts and the need for an intelligent allocation of business between the two systems.
- Reform of the legal system is high on the agenda of the new Congress in Washington.

Plainly, there will be no shortage of ideas to be considered by the Legislature, the judiciary, and the bar. How should these ideas be evaluated? That question, in its broad form, was addressed by the AJS Civil Justice Subcommittee that I chair. Drawing upon committee discussions, I drafted a memorandum that was ultimately published (with a few revisions) as an editorial in *Judicature*, the journal of the AJS. A copy of that editorial is attached. In my remarks to the Subcommittee I shall briefly discuss some of the points made in that editorial.

A Modest Suggestion

The existence of two coordinate court systems, one state and one federal, is, on balance, a source of strength for the administration of justice in this Commonwealth and in the nation. But it also has its costs. One cost is that federal courts are often required to decide cases on the basis of state law that is unclear or ambiguous. If these cases were heard in the state system, the state appellate courts could provide definitive answers. But when the cases are heard by federal courts (typically because the parties are citizens of different states), the federal court can only predict what the state law might be. If the prediction proves wrong, the outcome may diverge from what it should have been if the correct rules were followed.

There is no ideal solution to this problem, but many states have established procedures whereby federal courts may certify questions of state law to a state appellate court. A few years ago, the Third Circuit Court of Appeals expressed regret that Pennsylvania lacks a such a procedure. *See* Georgevich v. Strauss, 772 F.2d 1078, 1092 n. 18 (3d Cir. 1985); *see generally* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127 (1992) (encouraging universal enactment of a "new and improved" Act). Although certification has the potential for adding delay and cost to some lawsuits, it can also be beneficial. The National Conference of Commissioners on Uniform State Laws has drafted a Uniform Certification of Questions of Law Act that has now been adopted by 38 states. I urge this Subcommittee to consider it for Pennsylvania.

Editorial

Evaluating proposals for civil justice reform

Fundamental values, starting with procedural fairness, must inform society's consideration of changes to the civil justice system.

Everyone, it seems, has a plan for civil justice reform.

The 1991 report of the President's Council on Competitiveness attracted the widest controversy, perhaps because its announcement was accompanied by a televised skirmish between the council's chairman, Vice-President Dan Quayle, and the president of the American Bar Association. The Federal Courts Study Committee introduced wide-ranging proposals in 1990, and earlier this year the ABA issued a report on "Improving the Civil Justice System." Two American Law Institute projects, one on complex litigation, the other on products liability, annually generate voluminous drafts of legislation and restatements. Various states are involved in civil justice reform efforts, as seen in the recent discovery rules promulgated by the Arizona Supreme Court's Committee to Study Civil Litigation Abuse, Cost and Delay. The 1990 Civil Justice Reform Act obliges every federal district court to adopt a civil justice expense and delay reduction plan by the end of 1993, based on district advisory group recommendations. And "legal reform" has become an element of the 1992 presidential campaign.

Some of the proposals emerging from this array of activity raise fundamental questions of how a justice system ought to be run. Others involve technical matters of procedure, but even technical issues may implicate basic policy choices.

By what standards are these proposals to be judged? Proponents will set forth their own goals and explain why the changes they recommend will advance those goals. But judges, lawyers, legislators, and other citizens must take a broader view.

The first step is to recognize that changes in the civil justice system—like any significant changes in our pluralistic society—entail tradeoffs between competing values. Some of the recent proposals seem to focus almost entirely on efficiency. Efficiency is surely an important value in the legal system as elsewhere, but other values are important too. And often changes hospitable to one value will disserve others.

It is vital that proponents of new proposals candidly articulate the competing values that a civil justice system should serve, test each suggestion against the various criteria, and explain why the tradeoff is warranted. As a starting point, we set forth some of the fundamental values that, to one degree or other, should be considered in this process.

Procedural fairness. This is at once the most obvious, the most comprehensive, and the most difficult to define of the values to be considered. It encompasses basic notions of due process: When a court or other arm of government undertakes to resolve a dispute, it must provide notice of what is at stake and an opportunity to be heard in a meaningful way. Even fairness is not an absolute, as *Mathews v. Eldridge*, the oft-invoked Supreme Court decision on administrative procedure, illustrates. But it would be a mistake to define fairness only by what due process requires; the Constitution establishes a floor, not an ideal.

Access. "Fairness" refers to the processes to be followed once disputes are in the judicial system; "access" deals with whether individuals are able to make use of that system to resolve disputes that are within the realm of the law. Together, they also reflect a commitment to equal treatment regardless of any invidious classification, including but not limited to race or gender.

Efficiency. Efficiency is perhaps best defined by the evils to be eliminated: costs in excess of benefits to the parties and the law; delays in litigation beyond what is required for zealous advocacy and reasoned adjudication; resources given to disputes that do not justify the financial and human toil that litigation exacts.

Effectiveness. Trial and pretrial processes should maximize the fact finder's ability to arrive at the truth and apply the law to it. Appellate processes should produce fair and just results in individual cases while also serving the law-declaring and other institutional functions of appellate courts.

Litigant autonomy. The American legal system recognizes the courts' obligation to bring a dispute to termination as fairly, inexpensively, and timely as possible. But it also recognizes that in a free society, the primary responsibility for ordering human affairs belongs to the individual, not the government.

Federalism. We expect, as memorably articulated by Justice Hugo Black, that "the National Government, anxious though it may be to vindicate and protect...federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Conversely, state judicial reform should respect national interests and values and mechanisms that nurture them.

Predictability of outcomes. Litigants, as well as the many who will never be litigants, order their affairs based on expectations of how courts will enforce the law. Outcomes, therefore, should be reasonably predictable. Predictability also enhances the perception that decisions are the product of reasoned and dispassionate judgment.

Legitimacy. In a democratic society, courts can do their job only if they have the confidence of the citizenry. But in an era when cynicism about gov-

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ernment institutions abounds, legitimacy cannot be taken for granted. Fairness, access, efficiency, and predictability promote it.

Holism. The civil justice system does not operate in isolation, but as part of a larger whole. As former Congressman Robert W. Kastenmeier said, "The administration of justice is a total ecology; changes in part ripple throughout." Civil justice reform must not frustrate the goals of the rest of the system. Of equal importance, changes must take into account the realities elsewhere in the legal system. For example, the criminal docket may cripple any effort to add new deadlines in civil litigation.

To list these values is not to say that change should be shelved until we know all its consequences. But proposals for change should be widely circulated and seriously debated, so as to maximize the likelihood that policy makers will be aware of possible ripple effects. There is no better way to ensure that competing values will be given their just due than to encourage broad participation in the policy-making process by all who look to any aspect of the justice system for the resolution of disputes. □

Editorials are prepared by a standing committee of the American Judicature Society. Topics proposed by the committee are approved by the Society's executive committee.