

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

\* \* \* \* \*

Judicial Reform  
House Bills 10 and 838

\* \* \* \* \*

House Judiciary Committee

Main Capitol Building  
Room 140, Majority Caucus Room  
Harrisburg, Pennsylvania

Thursday, March 2, 1995 - 9:00 a.m.

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BEFORE:

- Honorable Jeffrey Piccola, Majority Chairman
- Honorable Scot J. Chadwick
- Honorable Al Masland
- Honorable Dennis O'Brien
- Honorable Thomas Caltagirone, Minority Chairman
- Honorable Lisa Boscola
- Honorable Harold James
- Honorable Kathy Manderino

ORIGINAL

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**ALSO PRESENT:**

**Karen Dalton, Esquire**  
**Counsel for Judiciary Committee**

**David L. Krantz**  
**Minority Executive Director**

**Daniel DeLash**  
**Minority Committee Secretary**

**Galina Milohov**  
**Minority Research Analyst**

C O N T E N T S

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22  
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24  
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WITNESSES	PAGE
Honorable Jeffrey Piccola's opening remarks	4
Paul L. Stevens, President Pennsylvania Bar Association	8
Jon LaFaver, Adjunct Professor The Dickinson School of Law	25
Honorable Edmund B. Spaeth, Jr. Chairman of the Board Pennsylvania for Modern Courts	38
James R. Ronca, Esquire, Past President PA Trial Lawyers Association	72
Honorable Robert L. Byer Kirkpatrick & Lockhart	91
Bruce S. Ledewitz, Professor of Law Duquesne Univeristy School of Law	118
William H. Nast, Esquire Hursh & Hursh	132
Erwin C. Surrency, Professor (Retired) University of Georgia School of Law	158
Barry L. Kauffman, Executive Director Common Cause of Pennsylvania	185

1                   CHAIRMAN PICCOLA: This public hearing  
2 of the House Judiciary Committee will come to  
3 order. I'd like to welcome everybody here this  
4 morning. Before we begin, I'd like to advise  
5 all witnesses and members to please use the  
6 microphones that are situated at various parts  
7 of the room. I'm advised that the acoustics in  
8 here are very poor. The court reporter will  
9 have a hard time picking up what we are saying  
10 unless we use the microphones.

11                   Before we begin I'd like to recognize  
12 the other member of the committee who is  
13 present. I'm sure there will be other members  
14 present as we proceed. Representative Scot  
15 Chadwick is to my far left. To my immediate  
16 left is Karen Dalton, counsel to the committee.

17                   Before we begin I have a brief opening  
18 statement. The importance of this morning's  
19 hearing on judicial reform in my view cannot be  
20 overstated. As an elected representative in  
21 Dauphin County, the seat of government, as a  
22 member of the Judiciary Committee for many  
23 years, as Minority Chairman of that committee  
24 and now the Chairman of the committee, I have  
25 been actively engaged in the process of trying

1 to addresses the many problems that face our  
2 Judiciary.

3 Each citizen of Pennsylvania deserves  
4 a government that is accountable for its action,  
5 one that is made up of men and women of  
6 unquestioned integrity. This is no less true  
7 for our judicial branch and for any of the other  
8 two branches of government. The Judiciary  
9 impacts upon the hard-working men and women of  
10 Pennsylvania and their children in more intimate  
11 ways than the Executive or Legislature ever  
12 could.

13 Each and every day courts across this  
14 Commonwealth decide how families will order  
15 their lives, how much time parents will spend  
16 with their children, where they will live, and  
17 the kinds of duties owed to each other. When it  
18 comes to the important issue of crime, judges  
19 have enormous power. They decide which  
20 perpetrators will be released, which hoops  
21 prosecutors must jump through to gain  
22 convictions, and the rules that the police are  
23 to play by.

24 I'm proud to say that in the past this  
25 committee has risen to the challenge and

1 challenges that have been placed before it. The  
2 challenge of restoring the public's faith in our  
3 Judiciary.

4 In 1992, the committee worked on and  
5 saw and enacted a new judicial discipline  
6 procedure. During the 1993-94 session, after  
7 the 9th Statewide Grand Jury and the Court of  
8 Common Pleas finished their work, this committee  
9 and the General Assembly launched an  
10 investigation in the activities of former  
11 Justice Ralph Larsen.

12 I would like to commend, and I see  
13 he's in the back now, Chairman Caltagirone, who  
14 chaired the committee during that session, and  
15 the Chairman of the Subcommittee on Courts at  
16 that time, Representative Frank Dermody, who  
17 also chaired the Committee of Managers from the  
18 House who oversaw the prosecution of that case  
19 before the State Senate. Of course, the result  
20 was the first impeachment of a judge in over a  
21 century.

22 Although Ralph Larsen's illegal and  
23 unethical acts are now committed to the care of  
24 historians, there is more work to be done, and  
25 that is the subject of this hearing-- House Bill

1 10 and House Bill 838, a judicial reform package  
2 opposed to the constitutional amendment and  
3 implementing legislation. This reform package  
4 is designed to achieve 2 very important goals:

5 First, restoring the constitutional  
6 balance between the judiciary the legislature;

7 Second, and perhaps more important,  
8 making the Judiciary more accountable to the  
9 clientele that it ultimately serves--the  
10 citizens of Pennsylvania.

11 We have an impressive lineup of  
12 witnesses today: Legal scholars, former members  
13 of the Appellant Bench, representatives from the  
14 legal community. I thank each of them for  
15 taking the time to come here today. One person  
16 came all the way from Georgia under his own  
17 steam, I might add.

18 Unfortunately, no one will be  
19 appearing who can speak for the Pennsylvania  
20 Supreme Court or the unified judicial system.  
21 This was not an oversight by this committee. We  
22 extended an invitation to Nancy Sobolevitch, the  
23 Court Administrator of Pennsylvania, to come and  
24 testify personally or to appoint someone in her  
25 stead. Staff contacted her office by letter and

1 by telephone. I personally extended the offer  
2 again this past Tuesday. I'm told that due to  
3 scheduling conflicts no one from her office  
4 could be here, and I regret that that is the  
5 case.

6 At this time we will now call our  
7 first witness, Paul Stevens, President of the  
8 Pennsylvania Bar Association. Mr. Stevens.

9 MR. STEVENS: Good morning. My name  
10 is Paul Stevens and I am the President of the  
11 28,000-member Pennsylvania Bar Association.  
12 With me today to my right is Art Piccone, who is  
13 the president-elect of our association and to my  
14 left is Jim Mundy, who is our Vice President.  
15 We are pleased and honored to provide testimony  
16 on behalf of the Bar Association to this  
17 distinguished committee of the House of  
18 Representatives.

19 Our testimony this morning will focus  
20 on House Bills 10 and 838. Those bills, as you  
21 know, provide for a major restructuring of the  
22 judicial branch of our government. The bills  
23 jointly provide for 4 major provisions: The  
24 elimination of the Supreme Court's Bench power,  
25 the creation of a new Judicial Council, the



1 selection of the Chief Justice by the Governor  
2 and the requirement that the seat of the Court  
3 be placed in Harrisburg. Additionally, there  
4 are other constitutional amendments regarding  
5 financial affairs and budgets in the proposals.

6 The Pennsylvania Bar Association has  
7 been for many years at the forefront of  
8 establishing policies and positions which would  
9 provide the citizens of Pennsylvania with an  
10 efficient judiciary. For example, our 235-plus  
11 member House of Delegates has considered  
12 proposals to change the manners in which the  
13 Chief Justice is selected, to centralize court  
14 functions and to implement the Judicial  
15 Council's advisory role under the Constitution.  
16 Although we agree that these are areas that are  
17 worthy of review and consideration, we emphasize  
18 that they should be tackled only after careful  
19 and thoughtful study.

20 Before I discuss the specific  
21 proposals before us, I wish to re-emphasize the  
22 consistent policy of the Pennsylvania Bar  
23 Association since 1947, that the primary measure  
24 of court reform needed in Pennsylvania is to  
25 change the way we select our appellate judges.

1 Our judges should not be selected by partisan  
2 elections.

3 I would next like to comment on each  
4 of the major issues provided for in this  
5 legislation and provide you with the position of  
6 the Pennsylvania Bar Association.

7 In addressing judicial reform, we  
8 believe that the legislature should keep  
9 foremost in mind the traditional constitutional  
10 balance of power between the branches of  
11 government. As I stated to this committee's  
12 subcommittee on courts last fall, there is a  
13 fine line between fixing the perceived ills of  
14 the Judiciary and usurping its constitutional  
15 role. I also stated then that quick fixes  
16 developed to address the specifics surrounding a  
17 particular situation are not recommended because  
18 of the unforeseen or unknown problems which they  
19 may in turn create.

20 Rather, the Pennsylvania Bar  
21 Association urges careful study of the  
22 recommendations of the Pomeroy and Beck reports,  
23 with which we know you are familiar. Those  
24 recommendations were objectively developed some  
25 years ago after careful objective study by

1 knowledgeable panelists and without reference to  
2 a specific perception of need. Only with this  
3 type of understanding and after that type of  
4 consideration should the issue of judicial  
5 reform be addressed.

6 Now I'd like to turn to the specific  
7 provisions contained within the legislation at  
8 hand, House Bills 10 and 838. The Pennsylvania  
9 Bar Association has not adopted an official  
10 position regarding the elimination of the King's  
11 Bench power, because, to the best of our  
12 knowledge, this has never been proposed before.  
13 We therefore caution this committee to consider  
14 if this may be an example of throwing the baby  
15 out with the bath water.

16 We assume that this provision is a  
17 reaction to a specific recent utilization of the  
18 King's Bench power by the Supreme Court in a  
19 manner that some legislators felt was  
20 inappropriate. While we could take issue with  
21 that perception, it will be more productive to  
22 cite recent instances in which we believe  
23 legislators would agree that utilization of the  
24 King's Bench power was both necessary and very  
25 appropriate.

1                   For example, the Supreme Court  
2                   recently took the unusual step of exercising its  
3                   King's Bench power in ordering a Butler County  
4                   Common Pleas Court to open its proceedings to  
5                   the public and to the news media. In that  
6                   particular case, a Butler County judge had  
7                   closed a pre-trial suppression hearing in an  
8                   attempted murder case. The judge had conducted  
9                   no hearing and had made no factual findings  
10                  regarding the need for closure. The media  
11                  sought relief, but was denied any sort of relief  
12                  until the Supreme Court properly granted a  
13                  request for emergency extraordinary relief and  
14                  directed the Butler County Court to open its  
15                  proceedings to the public.

16                  Had there been no bench power, the  
17                  situation would have had no remedy. You can see  
18                  by this example that you cannot view the King's  
19                  Bench power only in the context of one instance  
20                  of its use. We can provide statistics which  
21                  will demonstrate to you how infrequently this  
22                  power has been used, and it has been truly  
23                  reserved, I might add, for unusual situations.

24                  Indeed, every power that is granted to  
25                  courts under the doctrine of separation of

1 powers will always be subject to criticism,  
 2 indeed anger, by the legislature, by the  
 3 executive branches of government when the use of  
 4 that power conflicts with the other branch's  
 5 goals. However, we submit that that is the  
 6 essence of checks and balances; not a valid  
 7 reason for elimination of that power.

3

8 To strip the court's system of its  
 9 ability to grant extraordinary remedies when  
 10 needed is to expose citizens to irreparable  
 11 harm. There are situations where justice  
 12 delayed is truly justice denied. Allow me to  
 13 cite a few examples:

14 A challenge to a newly-enacted  
 15 taxation statute which would force a taxpayer to  
 16 pay what may prove to be an unlawful tax for  
 17 three or four years before a final determination  
 18 is made might be an appropriate opportunity for  
 19 King's Bench power to be exercised.

20 Newly-discovered evidence which tends  
 21 to show an individual scheduled to be executed  
 22 is innocent; and, what could happen to the  
 23 constitutionally mandated reapportionment if the  
 24 legislature could not agree and an election  
 25 deadline must be met.

1           It is not unusual for the other  
2 branches of government to attempt to limit the  
3 equitable power of the courts. Historically, as  
4 long ago as 1258, the lords of England, in a  
5 compact called the province of Oxford sought to  
6 forbid the chancellor from framing new writs  
7 without the consent of the king and council;  
8 yet, the power of equity has survived to this  
9 day.

10           The history of the King's Bench power  
11 dates back to the English Common Law tradition  
12 in equity of the 1300's. It provided that the  
13 second highest court in all of England was  
14 vested with the authority to summon before it  
15 any proceedings stemming from any lower court,  
16 much like the Supreme Court did recently in the  
17 Butler County situation.

18           For years and years, Pennsylvania has  
19 seen fit to preserve this historical King's  
20 Bench jurisdiction in our highest court.

21           King's Bench and plenary jurisdiction  
22 in Pennsylvania are preserved and codified at  
23 42 PA C.S.A. Sections 510 and 726. These were  
24 codified as early as 1936. They were retained  
25 in the Constitutional Convention of 1968.

1           We urge that, before reversing three  
2 or 400 years of history, you undertake a very  
3 careful examination of that history and the  
4 dangerous impact of its elimination.

5           The second issue that I would like to  
6 address is the creation of a new Judicial  
7 Council. Both the Pomeroy and Becks reports  
8 recommend proposals for reform that provide for  
9 the delegation of responsibility for the  
10 handling routine management of the unified  
11 judicial system by the Chief Justice. This was  
12 to be accomplished with the aid of a state court  
13 administrator.

14           The Chief Justice, and not the entire  
15 Supreme Court, was to be recognized as the  
16 administrative head of the court system under  
17 those proposals. The chief was to have  
18 responsibility and authority for management of  
19 the court system in accordance with the policies  
20 and decisions of the court. The Pennsylvania  
21 Bar Association has supported policies and  
22 positions consistent with those proposals of  
23 both the Pomeroy and Beck reports and continues  
24 to do so today.

25           We favor a centralized administrative

1 office for our courts. We favor the creation of  
2 a Judicial Council as an advisor to the courts.  
3 I stress the word advisor as envisioned by the  
4 1982 report of the Pomeroy Commission. We  
5 believe that the administration of the Court  
6 should be in the hands of professional  
7 administrators, and that they should have the  
8 advice of a Judicial Council comprised of  
9 jurists, legislators, lawyers and lay persons.

10 We strongly believe that the Supreme  
11 Court should make the rules for the  
12 administration of justice and oversee the  
13 administrators within this scope; not some  
14 outside body. The very makeup of the council as  
15 proposed provides for a body which may in itself  
16 be politically motivated in an environment where  
17 politics should have no place.

18 In summary, the Pomeroy Commission  
19 recommended that there should be a stronger,  
20 more independent Judicial Council. The  
21 Pennsylvania Bar Association strongly supports  
22 that aspect of the Pomeroy Commission's report.

23 Neither the Pomeroy nor the Beck  
24 reports recommended usurping the historical  
25 constitutional power of the judicial branch of



1 government. We cannot favor a proposal that  
2 would do so. Clearly, there must be a balance  
3 between judicial and legislative rule-making  
4 power, which is now assured by the present  
5 Constitution at a plethora of statutory  
6 provisions.

7 Third, I wish to address the issue of  
8 the selection of the Chief Justice. This  
9 concept as drafted could lead to an infringement  
10 upon the separation of powers and could clearly  
11 politicize the judicial branch of government.  
12 We do favor changing the method of selecting the  
13 Chief Justice. The Beck Commission recommended  
14 that the Chief Justice should be selected by the  
15 court from their number and should serve for  
16 renewable terms of 5 years. We have endorsed  
17 that concept.

18 The fourth issue which I would like to  
19 address, and the final one, is the creation of a  
20 central location for the seat of the Supreme  
21 Court. The Pennsylvania Bar Association has  
22 consistently endorsed the concept of an  
23 Appellate Court center, which would contain the  
24 court's business offices, its committees and  
25 boards, and the administrative office of the

4

1 Pennsylvania courts.

2 The court center should also serve, we  
3 believe, as the headquarters of the Superior and  
4 Commonwealth Courts. We support the concept  
5 that the Supreme Court should generally sit at  
6 the Appellate Court center. But, that the  
7 Superior Court should sit in panels and continue  
8 to divide its session among the 3 main areas of  
9 the Commonwealth. To provide otherwise, would  
10 create, in our judgment, unnecessary hardships  
11 for litigants.

12 Please understand also this subject is  
13 not without serious financial ramifications. We  
14 caution that the development of an Appellate  
15 Court center, while a good idea, could be  
16 extremely expensive. It might well need to be  
17 the subject of a financial impact study, and we  
18 suggest that you seek estimates of the costs of  
19 this from the office of the Court Administrator.  
20 We suggest that priority of resources should be  
21 first directed to funding computerization of the  
22 courts, and then to funding the unified system  
23 that was constitutionally mandated many years  
24 ago.

25 We therefore believe that the subject

1 of these bills is worthy of careful  
2 consideration, deliberation and the development  
3 of thoughtful proposals. We favor centralizing  
4 the administration of the court system, new  
5 means of selecting the Chief Justice, and the  
6 concept of an advisory Judicial Council.

7 But, we are opposed to measures that  
8 might upset the balance of power between  
9 branches, and we certainly would not favor  
10 elimination of the courts King's Bench and  
11 plenary powers. We therefore urge that the  
12 legislature in looking at issues relating to  
13 improvement of the efficiency of a judicial  
14 system look carefully both at history and at the  
15 well-reasoned Pomeroy and Beck reports. If you  
16 have questions, Art, Jim, or I will be glad to  
17 answer those that you have.

18 CHAIRMAN PICCOLA: Thank you, Mr.  
19 Stevens. Let me first state that the  
20 motivation, at least my motivation for inserting  
21 the repeal of the King's Bench power for  
22 discussion was generated from the impeachment  
23 proceedings in Bill Larsen's case. There were 2  
24 instances of the exercise of King's Bench power  
25 in that case that came under scrutiny. I have

1 to say that in the course of our investigation  
2 and proceedings, we found nothing in the record  
3 that was in any way indicative of improprieties  
4 in the exercise of that King's Bench power by  
5 the Court.

6           However, the mere exercise of the  
7 power and the method of operation of the court  
8 brought the court into disrepute, we believe,  
9 because of the allegations made against him,  
10 and, of course, we found that none of the  
11 allegations were substantiated.

12           I guess my difficulty with your  
13 position in not getting rid of it is because it  
14 is such a huge power that I think historically  
15 is no longer relevant. I say that because, as  
16 you pointed out in your testimony, King's Bench  
17 originates from the power of the King's Courts  
18 of England. They were acting on behalf of the  
19 sovereign, the king. You don't have a king  
20 anymore. We have 3 co-equal branches of  
21 government.

22           In my view, the only thing that the  
23 court does when it reaches down into either  
24 lower courts or even in the one case that came  
25 before us in the Larsen matter, when they reach

1           into administrative proceedings, it just simply  
2           raises questions as to why the court would reach  
3           down for that particular case and not reach down  
4           for another case that might have identical  
5           facts, or very similar facts or circumstances.

6                     You pointed out a case, and I'm not  
7           familiar with the case, Butler County case in  
8           which the media sought King's Bench relief. I  
9           could probably cite a half dozen similar type  
10          cases that arise in Dauphin County in any given  
11          year because the media feels that it is, for one  
12          reason or another, improperly shut out of a  
13          proceeding under the state's Sunshine Law.

14                    Why should the Supreme Court of  
15          Pennsylvania be able to reach down into one case  
16          because it feels like it and not be forced to  
17          reach down in all these other cases where the  
18          citizens feel that they have been wronged by the  
19          authorities? Maybe you can address that.

20                    I just see a real problem, and I think  
21          it reflects poorly on the court. I'm not aware  
22          of any King's Bench or parallel authority in the  
23          United States Supreme Court or the federal  
24          system where the United States Supreme Court  
25          reaches down into the federal system. Maybe you

1 have some information on that. That system  
2 seems to work fairly well and equitably. So, I  
3 said a lot, maybe you would like to comment.

4 MR. STEVENS: Let me respond quickly  
5 in 2 ways. One is with respect to the United  
6 States Supreme Court, of course, the  
7 jurisdiction there is all statutory. The United  
8 States Supreme Court additionally has the  
9 ability under either the 14th or 5th Amendments  
10 to define that which they consider to be a  
11 violation of due process and, therefore, an  
12 extraordinary need. In that sense I think the  
13 Supreme Court is somewhat different based on the  
14 common law.

5  
15 As to the instances in which the court  
16 has exercised plenary jurisdiction which is one  
17 part of this, or the King's Bench power, I would  
18 suggest that the committee, and we'll be glad to  
19 furnish information, take a look at the actual  
20 exercise of that power over, maybe the last 15  
21 years. I think you will be surprised to see  
22 that it has been rarely exercised. And in those  
23 cases where it was, such as in the Butler County  
24 case, there was a very clear and egregious  
25 violation of, in that case, due process and the

1 potential for great harm if immediate action was  
2 not taken. That would be my response and of the  
3 offer for further information if the committee  
4 would so desire.

5 CHAIRMAN PICCOLA: Your resources at  
6 the Bar Association probably in this field is  
7 greater than ours. If you'd like to do that  
8 research, we would be more than happy to receive  
9 it.

10 I noticed in your testimony, I don't  
11 think you did address the provision in House  
12 Bill 10 which is, of course, the proposed  
13 constitutional amendment where we have suggested  
14 that the court, either the court nor the  
15 Judicial Council have the power any longer to  
16 suspend statutes of the Commonwealth which are  
17 inconsistent with the rules of court. You did  
18 not comment on that, I don't believe, in your  
19 testimony. Was there a reason why or do you  
20 have a comment on that?

21 MR. STEVENS: Like the legislature  
22 here, we are constrained by the positions and  
23 policies of our house and delegates, and  
24 frankly, we have not considered that. We need  
25 to take a look at that. We will be glad to do

1 so.

2 CHAIRMAN PICCOLA: Thank you. We'll  
3 open it up to questions by other members of the  
4 committee. Before we do so, I would like to  
5 recognize Minority Chairman Representative Tom  
6 Caltagirone of Berks County. He has some staff  
7 people here I'll ask him to introduce;  
8 Representative Dennis O'Brien from Philadelphia,  
9 Representative Steve Maitland on my far left  
10 from Adams County, and Representative Masland  
11 from Cumberland County. Tom, would you like to  
12 introduce your staff?

13 REPRESENTATIVE CALTAGIRONE: I have  
14 Galina Milohov, Research Analyst, and Daniel  
15 DeLash, Secretary to the committee. I want to  
16 thank the Bar Association for its fine  
17 presentation and we have worked with them very  
18 closely over the years. I'm sure that they will  
19 help us out in the research because they have  
20 extensive background in that. Of course, they  
21 have a very new addition and I think a very good  
22 personal friends of ours, who I'm sure will help  
23 us when we need resources to look at these  
24 issues. I don't have any comments. I'm  
25 interested in hearing what the other testaments



1 have to say. I want to thank each one of them  
2 for being here today. Thank you, Mr. Chairman.

3 CHAIRMAN PICCOLA: Do other members of  
4 the committee have questions for Mr. Stevens?

5 ( No audible response )

6 CHAIRMAN PICCOLA: Thank you very  
7 much. We appreciate you coming.

8 Next witness is Jon LaFaver,  
9 distinguished attorney from Cumberland County  
10 and Adjunct Professor at the Dickinson School of  
11 Law.

12 MR. LAFAVER: Good morning. My name  
13 is Jon LaFaver. I live in New Cumberland. I  
14 have been a member of the Bar of the  
15 Pennsylvania Supreme Court for 34 years and have  
16 maintained a general practice in law in  
17 Pennsylvania for that period of time. I'm the  
18 past president of the Cumberland County Bar  
19 Association and I teach Anglo-American Legal  
20 History at the Dickinson School of Law.

21 The testimony I'm about to give is the  
22 joint effort of myself and John A. Maher, who is  
23 the former Dean of the Dickinson School of Law  
24 and who is not here today because he is  
25 attending his daughter's wedding. We offer this

1 testimony as interested citizens and lawyers as  
2 representing our own considered views, and not  
3 those of any institution or association with  
4 which either of us may now or previously have  
5 been identified.

6 We address only specific proposals of  
7 House Bill 10 and House Bill 838 without  
8 expressing any general view of those bills,  
9 except to commend this committee for undertaking  
10 a subject which in our view cries out for  
11 attention.

12 First, we note the provision appearing  
13 in both bills which would remove King's Bench  
14 power from the Supreme Court of Pennsylvania.  
15 This is a far-reaching provision which would  
16 deprive the Supreme Court of many incidents  
17 necessary to its function as, quote, the highest  
18 Court of the Commonwealth, end quote, to extract  
19 the language from bills themselves. The Court  
20 presently enjoys King's Bench power and has done  
21 so at least since the time of an act of the  
22 General Assembly in 1722, which confers a  
23 plenary grant of all powers exercised by the  
24 English Courts of King's Bench, Common Pleas and  
25 Exchequer.

1                   The Court of King's Bench is the  
2                   oldest in England, it being by 1722 the highest  
3                   court of the realm other than the Parliament.  
4                   It was King's Bench which exercised supervisory  
5                   power over all other royal courts, and since it  
6                   was the only court with this power, it is the  
7                   source of the Pennsylvania Supreme Court's power  
8                   to oversee the other courts of the Commonwealth,  
9                   a power which certainly must be invested  
10                  somewhere, and logically in the, quote, highest  
11                  court of the Commonwealth.

12                  This is only one example of King's  
13                  Bench power and many others are enumerated,  
14                  inter alia, in the Blackstone's Commentaries,  
15                  which was a major source of legal authority in  
16                  the American colonies in 1722. The grant of  
17                  this power to the Supreme Court of Pennsylvania  
18                  was a shorthand way of conferring the ultimate  
19                  legal authority in that court, rather than by  
20                  itemizing all the powers which King's Bench then  
21                  exercised.

22                  Since the legislature is  
23                  constitutionally authorized to establish the  
24                  jurisdiction of the several courts of the  
25                  Commonwealth, it is certainly appropriate for

1 the legislature to grant or limit power as it  
2 sees fit. On the other hand, this should occur  
3 in such a manner as will be most certain, and  
4 which will give rise to the least amount of  
5 confusion and varying interpretation. If  
6 certain specific powers which had resided in the  
7 King's Bench are to be eliminated, then it would  
8 be more appropriate to set those powers out  
9 specifically and instead of a generic withdrawal  
10 which will undoubtedly leave a void.

11 For instance, it would be possible to  
12 restrict the power of the Supreme Court to issue  
13 writs of prohibition, which was one of the  
14 King's Bench power, to say only constitutionally  
15 created courts, and thereby eliminating the  
16 exercise of that power from other commissions  
17 and quasi-judicial bodies, without eliminating  
18 entirely the other historical powers of King's  
19 Bench.

20 To proceed to another matter, the  
21 creation of the Judicial Council. It appears  
22 unclear in the bill whether the Chief Justice of  
23 the Supreme Court has general administrative  
24 authority over all courts only as Chairman of  
25 the Judicial Council; or, whether he has joint

1 power with the council which could be exercised  
2 by him acting alone. This uncertainty arises  
3 from the use of the words beginning with, quote,  
4 together....end of quote, in lines 18 through 20  
5 of Bill Number 10.

6 Another question arises in connection  
7 with the rule-making power. Lines 26 through 30  
8 on page 2 of that bill extends the power of the  
9 Judicial Council to, quote, recommend, closed  
10 quote, rules the Supreme Court. Lines 24  
11 through 26 on page 3 requires the Supreme Court  
12 to adopt these recommended rules. This appears  
13 to take all rule-making power out of the, quote,  
14 highest court of the Commonwealth, closed quote,  
15 and place it in the hands of a body, the  
16 majority of whose members are members of lower  
17 courts.

18 Regarding the selection of the head  
19 judge of the various courts, the bill provides a  
20 variety of approaches, not unlike that presently  
21 existing. It is, perhaps, time to add some  
22 consistency to this process, and either allow  
23 the most senior judge to serve or allow the  
24 judges of each court to elect their own head.  
25 To insert the Governor into the process appears

1 to us to extend the executive power into the  
2 judicial area overmuch.

3 We are among those citizens who would  
4 advocate regional selection of all Appellate  
5 Court judges, a subject not addressed by the  
6 bills presently under consideration. However,  
7 that concept is suggested by the makeup of the  
8 proposed Judicial Council. It certainly would  
9 be inappropriate not to include members from  
10 each of the appellate courts.

11 It does not appear so clear why the  
12 President Judges of the Courts of Common Pleas  
13 in Philadelphia and Allegheny counties are  
14 specially singled out for 2 seats on the  
15 council, while the other 65 counties have to  
16 make do with 3 seats. Likewise, the inclusion  
17 of a member from the city courts of Philadelphia  
18 and Pittsburgh gives special advantages to those  
19 2 places.

20 We would propose consideration of 6  
21 members from the Common Pleas Courts and the  
22 city courts, 2 to be selected by the presiding  
23 judge of each of the appellate courts, with no 2  
24 to be selected from the same county. The  
25 non-judge members of the council should not all

1 be appointed by the Chief Justice alone, but  
2 should be selected by the council members from  
3 all the appellate courts. They should be from  
4 counties not otherwise represented on the  
5 council. It would certainly be appropriate  
6 somehow to include the President of the  
7 Pennsylvania Bar Association.

8 We believe that it is efficient,  
9 logical, fiscally responsible and proper for the  
10 high judicial courts of the Commonwealth to be  
11 headquartered in the State Capitol. The  
12 creation of a judicial center in Harrisburg  
13 would advance that concept, and would be  
14 consistent with the procedure now existing in  
15 many other states. Perhaps, the requirement  
16 that all regular sessions of those courts be  
17 held at the judicial center could be relaxed  
18 somewhat while still retaining the principle  
19 that the main situs of those courts will be in  
20 Harrisburg. It seems especially appropriate for  
21 the Superior Court, which has the largest number  
22 of judges, and which most often sits in panels,  
23 to have some flexibility in this matter.

24 Many areas included in these 2 bills  
25 have not been considered in this testimony

1           because of time restraints.  However, based upon  
2           those items which we have been able to give our  
3           attention, we would urge careful and close  
4           scrutiny of both bills and the widest possible  
5           input from interested segments in our society  
6           before a final proposal is offered to the full  
7           legislature.

8                         We thank you for offering us the  
9           opportunity to express our thoughts on these very  
10          significant legislative proposals.  To the  
11          extent that this committee might find our future  
12          input useful regarding sections of the bills on  
13          which we have not opined due to time  
14          constraints, we stand ready to offer our  
15          continued cooperation.  I will be happy to try  
16          to address any questions you may have.  Thank  
17          you.

18                        CHAIRMAN PICCOLA:  Thank you very  
19          much, Mr. LaFaver.  You also, and perhaps,  
20          simply because of time constraints as you  
21          indicate, did not comment on that portion of  
22          House Bill 10 that would amend the Constitution  
23          to preclude the Court or the council, if a  
24          council is to be created, from suspending  
25          statutes of the Commonwealth as being



1 inconsistent with rules.

2 I'd like to have your comment on that,  
3 if you have one. But before you do, I'd just  
4 like to throw out just one example of the  
5 problem as I see it as a member of the General  
6 Assembly. Then if you want to incorporate that  
7 into your response you may, or you can ignore it  
8 as irrelevant, which it may be.

9 This General Assembly last session,  
10 and I note that Chairman Caltagirone knows  
11 probably even more than I, all the work that  
12 went into it, attempted to develop a code of  
13 evidence for the Commonwealth of Pennsylvania.  
14 Former Senator Craig Lewis, the Chairman of the  
15 Senate Judiciary Committee worked on the bill.  
16 I worked on the bill. Chairman Caltagirone  
17 worked on the bill, any number of lawyers,  
18 professors of law. It's unknown how many people  
19 worked on that bill.

20 We got it to a point late in the last  
21 session when it looked like we had gotten very,  
22 very close to be able to pass it in terms of  
23 satisfying the interest groups that were  
24 involved, and so forth. All of a sudden the  
25 Supreme Court decided to get interested in the

1 subject and appointed a committee to study it.

2 Now, the threat was held over our head  
3 that, go ahead and pass it, but we're going to  
4 simply suspend it because this impinges on the  
5 rule-making authority of the Court.

6 Clearly, I believe that a great  
7 portion of that code of evidence was substantive  
8 law; not rule making; yet, they were going to  
9 suspend the whole statute to sort that out, I  
10 suppose. Speaking as a member of the  
11 legislative branch of government, that offends  
12 me because we feel that that statute was  
13 overwhelmingly substantive law and it should be  
14 the province of the policymakers of the  
15 Commonwealth, the legislative branch with the  
16 concurrence of the Governor. That's just one  
17 example.

18 We've run into that many, many times  
19 in the past. If you could comment on that  
20 section of the bill I'd appreciate it.

21 MR. LaFAVER: I'll comment, and I  
22 might say that John and I talked about it and  
23 came to no conclusions as to what our joint  
24 thoughts were that could be included in this.  
25 Certainly, what we have got in that particular

1 matter is the difference between judicial power  
2 and legislative power and it certainly is not  
3 going to be a surprise to this committee for me  
4 to say that very often the two interplay in such  
5 a way it is hard to extract one from the other.

6 It does appear to me, however, and I  
7 regret what you said before we began this  
8 testimony that the courts themselves are not  
9 here. It appears to me that, at least a common  
10 sense approach to the problem that you just  
11 cited --

12 CHAIRMAN PICCOLA: They are here.  
13 They are not just testifying. They will hear  
14 what we say, I'm sure.

15 MR. LaFAVER: It appears that,  
16 perhaps, some combined effort of the legislature  
17 and the judiciary, if indeed that sort of thing  
18 is ever possible any longer, might have been  
19 able to produce a statute which would not have  
20 been unduly interpretive of the Supreme Court's  
21 role and which still would have met the  
22 substantive law needs that the legislature  
23 believed was appropriate for the Commonwealth.

24 I think in many of these cases the  
25 vision of powers, the separation of powers that

1 we have in the Commonwealth, as well as in the  
2 United States, tends to divide in such a way  
3 that it's not only divided but an attempt to  
4 divide and conquer. I don't believe that that's  
5 the best way for it to work.

6 CHAIRMAN PICCOLA: Thank you. Do any  
7 other members of the committee have questions?  
8 Representative Masland.

9 REPRESENTATIVE MASLAND: Good to see  
10 you today, counselor. I just have a couple  
11 brief questions for clarification on a couple  
12 points you made. On the first page of your  
13 testimony you talked about the question, the  
14 ambiguity of regarding the general  
15 administrative authority whether it's in the  
16 Chief Justice or the Judicial Council. In  
17 looking more closely, I think I agree with it.

18 MR. LaFAVER: That word together  
19 confused me.

20 REPRESENTATIVE MASLAND: Do you have  
21 an opinion as to where that general  
22 administrative authority ought to rest? Should  
23 it rest in a council or --

24 MR. LaFAVER: It certainly seemed to  
25 me that the thrust of both bills was that we

1           wanted the authority to be in the council. I  
2           have no particular problem with that. But my  
3           point in making the comment was, I didn't think  
4           that was clear.

5                         REPRESENTATIVE MASLAND: I agree that  
6           there was some ambiguity. The only other  
7           question I have is, just on another matter that  
8           really, although it is contained in House Bill  
9           10, was not addressed or changed. As you noted  
10          it was merely retained in terms of how each of  
11          the various courts go about selecting a head  
12          judge. Do you have any recommendations for us  
13          on that?

14                        MR. LaFAVER: I just think that the  
15          selection could well be made consistent. If we  
16          are going to say it is the senior judge, why not  
17          have it be the senior judge in each case. Or,  
18          we are going to say that each court shall select  
19          either or for life or good behavior, or for a  
20          time certain like 5 years, then I can't see why  
21          that shouldn't apply to all of the courts. Why  
22          must there be a difference in the selection of  
23          the head of a court? They are all courts  
24          functioning under the general authority of the  
25          Constitution of Pennsylvania.

1                   REPRESENTATIVE MASLAND: I guess it  
2 would be your recommendation that while we are  
3 taking up this general issue to address that at  
4 the same time?

5                   MR. LaFAVER: That's the general idea.

6                   REPRESENTATIVE MASLAND: Thank you.

7                   CHAIRMAN PICCOLA: Staff have  
8 questions?

9                   ( No response )

10                  CHAIRMAN PICCOLA: Thank you. Our  
11 next witness is the Honorable Edmund B. Spaeth,  
12 Junior, Chairman of the Board of Pennsylvanians  
13 for Modern Courts.

14                  JUDGE SPAETH: Good morning, ladies  
15 and gentlemen. If I may introduce Lynn Marks  
16 and Ellen Kaplan, who are the Executive Director  
17 Associate of Pennsylvanians for Modern Courts.

18                  CHAIRMAN PICCOLA: They may join you  
19 at the witness table if they would like.

20                  JUDGE SPAETH: We appreciate very much  
21 the opportunity to appear before you today on  
22 what plainly would be a very sweeping and  
23 important reform of the way the judicial system  
24 in Pennsylvania is administered. Just very  
25 briefly to state the point of view from which

1 we, Pennsylvanians for Modern Courts is a  
2 statewide, nonpartisan organization. We are  
3 dedicated to the proposition that one of the  
4 most important things that the citizens of  
5 Pennsylvania are entitled to have. We know that  
6 this committee is profoundly concerned with is a  
7 judicial system which is perceived by the  
8 citizens to be qualified and independent. And  
9 regrettably, as the committee, of course, knows  
10 very well, that isn't the way the citizenry of  
11 Pennsylvania perceives the court system today.

12 Lots of reforms are necessary and the  
13 General Assembly, with the people's approval,  
14 has already overwhelmingly approved one of them,  
15 when the Constitution was amended to reform in a  
16 fundamental way the judicial discipline system.

17 In our view, and I know the committee  
18 is aware of this, but we think it's very  
19 important to mention it so that what I'm about  
20 to say about the matters you are considering  
21 today, assume what we think is an appropriate  
22 perspective.

23 In our view far and away, the most  
24 important reform that remains is the provision  
25 of merit selection for appellate judges. But,

1 we realize, of course, that that's not the  
2 subject today. We will make some comments that  
3 I hope the committee will find of some  
4 assistance in considering the proposals before  
5 you.

6 I'd like to express our appreciation  
7 to the Chairman, not simply for the tremendous  
8 effort that obviously has been made in drafting  
9 these bills and in assembling the procedures  
10 necessary for public hearings, but also for the  
11 leadership that you have demonstrated, Mr.  
12 Chairman, in the past and the commitment that  
13 you have shown to taking the steps necessary to  
14 ensure that we will have merit selection.

15 First, if I may make a few remarks  
16 about the proposed creation of the Judicial  
17 Council. In the past PMC has supported the Beck  
18 Commission, the Governor Judicial Reform  
19 Commission to give its formal name, that the  
20 Chief Justice be given administrative authority  
21 and that there be a Judicial Council or judicial  
22 conference that would issue recommendations.  
23 The recommendation of the Governor's Judicial  
24 Reform Commission, the Judicial Council was a  
25 recommendatory body only. It had a broad



1 membership, including lay members, lawyers, as  
2 well as judges and legislative leaders, but its  
3 role was to advise. It had no authority.

4 Plainly, the Judicial Council that you  
5 are considering creating is an entirely  
6 different creature. It would be the  
7 administrator of the court system. As I  
8 understand the proposal, it probably most simply  
9 can be put by saying, what you would do, what  
10 you propose asking people to approve, is simply  
11 transferring the administrative authority that  
12 the Supreme Court now has to the Judicial  
13 Council.

9

14 In principle, we have no objection to  
15 that, so long as, and this is an important  
16 qualification, so long as the Judicial Council  
17 which would be running the courts is solely  
18 composed of judge members. We do believe that  
19 to include the Court Administrator, a nonjudge,  
20 and 3 lawyers, and also to provide it upon  
21 appropriate resolution the legislative branch  
22 could both control the docket and would have  
23 representatives who would vote on the proposal  
24 that the legislative branch had put before the  
25 Judicial Council. We think those features all

1 represent a quite serious intrusion upon the  
2 concept of separation of powers.

3 We respectfully submit that it's  
4 critical to our conception, United States'  
5 conception of democracy, that the 3 branches of  
6 government, the legislative, the executive, and  
7 the judicial, be independent of each other.

8 Now, I apologize for not being here at  
9 the beginning of your hearings and it may well  
10 be that what I will say will repeat what some  
11 earlier witnesses have said. If I do that,  
12 please forgive me.

13 The concept of separation of powers is  
14 a difficult one, because, of course, each of the  
15 branches of government is deeply concerned that  
16 the people's will be done and that the  
17 government be run honestly and efficiently.  
18 Each has its distinctive responsibilities.

19 Unquestionably, their respective views  
20 of what is the appropriate way to proceed will  
21 sometimes clash. That clash is inherent. It is  
22 an aspect of, it is what makes checks and  
23 balances work. It's something that we don't put  
24 up with, we don't suffer it. We welcome it as  
25 an integral part of how our democracy works.

1           It, therefore, seems to us that if we  
2           are to have what we must have; if we are going  
3           to have a rule of law that is respected by  
4           everyone, we are going to have that we have got  
5           to have an independent and qualified judiciary.  
6           In our view an inevitable corollary of that  
7           desire, of that need is that, the judges run the  
8           courts.

9           Unquestionably, sometimes the judges  
10          will run the courts in a way that the General  
11          Assembly will not like. The Court will say it  
12          needs more money than you are willing to  
13          appropriate or than you think necessary, just to  
14          take the most frequent clash. I know there's  
15          this rule making, and I'll come to that in a  
16          moment, Mr. Chairman, if I may.

17          But, that's the way our government  
18          works. We urge very respectfully that if you  
19          conclude that the administrative powers of  
20          running the judicial system are to be  
21          transferred from the Supreme Court to a Judicial  
22          Council, that you ensure that the Judicial  
23          Council be entirely made up of judges.

24          I take it that the selection of judges  
25          that you have designated on the Judicial Council

1 as you propose it is based on the notion that  
2 since the entire judicial system would be  
3 administered by the Judicial Council, each  
4 aspect of the system would be represented: The  
5 Supreme Court, of course, but also the Superior  
6 and Commonwealth Courts by their respective  
7 president judges, the 2 largest Common Pleas  
8 Courts by their respective president judges, and  
9 then the other Common Pleas Courts by 3 judges,  
10 and then a district justice.

11 With respect to the selection of the  
12 Common Pleas judges you might consider, we put  
13 it before you as something that you may wish to  
14 reflect upon, you might consider having the  
15 Common Pleas judges from the counties other than  
16 Allegheny and Philadelphia selected by the other  
17 members of the Judicial Council rather than by  
18 the Supreme Court Justice. As the bill is now,  
19 the Chief Justice would have tremendous powers  
20 because he or she would have the power to  
21 appoint a majority of the members of the  
22 Judicial Council.

23 We don't say that that would be  
24 undesirable, but we express it as something that  
25 you may wish to ponder as you reflect upon just

1           how you believe the Judicial Council should be  
2           constituted.

3                         In that same regard, and I did hear it  
4           said earlier, we share the view that the phrase  
5           in Article 5, Section 10 of House Bill 10, that  
6           the authority of the council shall be exercised  
7           together with the Chief Justice. It does create  
8           an unfortunate ambiguity. It certainly is an  
9           appropriate question that one of the committee  
10          members just asked, what then should be the  
11          authority of the Chief Justice?

12                        Our own comment is that, as we imagine  
13          the Judicial Council, it would be analogous to a  
14          Board of Directors of a major corporation. The  
15          Chief Justice would be the Chairman of the  
16          Board. The Court Administrator would be like  
17          the chief operating officer of the concern.

18                        Typically, and wisely, a Board of  
19          Directors operates according to bylaws that the  
20          Board approves, and by dividing its  
21          responsibilities among appropriate committees,  
22          which you are appointed in the manner provided  
23          for by the bylaws, and in particular, of course,  
24          there's provision for an executive committee.  
25          Because you can't expect the Judicial Council,

1 and I'm sure you don't, anymore than you could  
2 expect a Board of Directors to be concerned with  
3 the day-to-day operations of the courts. There  
4 has to be some authoritative representative of  
5 the Judicial Council that will be able to  
6 respond to situations at anytime as the Court  
7 Administrator brings them to the council. We  
8 imagine that that would be an executive  
9 committee.

10 We suggest that the Chief Justice be  
11 designated as a chair of the Executive  
12 Committee. We also suggest that the bill  
13 specifically state that the Chief Justice is the  
14 chief judicial officer of the entire judicial  
15 system.

16 Whatever may be the Chief Justice's  
17 appointed powers, whether of a majority of the  
18 council or otherwise, the Chief Justice of  
19 Pennsylvania is an enormously important  
20 position. We think that his or her authority in  
21 operating as the chair of the Judicial Council  
22 and as the chief judicial officer of the  
23 Commonwealth should be sufficiently clearly  
24 defined so that the authority will be allocated  
25 according to general settled rules, typically by

1           bylaws that had been enacted by the council so  
2           that you won't have rump meetings within the  
3           council which -- behind the Chief Justice's back  
4           might divest the Chief Justice of the authority  
5           that you want the Chief Justice to have as the  
6           chief officer of the system.

7                     Let me speak briefly to this matter  
8           that I heard the Chairman refer to, that I know  
9           has tremendously troubled the General Assembly,  
10          and that is the appropriate allocation of  
11          authority when it comes to rule-making power and  
12          statutes. I'll touch on this only very briefly.  
13          I know that Robert Byer, who will be testifying  
14          before you, is going to speak to it in more  
15          detail. We know what he's going to say, and  
16          I'll say it now that we agree with it.

17                    But briefly, recently Chief Justice  
18          Rehnquist has filed his regular report on behalf  
19          of the United States Supreme Court. In one part  
20          of that report the Chief Justice remarks that  
21          the Court's experience with rule-making problems  
22          has worked out very well, and as a lawyer I  
23          think most lawyers would agree with that, with  
24          specific reference to the rules of evidence.

25                    For example, Mr. Chairman, I think

1 that in general the federal rules of evidence  
2 are an improvement over most common law bodies  
3 of evidence, and I had some very small part in  
4 serving on an advisory group that commented on  
5 the evidence code that the General Assembly was  
6 considering. I know to a very substantial  
7 extent the provisions of that code would have  
8 been modeled under the federal rules of  
9 evidence, and I think it would have been an  
10 improvement.

11 Now, the way it works in the federal  
12 system is that the Court initiates rules, but  
13 under the Rules Enabling Act, the rules don't  
14 become effective unless the Congress approves  
15 them, or unless the Sunset provision goes by.  
16 And with the rules of evidence, for example, the  
17 Court proposed rules or an advisory committee  
18 appointed by the Court proposed and the Court  
19 then approved them, transmitted them to the  
20 Congress and the Congress did not let the Sunset  
21 provision become effective, but instead made  
22 some changes and with those changes the rules  
23 became effective.

24 We suggest that the federal practice  
25 would be a useful analog for you to consider in



1 deciding how you want to divide rule-making  
2 power between the legislature and the courts.  
3 If you do that, it would be unnecessary to say  
4 anything about suspending statutes. It would  
5 be, if I may say, a superfluous negative  
6 statement because it would be the General  
7 Assembly that would be enacting the rules. It  
8 wouldn't be a question of you doing something  
9 and then the Court suspending it.

10 Centralization, a much flexed subject  
11 and one that PMC, quite frankly, has gone back  
12 and forth on when it comes to the Supreme Court.  
13 Initially, if I may respectfully make the  
14 observation, it would seem wise to us if the  
15 General Assembly were first to authorize a  
16 feasibility study for the judicial center that  
17 you contemplate.

18 The reform that you suggest, of  
19 course, could not become effective until '97  
20 because General Assembly would have to enact it  
21 twice and then it would go before the people to  
22 say yes or no. So, you have plenty of time and  
23 the money that would be necessary could be  
24 appropriated in this year's budget.

25 We mention that because it really

1 would be rather mortifying if the people were to  
2 approve the creation of a judicial center and  
3 then the feasibility study were conducted and it  
4 were decided that it wasn't feasible. That  
5 would be a frustrating outcome that I'm sure  
6 nobody would want; and yet, as we read the  
7 proposed bill now, that would be a possibility.

8 Our suggestion is that, whatever you  
9 do about amending the proposal and then adopting  
10 it this session, meanwhile, you undertake a  
11 feasibility study which would be relatively  
12 modest cost and might be a very useful -- In  
13 fact, I should think it would be a very useful  
14 exercise because it would enable you to think  
15 through in the concrete terms of preliminary  
16 architectural drawings and preliminary financial  
17 studies, functions, that you want to the  
18 judicial center to fulfill.

19 We can see a great deal of sense, for  
20 example, in providing such a center the  
21 necessary offices and facilities for the  
22 administration of the Courts. We do suggest  
23 that it would be useful to have satellite  
24 offices in the Commonwealth where papers could  
25 be filed. That's a great convenience to the

1 parties and to the lawyers, and it's a very  
2 modest expense.

3 Of course, the main things that  
4 you're -- Well, I don't mean to deprecate the  
5 other provisions. The idea of having the  
6 various ancillary facilities such as the  
7 judicial discipline authorities, and lawyer  
8 discipline authorities all centered in a  
9 judicial center seems to us to make good sense.

10 When it comes to the courts themselves  
11 we are of a mixed mind, if it please the  
12 committee. We can see that there would be  
13 tremendous and valuable symbolic significance to  
14 having the state's highest court sit in the  
15 Capitol. Almost every other state does that,  
16 and it works. If you decide to do that, though,  
17 of course, you are not just dealing with  
18 symbolism. You want to improve the operation of  
19 the courts, and we are skeptical about denying  
20 the Supreme Court Justice's chambers anywhere  
21 except in Harrisburg.

22 As you know, the Supreme Court has  
23 only a very few cases that it must hear on  
24 appeal. The great bulk of its appellate  
25 jurisdiction is by it granting allowance of

1 appeal. The result of that is, that the Court  
2 hears really only very few cases. I don't know.  
3 I think 150, something like that, a year; so  
4 that, they are not in continuous session at all.  
5 It appears to us that the justices should have  
6 chambers in their home counties so they would  
7 have places to work when they are not sitting in  
8 Harrisburg where they wouldn't be all that much.

9 With respect to the Superior Court and  
10 Commonwealth Court, we do believe that it would  
11 be unwise to require them to sit entirely in  
12 Harrisburg and only to have chambers in  
13 Harrisburg. I know from personal experience  
14 when I was on the Superior Court and then served  
15 as president judge that it is enormously  
16 important to the operation of the Court to be  
17 able to sit on circuit. Unlike the Supreme  
18 Court, the Superior Court decides thousands of  
19 cases every year. It therefore must sit in  
20 panels of 3. It occasionally sits en banc, but  
21 the great bulk of the business are done by  
22 sitting in panels of 3.

23 It's the everyday litigant who appears  
24 before the Superior Court. There are, of  
25 course, many major cases, but many of them from

1 the point of view of judicial administration are  
2 relatively minor. They don't involve large sums  
3 of money, and to require the everyday citizen  
4 litigant in thousands of cases to come to  
5 Harrisburg only to argue their cases we think  
6 would be an unreasonable burden, and it  
7 certainly would be an unnecessary burden  
8 because, and I speak with some pride about this,  
9 the Superior Court really is handling its  
10 workload very efficiently.

11 I know less about the Commonwealth  
12 Court. Its distinctive feature, of course, is  
13 that a Commonwealth Court judge has both nisi  
14 prius jurisdiction and appellate jurisdiction,  
15 so that they sit throughout the Commonwealth.  
16 With respect, I don't really see any need to  
17 change the operation either of the Superior or  
18 the Commonwealth Court. They are both handling  
19 their workloads very well. There is real value  
20 to going out where citizens can see the courts  
21 in operation.

22 I know that when I was on the Court we  
23 sat not only in Harrisburg, Philadelphia and  
24 Allegheny County, but in many other counties.  
25 We would schedule special sessions. I myself

12

1 sat in Lackawanna, Northampton, Chester, Mercer,  
2 Beaver, and I think some others. Those were  
3 always very useful occasions because the Court  
4 would come to a county where it didn't  
5 ordinarily sit. The bar associations from that  
6 county and surrounding counties would convene  
7 and the lawyers would meet with the Court. The  
8 school children would always be, at least for  
9 the opening session, with the civics teachers.  
10 The newspapers would come and it was a very  
11 useful exercise. We would regret to see it  
12 disturbed. We don't really think that it would  
13 serve your purpose, which is to see to it that  
14 the courts work better.

15 Selection of the Chief Justice of the  
16 Supreme Court and of the president judges of the  
17 Commonwealth and Superior Courts, again, it's a  
18 vexed subject. It doesn't seem to be any good  
19 way. In the context of merit selection of the  
20 Supreme Court justices, PMC believes that the  
21 best way is to have the Chief Justice appointed  
22 by the Governor subject to Senate confirmation.

23 New York State, it works well because  
24 you do have merit selection as the underlying  
25 system. As long as we have partisan political

1 selection of the appellate justices, we don't  
2 believe that the appointment of the Chief  
3 Justice should be by the Governor. We fear that  
4 that would simply further politicize the Court  
5 that is already perceived as too political.

6 Now, that leaves 2 other methods of  
7 selection, and they both have disadvantages. To  
8 permit the judges of the Court to select their  
9 own chief officer, regrettably, may lead to  
10 internecine warfare with promises being made as  
11 to how the Court would be administered if you  
12 vote for me. That's very destructive of  
13 collegiality, and it's a source of concern.

14 We know that's the way the Superior  
15 Court and Commonwealth Court both work now. I  
16 felt blessed, I was the last president judge of  
17 the Superior Court who was picked by seniority.  
18 We did not have an internal campaign. The other  
19 judges has simply put up with me and say, oh,  
20 he's the oldest one of the bench, and so there  
21 it is.

22 On balance, of course, the danger of  
23 seniority is that, the senior judge who becomes  
24 the chief judge may not be any good at  
25 administration, or may be good but just

1 disinterested in it. Administrating a court  
2 system, and particularly that this be so of the  
3 Chief Justice, is a major responsibility.  
4 Certainly no large business would pick its chief  
5 operating officer by seniority. They would  
6 choose by demonstrated performance and  
7 disposition. So, seniority has its problems.

8 On balance, we respectfully suggest  
9 that you consider, as long as there are partisan  
10 elections, not having the selection of the Chief  
11 Justice made by the Governor, but instead having  
12 it by seniority, but with a limited term.

13 Also, it does appear to us that  
14 there's no particular reason to distinguish  
15 between the Supreme Court, the Superior Court  
16 and the Commonwealth Court when it comes to the  
17 selection of the chief judicial officer, and it  
18 would seem to us the method of selection should  
19 be the same.

20 The only other specific provision that  
21 I would comment on, though, I will certainly  
22 respond to any questions to the best of my  
23 ability is the King's Bench power. If you  
24 decide that the Supreme Court should be divested  
25 of that, we suggest that you reserve to the



1 General Assembly the power to confer special  
2 extraordinary powers on the Court. Because, the  
3 day may come where you conclude that that would  
4 be a useful thing to be able to do. In other  
5 words, if you eliminate it, don't eliminate it  
6 in such a way that it never can be restored.

7 To conclude then, we do hope that  
8 something I said will be useful to you, but with  
9 full respect we urge that nobody should be  
10 misled into believing that if these bills are  
11 enacted, that truly important reform would have  
12 been accomplished because it won't have been.

13 The problem with the judicial system  
14 in the public's eyes is that appellate judges  
15 are selected only after a process that demeans  
16 the system, discourages confidence in it. It's  
17 mired and money raising from those who practice  
18 before the Court. These bills would do nothing  
19 about that. That's the root of judicial reform.

20 We appreciate the opportunity. If you  
21 have any questions, as I say, I'll be glad to do  
22 my best to respond to them.

23 CHAIRMAN PICCOLA: Thank you, Judge  
24 Spaeth. Thank you for the kind words directed  
25 my way at the beginning of your statement and

1 your comments at the end indicating the need for  
2 merit selection. I guess I should put on the  
3 record that this member remains committed to  
4 that concept and that this committee will be  
5 dealing with that issue during this session. I  
6 would suspect during this year.

7 I will continue to work with you and  
8 your organization, Lynn Marks and her associate  
9 because I concur that a lot of what we are doing  
10 here is reform, but it is not the underlying or  
11 absolutely essential reform that I think needs  
12 to be done; that is, the method by which we  
13 select our jurists in this state. So, we will  
14 be dealing with that subject.

15 We did separate them, however, for  
16 obvious political and support reasons because  
17 there is clearly more broad-based support for  
18 this kind of reform and we did not want that not  
19 to go forward. I want to assure you and members  
20 of the committee that we will continue to pursue  
21 merit selection.

22 I did have a question or a comment.  
23 You brought up the issue of collegiality of the,  
24 particularly I guess of the Supreme Court.  
25 Tying that into the issue of centralization of

1 the Court in Harrisburg, I guess a lot of people  
2 think that I'm beating that particular drum  
3 because I live here and I suppose that probably  
4 plays a part. I'm very proud of my county and  
5 my Capitol city where I was born and raised.

6 But, I still feel strongly, and I  
7 think you confirmed it, that the Capitol city is  
8 the Capitol city for a reason and that it should  
9 be the headquarters for all 3 branches of  
10 government. It works in other states. They do  
11 it in most other states.

12 I would say that I concur with your  
13 analysis that the Commonwealth Court and the  
14 Superior Court should be given flexibility to  
15 sit in panels, or in the case of Commonwealth  
16 Court, at the trial level in various parts of  
17 the Commonwealth. I have no problem with that,  
18 although I will say this. As I understand it,  
19 maybe you can correct me if I'm wrong, the  
20 Superior Court is headquartered in Philadelphia.

21 JUDGE SPAETH: Its administered  
22 headquarters are mostly. As I said, I don't see  
23 any reason why that shouldn't be in Harrisburg.

24 CHAIRMAN PICCOLA: I had the  
25 opportunity a couple weeks ago to appear on a

1 relatively minor Orphans' Court appeal before a  
2 panel of Superior Court Judges in Philadelphia.  
3 The one lawyer was from Lackawanna County where  
4 the estate was situated. The other lawyer was  
5 from Northampton County and I was from Dauphin  
6 County, and we were all right across the street  
7 from Independence Hall arguing a case. That  
8 didn't make any sense to me at all.

9 I don't know how it's done. I don't  
10 know what the internal workings of the Superior  
11 Court are, but it seems to me it's not done very  
12 well because -- and there were 18 cases there.  
13 Most of the cases involved lawyers from far  
14 flung areas of the Commonwealth; not the  
15 Philadelphia region.

16 JUDGE SPAETH: That's a perfectly  
17 proper observation. The reason that it happened  
18 was that the Court doesn't sit in Harrisburg  
19 very often. Your case came up at a time where  
20 it would be heard earlier in Philadelphia than  
21 in Harrisburg. If it sat in Harrisburg more  
22 often, that wouldn't have happened.

23 CHAIRMAN PICCOLA: Or even in  
24 Scranton. It would have been more appropriate  
25 to have that up at Scranton. I don't know how

1           it works now. It doesn't appear to be working  
2           very well with regard to the Superior Court at  
3           any rate. I think Commonwealth Court works a  
4           little bit better from my personal observation.

5                        I just throw that out because I'm not  
6           trying to say every lawyer for every appellate  
7           case has to come to Harrisburg. I concur with  
8           respect that the Superior, Commonwealth Court  
9           there should be flexibility to allow those cases  
10          to be heard locally.

11                       However, on the issue of the Supreme  
12          Court, I don't think I do agree, and I think I  
13          don't agree for the reasons that I think you set  
14          forth in that they are a court of certiorari or  
15          allowance of appeal, and they only hear the  
16          cases that they feel are necessary to hear  
17          because they have statewide implications and  
18          they involve, perhaps, points of law that are a  
19          first impression in the Commonwealth or some  
20          division from the lower courts, or for whatever.

21                       I also disagree, and this became vivid  
22          to me and I'm sure to Chairman Caltagirone and  
23          anyone else who was on the committee last  
24          session, that the collegiality of the Supreme  
25          Court is more important than it is for any of

1 the other appellate courts and it does not exist  
2 to any great extent, or at least it did not  
3 exist last year. I could tell you some really  
4 good war stories, but I won't do that on the  
5 record.

6 I don't know how you get that to exist  
7 when you have 3 or 4 members sitting in their  
8 high-rise office suits in downtown Pittsburgh  
9 and 1 or 2 members sitting in their offices in  
10 Philadelphia and maybe 1 member out here in the  
11 central part of the state faxing allocatur  
12 petitions and memorandums back and effort and  
13 law clerks talking to each other on the  
14 telephone. I don't think that makes for  
15 collegiality. I would suggest that the Supreme  
16 Court, if it doesn't want to aspires to that  
17 position, they should aspire to it and sit here  
18 in Harrisburg.

19 JUDGE SPAETH: I'm not sure we do  
20 disagree, Mr. Chairman. To state it in the  
21 affirmative, I think you are absolutely right  
22 about collegiality. I know that modern  
23 technology permits video conferencing, and, of  
24 course, there are the faxes and the E-mail and  
25 lawyers engage in that all the time. But, they

1 are dealing with client's time and it's a  
2 different thing.

3 I don't think, and I do speak from  
4 personal experience in this, that you really are  
5 able to come to a collegial decision unless you  
6 are in the same room and talk with your  
7 colleagues.

8 I also definitely agree with you that  
9 the Supreme Court is an entirely different  
10 institution than the intermediate appellate  
11 courts. All of those considerations point very  
12 strongly, and I think appropriately, to having  
13 the Court sit in the Capitol, and that's what it  
14 does, I think it's 44 out of the 50 states.  
15 It's an overwhelming figure.

16 Let me also interject one other  
17 thought. I don't share the worry that had been  
18 expressed by some that if the Court has to sit  
19 only in Harrisburg, there will be people who  
20 don't want to aspire to the Court. That hasn't  
21 proved true in New York State, for example,  
22 where they have gone from merit selection of  
23 their Court of Appeals. Likewise, I don't worry  
24 that the justices won't be able to get  
25 first-rate law clerks. An abled and ambitious

1 young lawyer would be perfectly happy to be in  
2 residence at the Capitol while serving a  
3 clerkship.

4 The difficulty is, and this was the  
5 reservation I expressed, with so few cases they  
6 don't sit all the time. I would expect them to  
7 work at home. It's a hard thing to deal with.  
8 You can't force collegiality. That's the  
9 problem. I think it's hitting upon an  
10 institution that will encourage it, because you  
11 are creating an institution. You're writing a  
12 constitution. I think where we come out is,  
13 yes, have the Court sit in Harrisburg, but  
14 permit it to have out-of-Harrisburg working  
15 facilities and hope that by having it sit in  
16 Harrisburg, having its administrative offices in  
17 Harrisburg there will be collegiality.

18 To deprive the justices of any out-of-  
19 Harrisburg working facilities I'm afraid would  
20 be counterproductive because it would mean they  
21 would work less efficiently. That's the limit  
22 of my reservation, so I'm not sure that we are  
23 really very far apart, Mr. Chairman.

24 CHAIRMAN PICCOLA: Thank you. Other  
25 members of the committee? Representative



1 Masland.

2 REPRESENTATIVE MASLAND: I don't want  
3 to beat that to death, but I was going to talk  
4 about collegiality a little bit too. Let me  
5 just say that I agree with Chairman Piccola and  
6 anybody that was at the hearings this past  
7 summer, when you say collegiality would be  
8 enhanced I think that assumes that there's some  
9 collegiality exists, and I'm not sure that  
10 that's the case.

11 I think with the fax system that they  
12 have and -- I really don't, when it comes right  
13 down to it, think that life on the Internet is  
14 appropriate for Supreme Court justices. I guess  
15 maybe we could all hook up and talk to them as  
16 much as they talk to one another, but that's not  
17 good for collegiality or for any cogent decision  
18 process.

19 One other brief observation, and I do  
20 have a question. You are concerned with  
21 separation of powers I think is a valid concern,  
22 and I think that ties with the merit selection  
23 problem because there's always going to be a  
24 concern. One branch is always going to try to  
25 intrude on another branch whenever that branch

1 is perceived as being ineffective. I think that  
2 that's what we have with the court system.  
3 There is some insecurity and a perception of  
4 lack of ability on the part of our Appellate  
5 Courts, and because of that I think that that  
6 void is being met with maybe some legislative  
7 intrusions. It may go too far. We will see as  
8 we go through this process. I do agree with you  
9 that merit selection does have to be addressed.

10 My question deals with the authority  
11 of the Chief Justice, because as I listen to you  
12 and looked over the notes, I wasn't sure exactly  
13 where you stood. On the one hand, you expressed  
14 a concern that the Chief Justice would be a mere  
15 figure head and that the Judicial Council would  
16 be overriding any decision he or she might make.

17 But on the other hand, you didn't want  
18 the Chief Justice to be making the appointments.  
19 You wanted somebody else to make those  
20 appointments. I wasn't really sure, you know,  
21 maybe you see that as consistent. But if the  
22 Chief Justice is to have power, shouldn't he  
23 also have the appointment power?

24 JUDGE SPAETH: You put your finger on  
25 a very difficult issue. I plead guilty of not

1 having been a model of clarity. It's a  
2 difficult subject. We do think the Chief  
3 Justice should be recognized officially as the  
4 head of the judicial system. Our suggestion was  
5 that that be so stated in the Constitution, and  
6 that the Chief Justice's authority be secured by  
7 a provision; for example, that not only would  
8 the Chief Justice be the chair of the Judicial  
9 Council, but would be the chair of the Executive  
10 Committee.

11 Now, I realize that doesn't answer  
12 your concern. I don't think there is a clear  
13 answer. You'll have to make a choice of the  
14 roads. If you give the Chief Justice the power  
15 to appoint 3 Common Pleas and one member of the  
16 minor judiciary, then with his or her own vote  
17 he would have a majority of the 9-judge council.  
18 And we don't say that's bad. That would help  
19 secure the Chief Justice against being undercut  
20 and turned into a figure head.

21 You must ask yourself, though, is,  
22 that would be to create a very powerful  
23 individual, and with the enormous sums of money  
24 and the complexities, do you want that much  
25 power in one individual? We are concerned about

1           it.  Quite frankly, we haven't come to a firm  
2           conclusion.  But, it's something that we  
3           respectfully say you've got to wrestle with.

4                        The compromise which was the burden of  
5           my comments was not to have one individual have  
6           that much appointing power, but to have internal  
7           provisions such as that the individuals would be  
8           the chair of the Executive Committee which would  
9           give the Chief Justice considerable status.

10          But, again, really you are counting on good  
11          people.  You are counting on people who want to  
12          make the system work and who are able to make it  
13          work.

14                        REPRESENTATIVE MASLAND:  I agree with  
15          that.  We'll continue I'm sure to wrestle with  
16          that issue.  I'm from Cumberland County.  I  
17          could sit here and say that, well, there's 2  
18          candidates for statewide court for Cumberland  
19          County on my party.  I can say, well, I'm  
20          satisfied that the process is working.  In all  
21          respect to them, I think they are great  
22          candidates, but I don't think we should have  
23          statewide elections.  I think we need merit  
24          selection.  I hope we can get to that because  
25          that will solve a lot of these other problems.

1 Thank you.

2 CHAIRMAN PICCOLA: We have been joined  
3 by Representative Harold James from Philadelphia  
4 and Representative Kathy Manderino from  
5 Philadelphia. Representative Manderino has some  
6 questions.

7 REPRESENTATIVE MANDERINO: Thank you,  
8 Mr. Chairman. Good morning, Judge. I had the  
9 opportunity along with Chairman Caltagirone last  
10 session and a few other members to have a really  
11 informative meeting with, I guess it was the  
12 Prothonotary and Court Administrators for  
13 Superior and Commonwealth Court. The issue that  
14 you addressed with Chairman Piccola about how  
15 the Court sits and where cases come from was  
16 something that we talked in depth about.

17 I guess my question is, I walked away  
18 from there with an understanding that not only  
19 is it, perhaps, sometimes happens that folks  
20 from the central and the western part of the  
21 state are coming into Philadelphia for a hearing  
22 based on where the Court was sitting and when  
23 the case came ready to be heard, but that it  
24 would not have been unusual either for the Court  
25 to have been sitting at a time in Pittsburgh and

1 a case that involved all southeastern  
2 Pennsylvania counsel come up on the list and be  
3 ready at a time when the Court was sitting in  
4 western Pennsylvania; and, therefore, all of the  
5 counsel would travel to western Pennsylvania to  
6 be heard.

7 JUDGE SPAETH: That's relatively  
8 unusual. We did occasionally sitting in  
9 Pittsburgh hear Philadelphia counsel argue.  
10 That was almost always because counsel had  
11 petitioned for an accelerated listening.

12 Typically, a Northampton, Lackawanna,  
13 cases arising from the eastern end would be  
14 heard in Philadelphia; the western end in  
15 Pittsburgh and the central part of the state in  
16 Harrisburg, except, because the Court didn't sit  
17 very often in Harrisburg, quite often central  
18 state cases went to one end or the other.

19 REPRESENTATIVE MANDERINO: I guess my  
20 question is, from your experience within the  
21 Superior Court, is the official setting location  
22 the key or is the -- I mean, will a problem like  
23 what Chairman Piccola talked about necessarily  
24 be solved if we want to keep, regardless of  
25 where the situs of the Court is, if we want to

1 keep some sort of rotational system in terms of  
2 where the Court goes?

3 JUDGE SPAETH: You could draft a  
4 discretionary provision. In other words, you  
5 could say that the headquarters of the Courts  
6 should be in Harrisburg, but it should be free  
7 to sit in any other county as its workload and  
8 administrative requirements dictated because, it  
9 can sit in any county.

10 As I said, I sat in Lackawanna County  
11 just, for example, that one case you mentioned,  
12 Mr. Chairman. That would be our suggestion;  
13 that you just not tie the Court down because it  
14 is -- I'm very proud of the Superior Court, but  
15 I wouldn't say it couldn't be run better,  
16 especially since I'm off of it. But, it needs  
17 to sit in lots of different places if it's going  
18 to do its job.

19 REPRESENTATIVE MANDERINO: Thank you.

20 CHAIRMAN PICCOLA: Further questions  
21 from staff or members of the committee?

22 ( No audible response )

23 CHAIRMAN PICCOLA: Thank you very  
24 much, Judge Spaeth. We may be calling upon you  
25 as we refine this legislation in the future. I

1 hope you will be available to us.

2 JUDGE SPAETH: If we can be of  
3 assistance, we would be very glad to.

4 CHAIRMAN PICCOLA: Our next witness is  
5 James Ronca, Esquire, a Member Board of  
6 Governors and Past President Pennsylvania Trial  
7 Lawyers Association. You may proceed.

8 MR. RONCA: Good morning. Chairman  
9 Piccola, members of the House Judiciary  
10 Committee and guests: My name is Jim Ronca and  
11 I'm past president of Pennsylvania Trial Lawyers  
12 Association and am actively engaged in the  
13 practice of law here in Harrisburg,  
14 Pennsylvania. I appreciate the opportunity that  
15 this committee has given to the trial lawyers to  
16 testify on House Bill 838, and I'm pleased and  
17 honored to represent our association today.

18 At the onset of this hearing and  
19 process, let me commend Chairman Piccola and the  
20 committee for beginning the undertaking of court  
21 reform in Pennsylvania. Certainly, the events  
22 surrounding the impeachment and conviction of  
23 former Supreme Court Justice Larsen require  
24 additional work and study of how Pennsylvania's  
25 court system should operate.



1                   As you undoubtedly know, the  
2                   Pennsylvania Trial Lawyers Association testified  
3                   before the Senate Judiciary Committee on court  
4                   reform in November of 1994. We have always  
5                   taken a keen interest and active role in  
6                   legislative proceedings regarding the duties and  
7                   operation of all our court systems; including,  
8                   of course, the Supreme Court of Pennsylvania.

9                   While in and of itself the  
10                  Pennsylvania Trial Lawyers Association has no  
11                  position on whether the Chief Justice of  
12                  Pennsylvania should be appointed by the Governor  
13                  or continuing the practice of having that  
14                  justice with the most seniority and service act  
15                  as Chief Justice, we are concerned that  
16                  executive appointment of the Chief Justice would  
17                  give the executive branch unprecedented control  
18                  over the activities of the judicial branch.

19                 In Subsection 343 on pages 5 and 6 of  
20                 House Bill 838, it appears that a clear  
21                 majority, 8 of the 13 members of the judicial  
22                 council, would be directly or indirectly  
23                 selected by the Governor of Pennsylvania through  
24                 his power to name the Chief Justice of the  
25                 Supreme Court. The Chief Justice, 3 judges of

1 the Courts of Common Pleas appointed by the  
2 Chief Justice, one member from among the judges  
3 of community courts or justices of the peace and  
4 police magistrates, and 3 non-judge members of  
5 the bar of the Supreme Court, would hold their  
6 offices on the Judicial Council directly or  
7 indirectly as a result of Executive Branch  
8 appointment. We feel that any executive with  
9 this constitutional power over the Judicial  
10 Council would clearly violate the separation of  
11 powers of the 3 co-equal branches of government.

12 Page 8 of House Bill 838, Section 345  
13 dealing with legislative matters, delineates  
14 another potential violation of separation of  
15 powers. In Section 345, the language reads,  
16 either House of the General Assembly may, by  
17 resolution, enter any question or matter which  
18 could be regulated by statute or which relates  
19 to judicial practice or procedure upon the  
20 agenda of the judicial council with like effects  
21 as if submitted by a member of the Judicial  
22 Council.

23 This section allows the president pro  
24 tempore of the Senate and the Speaker of the  
25 House of Representatives the power to appoint a

1 member who will have the right to attend such  
2 meetings and be heard and vote on such a  
3 question. Just as the composition of the  
4 judicial council would be an infringement on  
5 separation of powers by the Executive Branch,  
6 Section 345 likewise would be a violation of the  
7 powers of the judiciary on so-called legislative  
8 matters.

9 Perhaps, the broadest intrusion on the  
10 traditional powers of the judicial branch is the  
11 language which recinds the power of the Supreme  
12 Court to suspend statutes. Every elementary  
13 school civics and government class teaches a  
14 basic democratic principle that the legislature  
15 makes the law, the Executive enforces the law,  
16 and the Judiciary interprets the law.

17 While governmental scholars, writers,  
18 judges, and legislators have always and probably  
19 will always debate where such lines should begin  
20 and end, we feel this language clearly tips the  
21 balance too heavily in favor of the Legislative  
22 and Executive branches and against the  
23 traditional purview of the judicial branch.  
24 Such a broad and basic change should be  
25 carefully reviewed and discussed before

1 proceeding.

2 On the question of where the Court  
3 should be located, the Pennsylvania Trial  
4 Lawyers Association does not have a stated  
5 position on where the seat of the Court should  
6 be, pages 12 and 13. However, we believe it is  
7 incumbent upon the legislature, particularly the  
8 committees dealing with appropriations of public  
9 funds, to ascertain clearly what the cost of  
10 such spending would be, and adequately inform  
11 the voting public as a prelude to the  
12 expenditure of a large amount of public funds  
13 for this court center.

14 I want to thank you very much for the  
15 opportunity to speak today. If you have any  
16 questions, I certainly would be happy to answer  
17 them.

18 CHAIRMAN PICCOLA: Thank you, Mr.  
19 Ronca. I think you were probably here when  
20 Judge Spaeth and Mr. LaFaver and I had our  
21 colloquy about the issue of the courts  
22 suspending statutes. I cited the code of  
23 evidence issue. Judge Spaeth commented that we  
24 look at the federal model of the court  
25 promulgating rules, but the legislature having

1 the opportunity to act on those rules, or amend  
2 them, so forth. I know you didn't come prepared  
3 to comment about that if you are not that  
4 familiar with it. But, how does that strike you  
5 as an alternative suggestion?

6 MR. RONCA: An alternative to either  
7 the situation where the Supreme Court can  
8 suspend as they have it here now and in a  
9 situation that's reflected in House Bill 838?

10 CHAIRMAN PICCOLA: Right.

11 MR. RONCA: I can't speak for my  
12 association on that point because we haven't  
13 discussed that point in our deliberative bodies.  
14 It seems to me that the basic premise of the  
15 power of the Supreme Court to suspend statutes  
16 that violate rules of civil procedure is based  
17 upon the constitutional power of the Court over  
18 certain areas, which gives them the power to  
19 promulgate rules. They suspend because they  
20 think that the statute violates the  
21 constitutional powers.

22 So, what you are talking about here is  
23 a change in constitutional powers of the Court  
24 when you talk about giving the legislature the  
25 power to make their statement on these points.

1           Our concern, I think, is that, in  
2           reaction to what has happened to the Supreme  
3           Court over the past few years, the legislature  
4           might overreact in trying to control, or amend,  
5           or lessen the powers of the judicial branch,  
6           which could have 1 or 2 effects. It could  
7           lessen the effectiveness of the Supreme Court to  
8           act as the arbitrator of what is constitutional  
9           and what is not constitutional. And, it also  
10          could create a constitutional crisis, I think,  
11          where the Court may try to exercise powers that  
12          aren't there. I think we have to look beyond  
13          what has happened in the past few years and try  
14          to also keep an eye toward what the Supreme  
15          Court might be trying to do in future years.

16                 I just think that you have to tread  
17                 very carefully in that area because, as  
18                 suggested in the written testimony given by the  
19                 Pennsylvania Bar Association with respect to the  
20                 King's Bench, there are times when that  
21                 suspension or the exercise of those powers is  
22                 very useful and very proper.

23                 I don't have an organizational answer  
24                 to that question, but my view is that it's an  
25                 area where the legislature should take very

1 careful consideration before acting.

2 CHAIRMAN PICCOLA: You aren't  
3 interpreting this proposal in any way to  
4 abrogate the court's power to interpret statutes  
5 as they would be applied to constitutional  
6 principles? In other words, first, we are not  
7 suspending the right of the Court to strike down  
8 a statute because it violates freedom of press,  
9 freedom of speech. You sort of implied that,  
10 but I don't think you actually came out and said  
11 that.

12 MR. RONCA: No, I'm not talking about  
13 the power of the Court to affirm basic rights as  
14 set forth in the Constitution. I'm talking  
15 about, there are certain powers delegated to the  
16 Court which the Court has in case of  
17 interpreting of being their own and not within a  
18 legislative branch. I think, for example,  
19 regulation of attorneys is one example. Certain  
20 areas of rules of evidence and rules of  
21 procedure they believe is in their power and not  
22 the legislature's power to actually make those  
23 rules. It would be an infringement on that  
24 limited area, those powers; not on the general  
25 power of the Court to declare a statute

1 unconstitutional because it violates freedom of  
2 speech, for example.

3 CHAIRMAN PICCOLA: Do any other  
4 members of committee have questions?  
5 Representative Manderino.

6 REPRESENTATIVE MANDERINO: Thank you,  
7 Mr. Chairman. Actually, and I apologize, I  
8 didn't review these quickly, but -- I actually,  
9 maybe Mr. Ronca wasn't, but I was actually  
10 concerned about whether this language went too  
11 far in terms of the Court's ability to set aside  
12 statutes based on constitutional interpretation.

13 I guess my first question is more to  
14 you. Where is it in here again and why do you  
15 feel comfortable that it doesn't do that? Am I  
16 allowed to do that? Am I allowed to interrogate  
17 the maker of the bill? No, really, because I  
18 can ask Mr. Ronca the question. Seriously, let  
19 me just --

20 CHAIRMAN PICCOLA: Let me just say  
21 that was not the intent.

22 REPRESENTATIVE MANDERINO: Where are  
23 we; what page?

24 CHAIRMAN PICCOLA: Page 3 of the bill  
25 is specifically to general rules. I'm sorry,



1 House Bill 10.

2 REPRESENTATIVE MANDERINO: Maybe my  
3 question then to Mr. Ronca is, personally, I  
4 realize you said that the association didn't  
5 take a position, but do you share Chairman  
6 Piccola's understanding that as written here,  
7 this is clear enough that we are talking only  
8 about the Courts rule making, internal rule  
9 making procedures as compared to their authority  
10 to --

11 MR. RONCA: My own feeling was that,  
12 the language should be abundantly clear that no  
13 other powers are restricted. I thought that  
14 this language could be worked with a little to  
15 make it more clear. I didn't personally do any  
16 research on interpreting constitutional powers  
17 in this respect or, perhaps, other states'  
18 constitutions or statutes in this particular  
19 area. I'm not speaking from a position of  
20 knowledge here.

21 The thing that we tried to express in  
22 our written testimony was a concern about how  
23 much the legislature intends to try to limit the  
24 power of the Court to do certain things. I  
25 understand the consternation over the evidence

1 code and the concerns about that. I have  
2 discussed that with several members of this  
3 committee privately, but I don't know if the  
4 answer is to eliminate the Court's power to  
5 suspend statutes if the Court deems them to be  
6 within their power and not within the  
7 legislature's power in the fashion as it's  
8 designed in this particular bill. I'm not  
9 saying that our association is opposed to this  
10 provision, but we are very concern about this  
11 provision.

12 REPRESENTATIVE MANDERINO: My second  
13 point is maybe more a comment of my concern was  
14 sparked by Mr. Ronca's testimony about the  
15 expenditure for a center. Again, we've done a  
16 lot of testimony at least in 2 years that I have  
17 been on the committee, and I know that last time  
18 when the Judiciary and Appropriations had joint  
19 hearings around budget time, all movement to  
20 continue the total integration and  
21 computerization of the court system had pretty  
22 each come to a halt because of not enough money  
23 to do it.

24 I guess I would raise the question for  
25 us to consider, I didn't see a price tag

1 attached to House Bill 838, but I assume that  
2 there's some price tag that we would come up  
3 with for kind of a judicial center that's  
4 outlined here.

5 I guess my question is, if that should  
6 be considered in line with the other needs of  
7 the Court because they seem to be going -- maybe  
8 not necessarily 2 different ways, but I think  
9 the computerization and the total integration of  
10 a unified judicial system, at least to me makes  
11 a lot of sense, not only based on the current  
12 status of where everybody sits, but also based  
13 on the current statutes and things that we have  
14 been passing that we are looking more and more  
15 to our Courts and our judicial system to  
16 implement. And whether it's --

17 Maybe I'm mixing apples and oranges,  
18 but I'm raising it for committee members to  
19 consider, whether it's statewide registries that  
20 we have been talking about in some of the  
21 various crime bills we have been talking about,  
22 or whatever. I just would hate to lose fact and  
23 kind of shift gears in a time where technology  
24 is enabling us to come together and to get quick  
25 responses and communicate in a way that makes a

1 lot of sense, and to put that on a shelf in  
2 order to consolidate something centered in  
3 Harrisburg.

4 I know I'm rambling because I can't  
5 quite -- His testimony just sparked it. But I  
6 think that those are all things that we have to  
7 weigh. When we are weighing a proposal like  
8 this that deals with an investment of capital, I  
9 think we want to keep in mind the other  
10 investments that we had started and that we are  
11 already having trouble completing in terms of  
12 funding.

13 MR. RONCA: We have a concern that the  
14 Court be able to complete the computerization  
15 which we think is important to bring the Courts  
16 more into modern information era. While we  
17 don't have any objections to this, we want to  
18 make sure that bringing the Court into  
19 Harrisburg, or wherever, doesn't take away funds  
20 from completing that project also, which is an  
21 important capital improvement on our judicial  
22 system statewide.

23 REPRESENTATIVE MANDERINO: Thank you.

24 CHAIRMAN PICCOLA: My only response to  
25 the lady would be 2 points: First of all, if

1 the Court wanted to sit in Harrisburg, it could  
2 do so right now. If the institution of our  
3 judiciary as operated by the Pennsylvania  
4 Supreme Court was of a mind to implement that  
5 particular reform, they have it within their  
6 power right now, and I think the General  
7 Assembly would probably exceed to their wishes  
8 right now. They have resisted I think to put it  
9 mildly.

10 Number 2, obviously, this is not going  
11 to be something that will take place tomorrow or  
12 the day after this bill becomes law. In fact,  
13 this is a constitutional amendment which, as I  
14 think Judge Spaeth testified to, at the very  
15 earliest could be voted upon by the electorate  
16 in 1997. Obviously, I took note of Judge  
17 Spaeth's proposal of a feasibility study,  
18 perhaps, being launched simultaneously with  
19 that. That's an issue that I think we are going  
20 to look at.

21 My ideal would be that this wouldn't  
22 be necessary. If the Court would say, yeah,  
23 we'll implement most of these on our own, but we  
24 just haven't had that kind of response from the  
25 Court. Representative Chadwick.

1                   REPRESENTATIVE CHADWICK: Thank you,  
2                   Mr. Chairman. Mr. Ronca, I'm looking at the  
3                   second full page of your testimony right about  
4                   the middle of the page where you say, we are  
5                   concerned that executive appointment of the  
6                   Chief Justice will give the Executive Branch  
7                   unprecedented control over the activities of the  
8                   judicial branch.

9                   I'd like to draw your attention to the  
10                  United States Supreme Court where the Chief  
11                  Justice and, indeed, all of the justices are  
12                  selected by the President and then confirmed by  
13                  the United States Senate which is part of the  
14                  Legislative Branch.

15                 Given that overwhelming intrusiveness  
16                 of our Legislative and Executive branches on the  
17                 federal level, which no one I think would  
18                 suggest is brought down to the public, I wonder  
19                 if you could tell me why you are so concerned  
20                 about the Executive picking the Chief Justice in  
21                 Pennsylvania?

22                 MR. RONCA: In the federal system the  
23                 President nominates a person to serve on the  
24                 Supreme Court and then the Senate needs to  
25                 confirm that individual. In this circumstance

1 the Governor would select the Chief Justice, who  
2 then would personally select, including the  
3 Chief Justice's own vote, 8 of the 13 members of  
4 the Judicial Council. It is the concern about  
5 the control of the Judicial Council, because I  
6 don't believe that the members of the Judicial  
7 Council are approved by the Senate or there is  
8 any discretion by any other body over who is  
9 selected for those positions.

10 So, it is, I think, easy to foresee a  
11 circumstance where a Governor could select a  
12 Chief Justice who, in turn, would select  
13 individuals who would, perhaps, be controlled by  
14 the Executive. I don't think it's that  
15 far-fetched. That entire Judicial Council would  
16 then be controlled by the Executive Branch. We  
17 are not talking about a situation like we have  
18 on the U.S. Supreme Court where each member is  
19 subjected to scrutiny of the Senate. You know  
20 how strong that scrutiny is in recent years.

21 In that respect with the judicial  
22 council, which in certain areas control the  
23 whole judicial system, would be controlled by  
24 individuals appointed by an individual who is  
25 appointed by the Executive. I see a difference

1 between the U.S. Supreme Court and this  
2 situation that is proposed in this bill.

3 REPRESENTATIVE CHADWICK: Let's forget  
4 the Judicial Council for a moment. Suppose  
5 there was no such thing. We still have a  
6 problem with the Executive selecting the Chief  
7 Justice?

8 MR. RONCA: I think we said right in  
9 there we have no position on whether the Chief  
10 Justice should be appointed by the Governor or  
11 that the present practice continue.

12 REPRESENTATIVE CHADWICK: Your biggest  
13 concern then is with the judicial council?

14 MR. RONCA: Yes. I thought we made  
15 that clear, but if we did not, we make it clear  
16 now. Our concern was the control over Judicial  
17 Council; not over the Supreme Court.

18 REPRESENTATIVE CHADWICK: Thank you  
19 very much. Thank you, Mr. Chairman.

20 CHAIRMAN PICCOLA: Any questions?  
21 Representative Masland.

22 REPRESENTATIVE MASLAND: Just picking  
23 up on that, that concern obviously is based on  
24 the far-reaching tentacles that the Governor may  
25 have that passed through the Chief Justice and



1           into each and every one of these people that the  
2 Chief Justice appoints. I just see that as a  
3 bit overstated. Maybe there's some reason for  
4 concern, but I don't think it's that much  
5 concern.

6           I think that we have seen with the  
7 U.S. Supreme Court situations where people were  
8 appointed Chief Justice and were going to be  
9 liberal or were going to be conservative. It  
10 didn't turn out that way. I mean, the Warrens,  
11 the Bergers, maybe Chief Justice Renquist was  
12 informed, but there are certainly a lot of  
13 examples of people appointed and everybody  
14 presumed them to be of one stripe or another and  
15 they turned out to be a little bit different. I  
16 don't see that as being such a great concern  
17 with the Judicial Council.

18           MR. RONCA: It may not be, but I think  
19 you can perceive the situation where it seems  
20 like a lot of power is being vested in the Chief  
21 Justice who is appointed by the Executive. That  
22 is a concern of ours as we've said.

23           CHAIRMAN PICCOLA: Thank you, Mr.  
24 Ronca.

25           MR. RONCA: The other point, it is a

1 lifetime appointment also. I think that's a  
2 consideration also. Now you can dismiss me.

3 REPRESENTATIVE MANDERINO: Actually --

4 CHAIRMAN PICCOLA: Representative  
5 Manderino.

6 REPRESENTATIVE MANDERINO: Is the  
7 Judicial Council as proposed here a lifetime  
8 appointment?

9 CHAIRMAN PICCOLA: I got diverted. I  
10 don't believe that it is, but that's in the  
11 bill; that's in the statute proposal, statutory  
12 proposal. I don't believe it is a lifetime  
13 appointment from my recollection, but that could  
14 be changed. If it was, it could be changed.

15 REPRESENTATIVE MANDERINO: When I was  
16 listening to dialogue between Mr. Masland and  
17 Mr. Ronca, that's what came to my mind was that,  
18 the change of philosophy that sometime appears  
19 over time with any particular member of the  
20 Court on the federal level. There's a different  
21 kind of independence I think that exists in that  
22 system than ours now because of the lifetime  
23 appointment. And at least at this point, I  
24 think there's at least a distinction there we  
25 are not proposing lifetime appointments here, so

1 someone has to always worry about being subject  
2 to another review and somebody being satisfied  
3 or not satisfied with the philosophy that you  
4 have espoused.

5 REPRESENTATIVE MASLAND: Mr. Chairman.

6 CHAIRMAN PICCOLA: Representative  
7 Masland.

8 REPRESENTATIVE MASLAND: I would like  
9 to have the same worries that our Supreme Court  
10 Justices have on their retention elections.

11 CHAIRMAN PICCOLA: Thank you, Mr.  
12 Ronca.

13 MR. RONCA: I personally commend the  
14 committee for taking on these difficult issues.

15 CHAIRMAN PICCOLA: They are complex.

16 Our next witness is the Honorable  
17 Robert L. Byer with the law firm of Kirkpatrick  
18 and Lockhart and formerly a member of the  
19 Pennsylvania Commonwealth Court. You may  
20 proceed, Mr. Byer.

21 MR. BYER: Thank you very much, Mr.  
22 Chairman, and members of the committee. It is  
23 indeed a pleasure for me to be here this  
24 morning. Judicial reform is a topic in which I  
25 long have been interested, and I do want to

1 commend the Chairman and the members of the  
2 committee for taking on these thorny problems  
3 today.

4 I have submitted a lengthy statement  
5 which includes an attachment consisting of an  
6 excerpt from a prior statement I made to the  
7 Subcommittee on Courts at a hearing last  
8 November in Pittsburgh. What I would like to do  
9 is to ask that this statement be incorporated as  
10 a part of the record of this proceedings. I'd  
11 like to talk about some of these issues, but  
12 what I'd really like to do is to encourage, if  
13 it suits the committee, a dialogue. If anyone  
14 has any questions as I go about any of these  
15 points, I'd be happy to welcome the  
16 interruption. I love the give and take of an  
17 appellate argument which is when that usually  
18 occurs. I would be very receptive to that this  
19 morning, or I could summarize my points and  
20 leave the questions to the end, whichever you  
21 prefer.

22 CHAIRMAN PICCOLA: You are flying  
23 right into the face of the structure that I have  
24 tried to impose on this committee since I became  
25 the Chairman, because I've gaveled a number of

1           them out of order because they've interrupted.

2           If that's your desire --

3                       REPRESENTATIVE MANDERINO: I won't  
4           interrupt, Mr. Chairman.

5                       CHAIRMAN PICCOLA: I will set the  
6           committee lose if that's your desire.

7                       MR. BYER: This is your courtroom, Mr.  
8           Chairman.

9                       CHAIRMAN PICCOLA: Perhaps I'm old  
10          fashioned. I think it's more orderly if we  
11          could have your statement, and then we'll  
12          recognize members for questions and answers.  
13          Feel free to summarize your statement if you  
14          wish.

15                      MR. BYER: That's what I'm going to do  
16          rather than read it. I'd like to talk about the  
17          main points. I am wearing a couple of hats this  
18          morning. I was very pleased to be invited to  
19          testify here as an individual in my capacity as  
20          a lawyer and as a former Commonwealth Court  
21          judge.

22                      I also am representing the views this  
23          morning of the American Judicature Society, an  
24          agency which has been at the forefront of  
25          judicial reform movements throughout the United

1 States for more years than I can remember. The  
2 American Judicature Society performed a very  
3 important study of the Pennsylvania Appellate  
4 Court system in 1978. We've heard reference to  
5 the Beck Commission report from 1988. Before  
6 that there was the Pomeroy Commission report  
7 from, I believe, 1982.

8 The 1978 report from American  
9 Judicature Society on the Pennsylvania Appellate  
10 Courts merits reading by anyone interested in  
11 the topics we are talking about today. This  
12 report was pursuant to a contract with the  
13 Pennsylvania Supreme Court. The report is  
14 currently out of print, but we could supply  
15 copies to the committee if the committee would  
16 desire. You probably have it in your library,  
17 but we would be happy to make copies available.

18 One hat that I'm not wearing today is,  
19 I am the Chair of the Pennsylvania Supreme  
20 Court's Appellate Courts Rules Committee. I  
21 have been a member of that committee for several  
22 years. I became Chairman last summer. I'm not  
23 speaking in any official capacity with that  
24 committee today. I'm not aware of the views of  
25 the members of that committee on the rule-making

1 issues, but I have been involved in the  
2 rule-making process in Pennsylvania and also had  
3 some involvement on the federal side for a  
4 number of years. We will be speaking from an  
5 individual perspective on that aspect of my  
6 testimony. I will address that in as much  
7 detail as the Chair would like.

8 Let's talk about the proposal to  
9 eliminate the King's Bench power that's in both  
10 the constitutional amendment and in the proposed  
11 statute. The King's Bench power does date back  
12 to the Judiciary Act of 1722 which actually is  
13 the source of the May 22, 1722 date in Section  
14 502 of the Judicial Code. This has been a part  
15 of Pennsylvania history for a number years. To  
16 be honest, it's been used rarely. The American  
17 Judicature Society has no position on this, and  
18 speaking as an individual lawyer, I do not think  
19 it would have a great impact if the General  
20 Assembly were to eliminate the King's Bench  
21 power.

22 Mr. Stevens in his testimony for the  
23 Pennsylvania Bar Association did speak to a  
24 number of examples of situations where the use  
25 of that power might be appropriate. I would

1 suggest there are other remedies within the  
2 current judicial system that could be applied to  
3 each of those situations that would not require  
4 the extraordinary assumption of plenary  
5 jurisdiction of a case by the Pennsylvania  
6 Supreme Court.

1  
7 On the other hand, I see no problem if  
8 you want to leave that provision in the current  
9 structure of Pennsylvania law. I think it  
10 important really to address what the nature of  
11 the problem is that prompts the desire to  
12 eliminate the King's Bench power. I agree with  
13 Judge Spaeth and Mr. Stevens that much of what  
14 we are talking about would probably be remedied  
15 by the elimination of partisan judicial  
16 elections from Pennsylvania. We are one of the  
17 few states that continue to select our appellate  
18 judges in that medieval manner.

19 I have attached my former statement on  
20 that subject if anyone is interested in my  
21 statement today. I don't think it matters  
22 either way what we do with the King's Bench's  
23 power. My only suggestion -- I guess I have 2  
24 suggestions. First, if you decide to eliminate  
25 it, it need not be done in the state



1 Constitution. The King's Bench power derives  
2 solely by statute in Pennsylvania. So, it would  
3 be enough to do that in the context of House  
4 Bill Number 838. It need not be a part of the  
5 constitutional amendment.

6 Secondly, I don't think I would call  
7 it King's Bench power using those words. I  
8 would refer to the elimination of specific  
9 statutes. That power is codified in the  
10 Judicial Code in a couple of provisions. It  
11 would be enough, I think, to repeal those  
12 specific sections without using the words King's  
13 Bench, which can be misunderstood as Professor  
14 LaFaver appointed out in his testimony.

15 If there are specific aspects of that  
16 jurisdiction which are good as suggested by Mr.  
17 LaFaver, then you might want to retain them.  
18 But simply using King's Bench might be construed  
19 as setting up an inconsistency with the power of  
20 prohibition or mandamus that appears elsewhere  
21 in the Judicial Code. So, I would not use that  
22 language. I think what we are talking about is  
23 extraordinary jurisdiction in the Judicial Code.

24 With respect to the Judicial Council  
25 and selection of Chief Justice, I think these

1 are related provisions. The American Judicature  
2 Society has recommended in its 1978 report that  
3 the Judicial Council be reactivated. There is a  
4 recommendation in the Pomeroy Commission report  
5 that it be strengthened. The Beck Commission also  
6 calls for a Judicial Council.

7 All of these reports, though, are  
8 dealing with the Judicial Council as an advisory  
9 body. The proposed legislation here seeks to  
10 shift the governing authority of the judicial  
11 system from the Supreme Court to the judicial  
12 council.

13 Speaking as an individual, I think  
14 it's a good thing. I think the justices of the  
15 Supreme Court should not be burdened with the  
16 responsibility of becoming involved in the  
17 day-to-day administration of the Pennsylvania  
18 courts, a responsibility that is placed on their  
19 shoulders squarely by Article 5 of the  
20 Pennsylvania Constitution as it exists today.

21 I think the most efficient and most  
22 effective use of the time of our Supreme Court  
23 justices is to be deciding cases of presidential  
24 significance through writing opinions which aid  
25 in the development of the law, and they should

1 not be concerned with the day-to-day  
2 administration of the Court.

3 In my testimony before the  
4 Subcommittee on Courts last November, I pointed  
5 out a couple of examples where I, as a  
6 Commonwealth Court judge, had to negotiate with  
7 individual members of the Supreme Court in order  
8 to obtain pay raises for a secretary and law  
9 clerk. It has never made sense to me that our  
10 State Constitution requires our members of the  
11 Supreme Court to take on that administrative  
12 responsibility. I think the idea of a judicial  
13 council is a good thing. The idea of making it  
14 more than advisory, but actually making the  
15 judicial council the governing authority has a  
16 lot to be said in its favor.

17 I would like to clarify a comment on  
18 page 5 of my written statement this morning in  
19 which I have suggested that bringing in  
20 nonjudges to the Judicial Council could pose a  
21 separation of powers problem. Judge Spaeth, Mr.  
22 Ronca, I believe Mr. Stevens and others have  
23 discussed this.

24 Personally, I see the separation of  
25 powers problem not so much in the appointment of

1 nonjudges. As I think about it, if the Chief  
2 Justice is making the appointments of lawyers,  
3 then they are members of the judicial branch for  
4 that purpose and there's no intrusion, no  
5 usurpation of judicial authority, no violation  
6 of separation of powers in that respect.

7 The real problem would come about as a  
8 result of the proposal to, I believe it's  
9 Section 345. I might have that number wrong,  
10 which would have the legislature putting certain  
11 members of the Judicial Council on the council  
12 for voting purposes in certain situations. I  
13 think that does create a separation of powers  
14 problem. I would advise that that be given some  
15 greater consideration by the committee.

16 But, the idea of having the judicial  
17 council with governing authority including rule  
18 making, and I'll get into that in a moment, is a  
19 good one. This goes hand and glove with the  
20 adoption of a strong chief justice system in  
21 Pennsylvania.

22 The American Judicature Society in its  
23 1978 report recommended that seniority not be  
24 used as a method of selecting the Chief Justice.  
25 Pennsylvania is one of less than 10 states that

1 continues to pick its Chief Justice solely by  
2 seniority. As American Judicature Society has  
3 pointed out, that is the worse method to pick  
4 the Chief Justice if the Chief Justice is going  
5 to be a real administrator.

6 The Judicature Society had recommended  
7 that the members of the Court do the selecting.  
8 Speaking as an individual and not on behalf of  
9 the society at this point, my experience on the  
10 Commonwealth Court and my observations of that  
11 Court and the Superior Court in going through  
12 recent elections of president judges does lead  
13 to the problems that Judge Spaeth alluded to  
14 with respect to politics within the Court. So,  
15 I see a problem in having the selection made by  
16 members of the Court, although I think that's  
17 preferable to using seniority.

18 I think that the idea of having the  
19 Governor make the appointment might be a step in  
20 the right direction if that process can be held  
21 free of politics. I do have a couple of  
22 suggestions in that respect.

23 First, I guess I am assuming that the  
24 selection of the Chief Justice by the Governor  
25 would be subject to Senate confirmation, but to

1 be honest, I don't think that is expressed in  
2 the provisions. I would think that the Senate  
3 should have an advise and consent rule with  
4 respect to the selection of the Chief Justice.

5 Secondly, there is an ambiguity in the  
6 proposed legislation with respect to how long  
7 that chief would continue to serve with the  
8 election of a new Governor, give that Governor  
9 the right to select a new Chief Justice. That  
10 is not addressed in the legislation. My  
11 recommendation would be that whoever is selected  
12 as Chief Justice by the Governor, with the  
13 advice and consent of the Senate, continue to  
14 serve so long as that person either is qualified  
15 to remain as a member of the Court or until that  
16 person decides to give up the office of chief.

17 In addition, I think that the power of  
18 the Chief Justice should be recognized as  
19 extending beyond just the Supreme Court. The  
20 Legislation in House Bill 838 does refer to the  
21 chief in several instances as the Chief Justice  
22 of Pennsylvania, I would use that language in  
23 the Constitution as well, referring to that  
24 office as the Chief Justice of Pennsylvania.

25 The federal model I think has worked

1 well in terms of the selection of the chief by  
2 the President of the United States with the  
3 advice and consent of the Senate. I think that  
4 there is a lot again that can be said in its  
5 favor for Pennsylvania.

6 I do share Judge Spaeth's concern with  
7 respect to politics, but I think hopefully the  
8 governors would recognize their responsibility  
9 and I think, certainly, the Senate would make  
10 them do so if there were a problem where a  
11 Governor was perceived to be acting solely in a  
12 political manner in selecting a chief.

13 Rule making, perhaps the topic of  
14 greatest interest to me and I know the Chairman  
15 is interested in this. It has never made sense  
16 to me that the Supreme Court in Article 5,  
17 Section 10 (c), I believe, of the State  
18 Constitution was given the power to suspend  
19 statutes. I think that that power has been used  
20 in a manner with which some might take issue  
21 with respect to the substance procedure  
22 dichotomy that appears in the Constitution.

23 The Constitution as written would  
24 preclude the Supreme Court from suspending a  
25 statute unless it were of a procedural nature,

1 if the Supreme Court has declared in the past  
2 some things to be procedural which several of us  
3 would have thought to be substantive.

4 An interesting example was Rule 238 of  
5 the Rules of Civil Procedure providing for  
6 delayed damages in tort actions. The Supreme  
7 Court held that that was constitutional as a  
8 result of its rule-making power because it was  
9 procedural. Interestingly, the U.S. Court of  
10 Appeals for the Third Circuit has held that that  
11 provision will apply in diversity cases even  
12 though it's a Rule of Civil Procedure because it  
13 really is substantive. There is an interesting  
14 problem that that creates.

15 I think that the federal model under  
16 the Rules Enabling Act, which I cite in my  
17 statement, and I'd be happy to answer any  
18 questions on this morning, provides an  
19 interesting balance. Under the Rules of  
20 Enabling Act, the Supreme Court of the United  
21 States may propose a rule of procedure which is  
22 inconsistent with an act of Congress, but that  
23 takes effect only if Congress allows it to go  
24 into effect. So, at least you have the  
25 Legislative branch concurring in the abrogation



1 of a legislative provision, regardless of  
2 whether it's substance or procedure.

3 I don't see any problem in the  
4 provision as written in terms of any argument  
5 that it's eliminating the Supreme Court's power  
6 of judicial review. Although, I would suggest  
7 that ambiguities could be resolved by merely  
8 eliminating, repealing the language in Article  
9 5, Section 10 (c) granting the powers to suspend  
10 rules. I would not put the converse in. I  
11 don't think you need to do that. If you take  
12 away their power to suspend, then they don't  
13 have it. It would be hard to see how even the  
14 Supreme Court could read that back in. But, in  
15 any event, that might create the ambiguity and  
16 you could resolve it in that manner by not  
17 stating the converse; just take away the power.

18 The way this works in Congress and  
19 with the U.S. Supreme Court is, by May 1, I  
20 believe, of each year in which a rule is to go  
21 into effect, the Supreme Court has to transmit  
22 those rules to the Congress. The rule-making  
23 process provides for a great role on the part of  
24 the federal judicial center and that's by  
25 statute, and the judicial council could have

1           that role in Pennsylvania.

2                       The Supreme Court then would  
3 promulgate it, transmit it to Congress by May,  
4 and then unless Congress acts by December, the  
5 rules take effect. Congress may amend the  
6 rules; Congress may delete them. And if  
7 Congress doesn't want a rule to be inconsistent  
8 with a statute, it won't be. I think the same  
9 could hold true for the Pennsylvania General  
10 Assembly. That would eliminate the  
11 misunderstandings that might occur over  
12 provisions like the Evidence Code.

13                      Judge Spaeth talked about how the  
14 Rules of Evidence were adopted in the United  
15 States Supreme Court and by Congress, and  
16 Congress eliminated a whole chapter on privilege  
17 which Congress disagreed with. Interestingly,  
18 Rules of Evidence and Principles of Evidence  
19 have traditionally been by statute in  
20 Pennsylvania. I don't know what makes it any  
21 different now. My suggestion I think would  
22 eliminate that whole ambiguity and eliminate  
23 that area of concern.

24                      I'm running a little short on time,  
25 but in terms of centralization I agree with much

1 of what has been said about the Supreme Court.  
2 I think the real reason to centralize it is, the  
3 Supreme Court does engage in collective decision  
4 making. Now, whether they are going to be  
5 collegial or not, the legislature can't enforce.  
6 But, they sit as a whole on all their cases and  
7 they ought to be required to have conferences  
8 and arguments on those cases which are of  
9 statewide significance at the seat of  
10 government. The American Judicature Society has  
11 recommended this; other reports have recommended  
12 this as well for Pennsylvania. I think there is  
13 a lot to be said for it.

14 I would not eliminate their home  
15 chambers. I think New York is the appropriate  
16 model where I believe the judges of New York's  
17 highest court, New York Court of Appeals, do  
18 retain facilities in their home counties. But  
19 they can have regular argument and conference  
20 sessions at the seat of government and could  
21 work in their home chambers on opinions, but  
22 then come to Harrisburg to debate them with each  
23 other, to file them, and to hear arguments in  
24 cases. I think that's a good idea. I do agree  
25 that there should be flexibility on the part of

1 the -- with respect to the Superior and  
2 Commonwealth Court with respect to where those  
3 courts hear their arguments.

4 With that I'm going to stop and ask if  
5 there are any questions.

6 CHAIRMAN PICCOLA: Members of the  
7 committee have questions? Representative  
8 Manderino.

9 REPRESENTATIVE MANDERINO: Thank you,  
10 Mr. Chairman. Thank you, Mr. Byer. I found a  
11 lot of your testimony very informative and I  
12 appreciate it very much.

13 Just so you know where I'm coming from  
14 because I tend to ask pointed questions that I  
15 can really understand. I agree with a lot of  
16 what you say. I'm a big proponent of merit  
17 selection of judges.

18 One of my concern is that, that we are  
19 not, in any of the things we are proposing that  
20 we are not reacting to a bad -- I did a lot of  
21 work last session on the Evidence Code too, and  
22 I was personally very disappointed with how that  
23 was or wasn't happening. My concern is that  
24 we're not reacting to one particular instance  
25 and are going to create lots of problems on the

1 other end.

2 Kind of given that setting, can you  
3 just explain to me a little bit more what you  
4 meant about not using the words King's Bench  
5 power; instead, dealing with particular sections  
6 of the statute? If by doing that, there are  
7 certain things that may then become kind of  
8 taken out of the jurisdiction of the Court; yet,  
9 other things that we might ought not have  
10 anticipated would remain within the purview of  
11 the justices or the Courts?

12 MR. BYER: I don't address this in  
13 detail in my statement, but as Professor LaFaver  
14 pointed out, King's Bench incorporates a whole  
15 range of power that are set out mainly in  
16 English statutes and Blackstone's commentaries.

17 I will say that I have a basic problem  
18 with any procedural provision, whether it be by  
19 statute or by rule which of itself requires a  
20 lot of legal research in order to understand it  
21 and apply it. The whole notion of modern  
22 procedural provision is that somebody should be  
23 able to look up the rule or look up the statute,  
24 know what it means and know how to apply it  
25 without having to do a lot of case law research.

1                   If we are talking generically about  
2 the concept of the King's Bench and King's Bench  
3 powers, that certainly includes the  
4 extraordinary jurisdiction, plenary jurisdiction  
5 which appears I believe in Section 726 of Title  
6 42. But, it might include other provisions such  
7 as the provisions to grant writs of mandamus or  
8 prohibition.

9                   A procedure which has been used in  
10 Pennsylvania in appropriate cases and a  
11 provision which exists by virtue of other -- a  
12 power that exists by virtue of other provisions  
13 of the Judicial Code that grant that original  
14 jurisdiction to the Supreme Court, as well as in  
15 certain cases to the Commonwealth and Superior  
16 Courts.

17                   If we use King's Bench as legislative  
18 language--we've got to have it in the  
19 Constitution--but use those 2 words precisely as  
20 legislative language, I don't think we know what  
21 it means.

22                   REPRESENTATIVE MANDERINO: That's why  
23 I was asking you because I wasn't sure what it  
24 meant.

25                   MR. BYER: Right. I could research

1 and provide copies of it to the committee, but  
2 I'm not sure as it existed on May 22, 1722 which  
3 is language in Section 502 of Judicial Code  
4 which is addressed by repeal in House Bill 838.  
5 I think I would repeal that language that's used  
6 in Section 502, but I would not have a -- and I  
7 would repeal Section 726 if that's what the  
8 General Assembly wants to do. I don't have a  
9 strong position on that, whether it's a good  
10 thing or a bad thing. I don't think it matters  
11 much, frankly, to most lawyers and litigants in  
12 this state.

13 But, if that's what you want to do,  
14 then I would do that by having specific  
15 repealers. I would not then have a generic  
16 provision that said, the Court shall not have  
17 King's Bench power, because I don't think anyone  
18 knows what that means precisely. You might be  
19 creating ambiguities that were unintended if  
20 somebody wants to go back and look at English  
21 law.

22 REPRESENTATIVE MANDERINO: Your points  
23 about, at least to the Supreme Court being --  
24 arguing and conference at the seat of  
25 government. So then your recommendation is that

1 they don't kind of travel in circuit?

2 MR. BYER: Well, I think -- Yes, that  
3 would be my recommendation that they not travel  
4 the circuit. I would see nothing wrong with  
5 them continuing to maintain home offices so that  
6 somebody who is on the Supreme Court would not  
7 by virtue of that fact have to uproot the whole  
8 family and move to Harrisburg, unless that's  
9 what they wanted to do. I don't think anybody  
10 would discourage them from doing that, but I  
11 think that realities are such that I don't know  
12 that all of the Supreme Court justices would  
13 want to move here permanently if they are not  
14 from Harrisburg to begin with.

15 REPRESENTATIVE MANDERINO: You didn't  
16 specifically address the 2 intermediate  
17 appellate level courts. Do you have an opinion  
18 one way or another with regard to the circuit  
19 they tend not to sit en banc, but in panels more  
20 often than not?

21 MR. BYER: Because they sit in panels,  
22 the collective decision making doesn't require  
23 the whole court to be in the same place at the  
24 same time. You're just having conferences among  
25 3 judges on cases, some of which are of



1 sufficient significance because they do get to  
2 the Supreme Court eventually, but for the most  
3 part they aren't of that type of presidential  
4 significance.

5 I don't think that the collective  
6 decision making in those cases is enhanced  
7 sufficiently by requiring that those conferences  
8 and arguments all take place in Harrisburg.  
9 There I think the Court should have flexibility  
10 to sit in Pittsburgh, Harrisburg, Philadelphia,  
11 and anywhere else that might be appropriate as  
12 there are enough cases to warrant. But, I think  
13 there should be flexibility.

14 In criminal cases, for example, let's  
15 say you have a 3-day session of the Superior  
16 Court and those cases are all going to be heard  
17 in Harrisburg. Well, every county with more  
18 than one case is going to have to probably send  
19 both a public defender and a district attorney  
20 to Harrisburg for 3 days of time. That can  
21 start running into some taxpayers' expense.

22 Having the arguments in Philadelphia,  
23 Harrisburg and Pittsburgh sometimes will require  
24 overnight stays, but more often I think the  
25 theory is that they can come down for the day

1 and go back home. It doesn't seem to involve as  
2 much expense on the part of local taxpayers.  
3 There is an expense in moving the judges around  
4 the state, granted.

5 REPRESENTATIVE MANDERINO: My final  
6 question, when you were talking about the  
7 Judicial Council and you referred to some of the  
8 Beck, Pomeroy and American Judicature reports --  
9 By the way, I don't know about others, but I  
10 have personally seen the Beck and Pomeroy, so I  
11 would love to see a copy of the American  
12 Judicature report; talked about it in the  
13 capacity as an advisory body; not a governing  
14 authority, but then you went on to recommend  
15 from your experience why you think the governing  
16 authority makes sense. I guess I kind of  
17 understood by your examples some of the ways you  
18 were distinguishing between the 2 of those, but  
19 if you could expound on that to me, that would  
20 helpful.

21 MR. BYER: All 3 reports in talking  
22 about the Judicial Council as an advisory group,  
23 we are doing so in the context of the State  
24 Constitution which it does, as currently  
25 written, place the governing authority,

5

1 administrative responsibility in the hands of  
2 the Supreme Court; that is to say, all 7  
3 justices.

4 I think that if the judicial council  
5 were to be made the governing authority, it  
6 would relieve the individual justices, with the  
7 exception of the Chief Justice, of what has to  
8 be a burdensome responsibility of administering  
9 the court system.

10 I have to assume that people are on  
11 the Supreme Court because they are primarily  
12 interested in deciding cases of presidential  
13 significance in developing the law. And to  
14 throw an administrative responsibility on top of  
15 that, to me would make the Supreme Court  
16 somewhat a less attractive place to be. The  
17 justices do that job and right now they have to  
18 do it.

19 I think that a lot could be said in  
20 favor of making the judicial council the  
21 administrator. The Supreme Court justices could  
22 concentrate on deciding cases, the judicial  
23 responsibility, and the council with the chief  
24 actually administering the system where the  
25 council consist of members from all levels of

1 the unified judicial system.

2 REPRESENTATIVE MANDERINO: We have  
3 now, and I'm sure you know better than I do how  
4 it works, but we have now an administrative  
5 office of Pennsylvania Courts that deals with  
6 all 3 appellate courts, correct?

7 MR. BYER: Yes, as well as the state  
8 trial courts and the minor judiciary.

9 REPRESENTATIVE MANDERINO: I'm sitting  
10 here thinking, I know when I talk to a president  
11 judge of a trial in a county, at the trial court  
12 level, they very much see and understand their  
13 dual roles as both a judge and an administrator,  
14 I guess.

15 MR. BYER: Yes.

16 REPRESENTATIVE MANDERINO: And they  
17 have an administrative support function I'm sure  
18 within every county. I thought that's what our  
19 AOPC does here. I guess my question is, the  
20 example you gave was, a judge having to decide  
21 whether a secretary gets a raise. Couldn't that  
22 all just, even under the current system, be  
23 delegated to an administrative function within  
24 AOPC?

25 MR. BYER: It probably could, but I

1 think members of the Court might be concerned  
2 that they are delegating responsi- bilities  
3 which the Constitution places on them. I can't  
4 speak for the Court as to what theory is, but I  
5 would think that it would make sense for AOPC to  
6 do that and I would think that under a Judicial  
7 Council system AOPC would have that  
8 responsibility.

9 We talked about the federal model for  
10 statutes. There also is a federal model here  
11 where there are provisions of 28 United States  
12 code that establish the administrative office of  
13 the United States Courts, the Judicial  
14 Conference of the United States, individual  
15 circuit judicial councils which I don't think we  
16 would need that analogy in Pennsylvania, but  
17 also the judicial center of the United States  
18 which would be analogous to the Pennsylvania  
19 Judicial Center. I think it might be worthwhile  
20 for the committee to study those provisions to  
21 see if there are ideas in them which might be  
22 adopted into Pennsylvania law as well.

23 REPRESENTATIVE MANDERINO: Thank you.  
24 Thank you, Mr. Chairman.

25 CHAIRMAN PICCOLA: Representative

1 Masland.

2 REPRESENTATIVE MASLAND: Thank you,  
3 Mr. Chairman. I just want to thank Judge Byer  
4 and all our witnesses so far and apologize  
5 because I'm going to a satellite office that I  
6 have in Newville, but I do want you to know that  
7 the collegial atmosphere here today has been  
8 beneficial to me. I appreciate the opportunity  
9 to come to Harrisburg. Thank you, Mr. Chairman.

10 CHAIRMAN PICCOLA: Further questions  
11 from the committee or staff?

12 ( No response )

13 CHAIRMAN PICCOLA: Thank you, Rob. We  
14 really appreciate your availability today. I'm  
15 sure you will be available as we wrestle with  
16 these issues down the road.

17 MR. BYER: I would be happy to help in  
18 any way I can. I appreciate the opportunity to  
19 be here.

20 CHAIRMAN PICCOLA: The last witness  
21 this morning is Professor Bruce S. Ledewitz of  
22 Duquesne University School of Law.

23 MR. LEDEWITZ: Good morning. I'd like  
24 to thank the Judiciary Committee of the House of  
25 representatives for the opportunity to address

1 the committee on the subject of judicial reform  
2 and House Bills 10 and 838. I will not attempt  
3 in these remarks to cite instances of all the  
4 different ways in which the Pennsylvania Supreme  
5 Court has failed in recent years to live up to  
6 its constitutional responsibilities. Members  
7 who wish to review that record can find much of  
8 it set forth in the spring issue of the 1994  
9 Duquesne Law Review--an article that represents  
10 a lot of the work that I have been doing in  
11 state constitutional law in Pennsylvania.

12 I would like, instead, to give an  
13 overview of what I believe needs to be fixed and  
14 how to do it. I must clarify and say, of  
15 course, that I represent no one's views but my  
16 own based upon a significant study I have done  
17 over a number of years on the subject of the  
18 courts of Pennsylvania under the state  
19 constitution.

20 I will only discuss matters that are  
21 addressed in the House Bill with one exception,  
22 and I will exclude judicial selection which is  
23 not on the table for the moment.

24 The overall goal of judicial reform  
25 should be to remove the Court from politics and

1 policy making, and to return it to the primary  
2 job of the highest court of any judicial system,  
3 deciding actual cases involving the fundamental  
4 rights of the citizenry. This means that all of  
5 the court's extra-judicial powers, rule making,  
6 administration and appointment should be  
7 eliminated from the Constitution. The  
8 legislature would then be free to restore any  
9 such powers as proved convenient as a matter of  
10 statutory enactment.

11           These extra-judicial powers have been  
12 repeatedly abused by the Court. Under the rule  
13 making and administrative powers, and sometimes  
14 called the supervisory power, the Court has, for  
15 example, invalidated laws subjecting the  
16 judicial branch to the Open Meeting Law,  
17 subjecting the judicial branch to the State  
18 Ethics Act, subjecting the judicial branch to  
19 limits on partisan political activity, and  
20 prohibiting attorneys from entering into fee  
21 arrangements with hospital patients.

22           In 1990 the Court set aside a law, 42  
23 Pa. C.S. Section 8355, without argument, without  
24 opportunity for brief, without even a pending  
25 case, which law provided for civil penalties for



1 frivolous lawsuits and Pleadings.

2 Nor has the Court always acted to  
3 protect the bar under these extra-judicial  
4 powers. The Court has also created by fiat a  
5 burdensome, expensive and unnecessary continuing  
6 legal education program for the bar and not for  
7 itself.

8 Whatever one thinks of the policies  
9 behind these laws, they were all matters that  
10 should have been left to the people of  
11 Pennsylvania, acting through their elected  
12 representatives after open debate and  
13 discussion. They should not have been decided  
14 by 7 men in secret.

15 House Bills 10 and 838 limit the  
16 Court's constitutional powers over rule making  
17 and administration by the creation of a judicial  
18 council. A simpler solution would be to amend  
19 Article 5 of the Constitution to remove most or  
20 all of Section 10. Language could then be  
21 inserted that the Court shall have such  
22 administrative and rule-making authority as  
23 shall be provided by law. If that were done, a  
24 number of different statutory mechanisms could  
25 be created: A Judicial Council if warranted,

1 or, perhaps, a federal model of judicial  
2 recommendation of rules to the legislature.

3 I myself would hesitate to create any  
4 new constitutional body such as a council. Here  
5 if I may say, I think there's potential for  
6 future problems down the road as that council  
7 then, perhaps, acts in ways that the people of  
8 Pennsylvania would prefer not to see. The  
9 ultimate constitutional authority over the  
10 courts should be retained in the people of  
11 Pennsylvania through the legislature.

12 In terms of the court's remedial  
13 powers, the pending House Bills eliminate the  
14 so-called King's Bench power. Since the  
15 legislature now controls the Court's  
16 jurisdiction, a constitutional amendment should  
17 not have been necessary. Unfortunately, there  
18 is judicial language suggesting that the King's  
19 Bench power is inherent in the Court.  
20 Therefore, a constitutional amendment of the  
21 sort proposed may be needed. In order not to  
22 interfere with plenary jurisdiction or future  
23 legislation of extraordinary jurisdiction, any  
24 constitutional amendment on the King's Bench  
25 power should add the words, except as authorized

1 by law.

2 I would like to address one topic that  
3 I think is an important part of judicial reform,  
4 but it's not a part of the 2 pending House  
5 Bills.

6 The House Bills do not address the  
7 Court's appointment, so-called, of Justice Frank  
8 Montemuro in December 1993 to continue as a  
9 justice on the Pennsylvania Supreme Court. This  
10 claimed power to appoint a justice to their own  
11 court is unprecedented and unlawful. I have  
12 attached to my testimony a short article from  
13 the Philadelphia Inquirer in which this action  
14 is criticized.

15 I must say, it is enormously revealing  
16 that in the middle of the Justice Larsen debacle  
17 the Court would act in this way. I think it  
18 demonstrates that the court, the justices have  
19 learned nothing from the Larsen case. I also  
20 think that it's remarkable that they would then  
21 appoint Justice Montemuro as one of the heads of  
22 their committees on court reform.

23 I do not cast any aspersions on  
24 Justice Montemuro in the slightest as Justice  
25 Castille accused me of doing in his response to

1 my article in the Philadelphia Inquirer. This  
2 is an institutional issue and it is much more  
3 the fault of the sitting justices than it is of  
4 Justice Montemuro whose only action in this  
5 regard has been to accept a legal appointment.

6 The justices do not claim that the  
7 Constitution or statutes of Pennsylvania  
8 actually authorize this appointment power. They  
9 claim only that they have the power to appoint  
10 senior judges to court and that nothing forbids  
11 them from appointing a justice to their own  
12 court as well.

13 Indeed, the logic of this position  
14 would allow the justices to appoint several new  
15 justices to the Court, as the justices  
16 acknowledged in case of Commonwealth versus  
17 Wetton. The opinion simply stated that as a  
18 matter of prudence, that was the word that was  
19 used; not as a matter of power, not as a matter  
20 of limited law, but as a matter of prudence,  
21 the justices would only appoint one justice at a  
22 time.

23 The reason that there is not statute  
24 or constitutional provision expressly forbidding  
25 this abuse of power is that no one conceived of

1 the justices appointing justices to their own  
2 court. For example, in Sprague versus Casey, a  
3 case in which the 1988 judicial elections were  
4 cancelled, a unanimous court noted that if a  
5 gubernatorial appointee to the Court cannot  
6 serve the entire appointed term, quote, the  
7 balance of the term must remain vacant until the  
8 new term commences. Certainly, the justices did  
9 not think in 1988 that themselves could then  
10 step in where the Governor does not and simply  
11 appoint someone to the Court.

12 If I may say Justice Montemuro himself  
13 will reach the mandatory retirement age of 70 in  
14 November. I suppose by the logic of their  
15 position, they could simply continue his  
16 appointment as a senior judge/senior justice, or  
17 they could appoint someone else, or they could  
18 pick their chauffeur.

19 In that same opinion the Court said  
20 that once a vacancy occurs on the Court there is  
21 no discretion as to how the vacancy must be  
22 filled. Article V, Section 13(b) providing for  
23 appointment by the Governor must be followed.

24 There is a vacancy on the State  
25 Supreme Court right now, that of Justice Larsen,

1 but it has not be filled as the Constitution  
2 prescribes. Instead, it has been filled by  
3 unilateral action by the justices themselves.

4 Even the very rule the justices say  
5 controls this so-called appointment power, Rule  
6 701 of the Rules of Judicial Administration,  
7 provides that in every case of senior judge  
8 appointments the Court Administrator shall  
9 recommend the appointment. This procedure  
10 plainly was intended to allow for appointment to  
11 lower courts only, and is unsuitable for a power  
12 the justices claim to hold on their own.

13 Obviously, if Rule 701 had been  
14 intended to apply to appointments to the  
15 Supremem Court itself, the rule would authorize  
16 the justices to act unilaterally, and would not  
17 involve the charade that occurred twice of the  
18 justices telling the Court Administrator to  
19 submit a request for appointment to themselves.

20 If you have not, you should see the  
21 appointment for them. They had to X out the way  
22 it normally works, which is a senior judge of  
23 this district requests the Court Administrator  
24 to ask for a senior judge appointment. They had  
25 to X all that out, obviously, because there was

1 no senior judge asking for it. It must have  
2 been done by a phone call to the chief  
3 administrator asking the chief administrator to  
4 then ask them to appoint a senior judge, all  
5 that the form of Rule 701 and not in substance  
6 be followed.

7 When the justices originally wrote  
8 Rule 701 even they assumed a power of  
9 appointment only to lower courts.

10 Because the justices claim this power  
11 of appointment is premised in Article V, Section  
12 16 (c) of the Constitution, it probably will be  
13 necessary to amend Section 16 (c) to exclude  
14 appointment to the Supreme Court. In my view  
15 this should be done.

16 The House Bills in question deal also  
17 with the Court's budget and geographical  
18 location. There is a feeling that the Court  
19 will function more judicially if the justices  
20 are all located in a single geographic area.

21 Certainly, it is rumored that the  
22 Court currently operates by phone hook-up rather  
23 than by conference. No one can know, however,  
24 whether this change will improve matters. It's  
25 hard for me to imagine that putting former

1 Justice Larsen and Justice Castille and Kathy in  
2 a single room would have improved the  
3 collegiality of the Court very much.

4 I commend the committee for continuing  
5 to press legislation and amendment in the field  
6 of court reform. I do apologize for taking your  
7 time on a matter of appointment that is not  
8 addressed in the pending bills, but which I feel  
9 should be. Justice Larsen was by no means the  
10 full extent of the Court's problem. Thank you.

11 CHAIRMAN PICCOLA: Thank you,  
12 Professor. I found your testimony on the --  
13 and I had read your article in the Inquirer. I  
14 found that to be rather provocative. I suppose  
15 the totally illogical result of combining the  
16 Sprague decision with the Montemuro appointment  
17 would be a self-perpetuating Supreme Court, I  
18 guess, if you twisted the interpretations just a  
19 little bit.

20 MR. LEDEWITZ: Yes. Majority of the  
21 Court could continue appointing retired persons  
22 to the Court. Justice Papadacos, for example,  
23 could have been re-appointed, I guess, under  
24 their own senior judge appointment power to the  
25 Court.



1                   CHAIRMAN PICCOLA: There is a vacancy  
2 on the Court now. Judge Papadakos' seat is  
3 vacant.

4                   MR. LEDEWITZ: Yes, that's right.  
5 Justice Larsen's seat is vacant too, of course,  
6 as a matter of law.

7                   CHAIRMAN PICCOLA: Right. They have  
8 acted to fill it with Justice Montemuro. They  
9 have not taken any action on the Papadakos  
10 thing.

11                   MR. LEDEWITZ: No, and I don't mean to  
12 suggest that they would reappoint Justice  
13 Papadakos. Only by the logic of the  
14 Commonwealth versus Wetton, they could now  
15 reappoint Justice Papadakos to the seat he was  
16 forced to retire from because of turning age 70.

17                   CHAIRMAN PICCOLA: I believe from my  
18 recollection of Judge Byer's testimony, you and  
19 he differ on the need to incorporate the repeal  
20 of King's Bench authority in the Constitution.  
21 I think he said that he didn't think that it was  
22 necessary. You do.

23                   MR. LEDEWITZ: Well, yes, there is --  
24 Justice Roberts, obviously, one of the finest  
25 justices whoever sat on our Court. Justice

1 Roberts was influenced by Judge Vanderbilt of  
2 the New Jersey Supreme Court. He felt that some  
3 of the remedial powers of the Court were  
4 inherent, and he said so in a concurrence after  
5 the 1968 judicial amendments were passed.

6 So, if you want to get rid of this  
7 power, Mr. Byer was suggesting, I think, that  
8 you may not want to mention the words King's  
9 Bench and that may be prudent. But whatever you  
10 do, you may have to amend the Constitution and  
11 not rely on the legislature's jurisdictional  
12 powers because you don't know what this Court  
13 will say about their inherent power.

14 CHAIRMAN PICCOLA: What about Judge  
15 Spaeth's suggestion that we repeal it through  
16 constitutional means, but allow some language,  
17 and I forget what exactly his testimony was, but  
18 we allow some language to permit the General  
19 Assembly, the legislature, to give the Court  
20 certain parts of what is under the umbrage of  
21 King's Bench at some later date by statute? Do  
22 you have any problem on that?

23 MR. LEDEWITZ: I do address that in my  
24 written comments. I think that that would be  
25 easily accomplished and would be a very good

1           idea.  Something like, except as authorized by  
2           law; language similar to the language that now  
3           controls the powers of the Attorney General, for  
4           example, in the State Constitution.

5                   CHAIRMAN PICCOLA:  Questions from  
6           members of the committee?

7                   ( No response )

8                   CHAIRMAN PICCOLA:  Staff?

9                   ( No response )

10                   CHAIRMAN PICCOLA:  Thank you very  
11           much, Professor.  I read your law review  
12           article.  In fact, I began reading it during the  
13           course of the Larsen trial last summer and was  
14           very enlightening and very helpful.

15                   MR. LEDEWITZ:  Thank you very much.

16                   CHAIRMAN PICCOLA:  The committee will  
17           reconvene in this room at 1:15.  Committee  
18           stands in recess.

19                   ( At or about 12 noon, short recess  
20           was taken for lunch; hearing resumed at or about  
21           1:20 )

22                   REPRESENTATIVE MANDERINO:  Ladies and  
23           Gentlemen, we are going to proceed with the  
24           hearing.  For those who weren't here when we  
25           dismissed prior to lunch, Chairman Piccola had a

1 prior commitment that he could not rearrange.  
2 He asked me if I would take the Chair for him  
3 while we continue. I assume that we may have  
4 additional members coming in and out, but I  
5 would like to get started. Mr. Nast, are you  
6 ready?

7 I'm sorry. For those who don't know  
8 me, I'm State Representative Kathy Manderino.

9 MR. NAST: Representative Manderino,  
10 Ms. Dalton. I would ask that my remarks be put  
11 in the record in the usual way. I am going to  
12 use it as an outline to present my testimony,  
13 but not read it. I am honored to have been  
14 asked for my views on this subject which I have  
15 great concern about for many, many years.

16 My viewpoint is that of a lawyer who  
17 applauded the 1968 Constitutional Convention's  
18 significant changes that led to the revised  
19 Article V of the Pennsylvania Constitution. I  
20 recall, and I'm sure no one in this room  
21 remembers the 10 separate and independent Courts  
22 of Common Pleas of Philadelphia, each with a  
23 president judge, their own staffs, their own  
24 court calendars where lawyers stood in line to  
25 wait until a case was clocked in so they could

1 get it before the correct independent Court of  
2 Common Pleas with its own president judge.  
3 Since no one remembers that, but I do and it was  
4 a mess. The Article V revisions address that by  
5 putting some significantly -- well, putting all  
6 power into the Court.

7 My viewpoint is also that of a lawyer  
8 who, as a representative of the General Assembly  
9 dealt with representatives of the judiciary  
10 branch over my career as a counsel and director  
11 of the Joint State Government Commission.

12 It's true that my experience is  
13 painful when I recall that pre-1970 the  
14 judiciary system was terrible and changes had to  
15 improve the system; in fact did, but we forgot  
16 Lord Acton's admonishment that when power  
17 corrupts, an absolute power corrupts absolutely,  
18 and that's what we forgot.

19 The arrogance of the Supreme Court's  
20 dealings with the legislature exemplified by  
21 some examples that I set forth there, such as  
22 the opinion letter declaring a provision of  
23 Judiciary Code unconstitutional on separation of  
24 power grounds without there ever being a case  
25 started or proceeding brought, or argued or

1           briefed, or anything else.

2                   The infamous County of Allegheny case,  
3           which I would suggest as an aside be added to  
4           the matters for consideration for the reform  
5           amendment; that it should be reiterated in the  
6           Constitution that the appropriation power and  
7           the taxing power is exclusively the General  
8           Assembly's, and that a Court cannot dictate  
9           where the source of funds should come from, but  
10          rather that is sole prerogative of the  
11          legislature. That could be added to the things  
12          that should be addressed by the constitutional  
13          amendment.

14                   Early on it treated constables in a  
15          very heavy-handed manner, taking away their  
16          powers; the Constitutional interpretations of  
17          the State Retirement system which led to money  
18          being placed directly in the hands of the judges  
19          who interpreted the retirement system to be  
20          unconstitutional which, without reference to the  
21          factual situation underlying it. Secret  
22          unaccountable expense accounts, its amazing  
23          disregard, as I put it, a common decency and  
24          civility towards the bar and litigants has been  
25          detailed elsewhere in Professor Ledewitz's

1 excellent article, "What's Really Wrong with the  
2 Supreme Court of Pennsylvania".

3 Let me say -- I read over the lunch  
4 hour of a person -- of a critic that said he had  
5 more spleen than scholarship. I don't want the  
6 committee to think that's necessarily my  
7 situation. When I say common disregard of  
8 decency and civility toward the bar, let me  
9 remind you of the Blue case.

10 The Blue case when it was handed down  
11 by the Supreme Court that did away with the duty  
12 of a parent to provide college education in  
13 certain specific kinds of cases, which, I happen  
14 to applaud the result of that case. I disagree  
15 with what the General Assembly later did when it  
16 overturned it. So, I'm not unhappy with the  
17 result of the case, but if you read the opinion,  
18 it was total arrogance. It said to the lawyers  
19 of Pennsylvania, there is no right of  
20 educational support under any circumstances.  
21 There has never been such a right.

22 Every lawyer in Pennsylvania that  
23 practiced domestic relation law up until the day  
24 the Blue case came down would have said yes,  
25 there is a right for a parent. There was a

1 series of cases going back to Judge Woodside's  
2 1963 case. There was Supreme Court cases.  
3 There were Superior Court cases--a long line of  
4 clear indication that there was such an  
5 obligation.

6 The Court didn't come down and just  
7 say, unconstitutional base or some others we  
8 reverse the law. It said it had never been the  
9 law. It made every lawyer that had practiced in  
10 that field potentially subject to malpractice,  
11 which is absolutely absurd. But, it was the  
12 kind of way that the Court approaches these  
13 problems.

14 When we strengthen the Court to deal  
15 with the problems in 1968 and '70, we created a  
16 monster. That monster has led to serious  
17 accusations of personal corruption against more  
18 than one member of the Court. But, a reference  
19 in last week's National Law Journal referred to  
20 another matter dealing with a present member of  
21 the Court in that area.

22 But note, the examples that I'm  
23 recalling to you are not personal corruption  
24 matters. They are not the large kind of thing.  
25 They're institutional problems. How do you deal



1 with institutional corruption? You eliminate  
2 the absolute power, institutional power.

3 I was here this morning and heard the  
4 testimony of the others. Constant references to  
5 the fact that House Bill 10 disrupts  
6 constitutional separation of power. I want to  
7 address that point.

8 First of all, that doctrine is not  
9 found in the Pennsylvania Constitution  
10 explicitly. Judge Woodside in his book on page  
11 25 refers to the fact that since there are  
12 separate articles for each of the departments,  
13 therefore, you can deduce from that that there  
14 is separation of power. Of course, that's a  
15 similar kind of argument that's been used with  
16 the United States Constitution.

17 If you look at the United States  
18 Constitution, nowhere does it say there's a  
19 separation of power. It's an implicit doctrine.  
20 It really comes from extrajudicial writing such  
21 as Montesquieu's "Spirit of the Laws", and  
22 Lockean theory, and other philosophers, mostly  
23 Scottish philosophers of the 18th Century.

24 The fact is the only source of  
25 governmental power -- all of its source of

1 governmental power in our state and in our  
2 country is the people. They exercise that power  
3 by adopting state and federal constitutions  
4 which can create departments of government, and  
5 they can divide the powers any way the people  
6 choose to see fit to do so when they adopt the  
7 constitutional amendment.

8 In short, the effect of constitutional  
9 change upon separation of power in the  
10 Commonwealth must be argued upon the grounds  
11 that the amendments are necessary to redress a  
12 particular problem, and that their benefits are  
13 not outweighed by some cost to the independent  
14 judiciary. I don't think any of us wants to  
15 make the Judiciary less independent when it  
16 comes to the function of deciding cases of  
17 controversies before it. I don't think these  
18 amendments do that; whether they are good  
19 amendments or bad amendments should be judged on  
20 their merits and not on some, just throwing out  
21 some -- say, well, this is a violation of  
22 separation of powers. The arguments must be on  
23 the merits of the proposals themselves.

24 In other words implicit constitutional  
25 doctrine cannot be used to defeat a proposed

1 constitutional change, because otherwise you can  
2 never change the Constitution.

3 The other element issue is, of course,  
4 governmental power. While there are 3 separate  
5 and equal departments, the government is sort of  
6 like Orwell's animal farm. They are equal, but  
7 there's one that is more equal than the other;  
8 and the one that is more equal than the other,  
9 of course, is the legislative powers and it's  
10 always been; going back to Magna Carta and King  
11 John, and so on, when the power was wrestled  
12 from the king.

13 So, if there is a place for absolute  
14 power, absolute power must reside in the General  
15 Assembly. Of course, the people ultimately  
16 retain the supreme power by voting out of office  
17 legislators who are perceived as violating the  
18 limits of their power. I chuckle because I  
19 guess we all thought that was academic last  
20 November when, apparently, the people did speak  
21 for whatever reasons; and clearly by targeting  
22 certain people, such as I think of Speaker Foley  
23 indicated that there were limits on legislative  
24 power that people weren't going to overlook.

25 As to the specific provisions in House

1 Bill 10, the proposed constitutional amendment,  
2 3 of those specific matters are dealing with  
3 administrative duties or structural matters and  
4 not decision powers over litigation.

5 Regarding the Judicial Council, I  
6 suggest one change you might want -- One of the  
7 problems I have with the way the Judicial  
8 Council is set forth in the amendments is, I  
9 think the committee has to decide whether the  
10 judicial council is to be only an advisory  
11 committee, as it is in apparently 30 some states  
12 where, and most of which those Judicial Councils  
13 are relatively inactive and not funded; or,  
14 whether it is to be the supreme body.

15 Then if it is to be the ultimate  
16 governing body, governing authority is the  
17 language. If it is to be the one to write the  
18 rules, or whatever, then it should be given the  
19 authority to do that directly and not by  
20 requiring a recommendation of the Supreme Court  
21 and go through some charade where the Supreme  
22 Court would still have to do something.

23 I would suggest that the Judicial  
24 Council probably should be the governing  
25 authority that probably should go over the

1 Supreme Court. The Supreme Court should on  
2 decisional matters, of course, retain all  
3 independence, but on administrative, any kind of  
4 administrative matters the Judicial Council  
5 should have precedent and should not even  
6 involve the Supreme Court in any way, to issue  
7 the rules directly or whatever.

8 I would note that the -- I got a  
9 little bit out of order, but I do have a  
10 reference on page 4, second to last sentence  
11 about the King's Bench power. I think there's a  
12 problem in Section 1, it's scheduled to Article  
13 V, that should be addressed to make sure that  
14 the King's Bench power could be modified by the  
15 General Assembly.

16 As to the power of Supreme Court to  
17 suspend laws, Judge Byer and Judge Spaeth and  
18 others refer to the federal model. We don't  
19 have to look that far away. I'm suspicious of  
20 any federal model. The federal model is  
21 probably bad. But, the Pennsylvania Supreme  
22 Court's, the model that governed the Court until  
23 1970 was set out in 1937 Pennsylvania statute  
24 where it authorized the Court to set up rules  
25 committees, and the Rule Committee could refer

1 the matter to the legislature and the  
2 legislature could act on it. We don't have to  
3 look at the federal model. We can just look at  
4 the Pennsylvania model before 1970, and there  
5 was no reason at all that that provision should  
6 have ever gotten into the Constitution. It  
7 allowed the Court to just come along and suspend  
8 statutes because, of course, the problem with  
9 that is, there's no appeal from the Supreme  
10 Court short of a constitutional amendment,  
11 which, of course, you are dealing with here. I  
12 agree that the power to suspend laws has to go.

13 Now, that's not to say that you can't  
14 have a relationship between the Court and the  
15 legislature where the Court could recommend like  
16 the federal model, if you will, or pre-'70  
17 Pennsylvania model where the Court could put in  
18 place temporarily and the legislature could  
19 respond, where the legislature could approve.  
20 There's all sorts of ways that could be handled.

21 Separation of power concept doesn't  
22 preclude the departments from cooperating to  
23 address common concerns; at least not the way I  
24 see it.

25 As for the selection of the Chief

1 Justice, I would suggest that the way it's  
2 written there's no term at all. The only term I  
3 suppose is the 10-year term of the person who  
4 would be appointed until his term ran out.  
5 There would be -- It wouldn't be theirs so he  
6 wouldn't be Chief Justice, presumably, but we  
7 don't know that because we have the Montemuro  
8 example that Professor Ledewitz pointed out this  
9 morning.

10 I guess he or she should have a term.  
11 I don't think that every new Governor should  
12 automatically be allowed to pick a new Chief  
13 Justice. I think that would get into the Court  
14 even further into the political thicket than it  
15 already is. Obviously, the corollary problem  
16 here is, how do you do it with the merit system?  
17 If you do it with the merit system, you may want  
18 a different way of selecting a Chief Justice.  
19 That was a point made by several people this  
20 morning.

21 There are some matters regarding the  
22 financial, budgetary and auditing affairs.  
23 There's a reference to a separate appropriations  
24 bill page 5, line 25. I would take that out  
25 because I think the wisdom of a general

1 appropriation bill for all parts of government  
2 in one bill, one place, one time has a lot of  
3 merit. I would not have even a suggestion that  
4 the Courts could be funded somehow in a separate  
5 bill.

6 Out of order when I did this, came up  
7 in one place, the Judicial Council -- I think  
8 you would have to put the composition of the  
9 council into the Constitution, or you have to  
10 specifically authorize in the Constitution the  
11 legislature to determine the composition of the  
12 Judicial Council.

13 There was some question this morning  
14 raised by some -- the Trial Lawyers Association,  
15 Mr. Ronca specifically, that there's an  
16 impermissible penetration of executive power  
17 into the Judicial Council if the Governor can  
18 appoint the Chief Justice, who then can appoint  
19 the members of the council, who can then appoint  
20 the Court Administrator and ends up with 8 or 9  
21 members of the 13 members coming in this sort of  
22 one-stream of authority.

23 I don't have the problem that Mr.  
24 Ronca had. I think it was overstated, but I  
25 think what he's suggesting is that you don't



1 want to make it easy for either the Governor or  
2 maybe even the legislature, under certain  
3 circumstances, to change the composition of the  
4 council without going through some kind of a  
5 process there, so that you don't have a council  
6 that meets fearful of whether or not the members  
7 are going to still be members of the council if  
8 they take a particular action, anti-Governor  
9 action, anti-legislation action, anti-whatever.  
10 I think there has to be some independence built  
11 into that group; maybe by making them appointees  
12 of their courts in the case of intermediate  
13 courts or the Common Pleas Courts of  
14 Philadelphia, Allegheny.

15 Back to the abolishing of the King's  
16 Bench powers, I think the cases that  
17 Representative Piccola discussed this morning  
18 were egregious and did to the point that they do  
19 direct our attention to this problem. I think  
20 it is a serious problem. I'm not particularly  
21 concerned about the problems as a conceptual  
22 matter, but I do not agree with Judge Byer when  
23 he said it's only statutory and, therefore, you  
24 only have to do it in the statute.

25 The problem is, as Professor Ledewitz

1 pointed out, there's some language from Justice  
2 Roberts' current opinion. There's some other  
3 language, I believe, where the Court says, oh,  
4 this is inherent somehow in the Court. Even if  
5 you did it by statute, we somehow inherently can  
6 exercise it anyway.

7 If you think that that's far-fetched,  
8 remember County of Allegheny again, where they  
9 said essentially the opinion said, well, there's  
10 a unified judicial system; see, the Constitution  
11 says it is. Unified judicial system should be  
12 funded by the Commonwealth. Since it is a  
13 unified judicial system, it should be funded by  
14 the Commonwealth. That's nonsense, but that's  
15 what the opinion said.

16 Why can't you say it's an inherent  
17 power. Therefore, even if you abolish it, it's  
18 inherent power. You can't abolish an inherent  
19 power anyway. So, I think it has to be done in  
20 the Constitution. I don't agree with Judge Byer  
21 on that.

22 I might agree with Jon LaFaver and  
23 Judge Spaeth that you might want to look at  
24 specific powers and itemize them, and I  
25 certainly agree with all of them that you retain

1 the authority ultimately to put back, or further  
2 restrict or expand, or whatever, in the future  
3 any powers of the Supreme Court. The  
4 jurisdiction of the Supreme Court should be set  
5 by the legislature and be able to be changed by  
6 the legislature, as Congress can change the  
7 jurisdiction of the United States Supreme Court  
8 anytime it wants to. Then it's a political  
9 matter as to whether it's an advisable thing to  
10 do.

11 I already mentioned the problem with  
12 the Chief Justice picking 8 out of the 12 and  
13 then the 12 selecting the Court Administrator,  
14 13. I guess my question is, does this place  
15 absolute power in the Chief Justice domain?  
16 Maybe, and is that bad? Maybe. And maybe there  
17 ought to be some thought to that.

18 By the way, there's no provision for  
19 removing the Chief Justice other than the  
20 general provisions that deal with the removal of  
21 justices which you should know is pretty  
22 difficult, expensive and time-consuming problem.  
23 There ought to be some thought given to that.

24 I would give the Judicial Council  
25 specific authority to recommend to the

1 legislature bills to address areas of  
2 administration, structure, governing, financing,  
3 whatever; that the Court want to bring to  
4 attention. There's no reason that the Court  
5 should not be able to suggest those kinds of  
6 things not as specific decisions in specific  
7 cases, obviously, but to the government,  
8 structure, finance, administration, rules for  
9 the minor judiciary, procedural, things like  
10 that.

11 As a resident of Dauphin County and a  
12 member of its Bar Association, I applaud the  
13 proposal to establish as the seat of the Court,  
14 the seat of government in Harrisburg. I think I  
15 would agree with giving the Superior Court some  
16 flexibility as to being able to sit in panels.  
17 Supreme Court having decided it should sit in  
18 panels, it really seems to me that there's no  
19 reason that the panels should be required to sit  
20 here.

21 I'm not as familiar with the  
22 Commonwealth Courts. Certainly any trial that  
23 they might have might be more appropriate in  
24 another place. I don't know whether they sit  
25 here -- I guess the panel sits in Philadelphia

1 and Pittsburgh. I don't know. I haven't  
2 thought that through. I sort of like the  
3 Commonwealth Court being here all the time or  
4 almost all the time, but I can see there might  
5 be an exception for the Superior Court; a little  
6 flexibility for the Superior Court.

7 I absolutely do not agree, with all  
8 due respect to Judge Byers, that you should  
9 allow the justices to have home chambers in  
10 their area. I mean, if you don't force the  
11 Court to work at the seat of the government the  
12 judges won't. Their clerks, their secretaries,  
13 their luncheon companions will be at home in  
14 Philadelphia, at home in Pittsburgh, at home  
15 wherever, and that's where the justice will be;  
16 where the clerks are, the secretaries are and  
17 the luncheon companion are. If you don't force  
18 them to come here and work, they won't be here.  
19 I just don't agree with Judge Byers on that at  
20 all.

21 I am pleased that Section 1703 has  
22 been revised. That's the Sunshine provision  
23 which I wrote in 1978, which the Court  
24 ceremoniously dumped my unsolicited opinion. I  
25 see that you revived it, and that pleases me.

1 I would recommend that Section 12, the  
2 effective date, be given a little more thought.  
3 I don't think it should be a subject matter  
4 specific because there may be amendments to  
5 constitutional proposal as it goes through the  
6 legislature. You wouldn't want some glitch to  
7 occur where you got a constitutional change and  
8 the bill wasn't completely implemented because  
9 of the language there. I think there is some  
10 language available that you could use.

11 Finally, I congratulate the bipartisan  
12 sponsorship for these proposals for bringing  
13 forth them, because they are provocative. I  
14 think they're necessary. I think now is the  
15 time to do it. They address serious issues that  
16 have been long simmering on the judicial stove;  
17 and to use my metaphor, to prevent a boilover  
18 maybe by proceeding with thoughtful,  
19 deliberative legislative action now.

20 Any questions I'll try to answer them.

21 CHAIRMAN PICCOLA: Thank you, Mr.  
22 Nast. I apologize for my tardiness, and thank  
23 you, Representative Manderino, for presiding in  
24 my absence. I'd like to recognize  
25 Representative Lisa Boscola who has joined us.

1 She's a freshman member of the House and a new  
2 member of our committee. We welcome having her.

3 I don't have any specific questions of  
4 Mr. Nast. Since he's a constituent I know  
5 exactly where I can get a hold of him if I do  
6 have a question. Do other members of the  
7 committee have questions? Representative  
8 Manderino.

9 REPRESENTATIVE MANDERINO: Thank you,  
10 Mr. Chairman. Mr. Nast, when you were talking  
11 about the Blue case by way of an example, the  
12 arrogance of the Court, I guess you kind of lost  
13 me, if that's the right way to say it there,  
14 because it seems to me that these 2 bills, 10  
15 and 838 -- Let me start all over again.

16 The Blue issue was a substantive issue  
17 in the terms of where the Court was or wasn't  
18 coming from and whether their opinion was  
19 reasoned or not well-reasoned. I would rather  
20 put that aside and say, you obviously have some  
21 other viewings of the Court that you think these  
22 bills which are dealing more with procedural or  
23 how the courts are organized and managed as  
24 compared to their substance and opinion writing  
25 is made. I guess I'm trying to distinguish

1           between the 2 and say, go back to where you  
2           started with the power given to them in the 1968  
3           Convention in Article V and tell me why you  
4           think that didn't work, which you obviously  
5           don't think it did, as compared to what was  
6           wrong with their opinions. Do you understand  
7           what I'm saying?

8                       MR. NAST: No. I only mentioned the  
9           Blue case because I don't think they have been  
10          very courteous to the Bar. I don't think they  
11          have been very courteous to litigants. I only  
12          mentioned that as a tail end. All the other  
13          ones are -- and that doesn't go to substance  
14          because I said, I happen to agree with the Blue  
15          decision as the Court pronounced it, disagree  
16          with what the legislature did with it. But the  
17          question was not what they did substantively;  
18          the question was how they did it. They did it  
19          by treating all the lawyers as having committing  
20          malpractice for 20 -- 1963 to 19 -- 30 years.  
21          That's arrogance.

22                       It's indicative of institutional  
23          arrogance; that is, the Court as a whole did  
24          that. They wrote an opinion that said it has  
25          never been the law in Pennsylvania that a parent



1 had to support a child over 18, college support.  
2 I know Mr. Piccola, if he had any of those  
3 clients, told his clients many times over that  
4 under certain circumstances, certain conditions,  
5 or whatever there was -- and the law was --

6 CHAIRMAN PICCOLA: Not only that. I  
7 don't mean to interrupt, but I took that very  
8 case to the Supreme Court from the Superior  
9 Court 3 years before and they wouldn't listen to  
10 me. They didn't hear my case.

11 MR. NAST: It's not a question of  
12 substantive procedure. It's a question of  
13 institutional arrogance. That was only an  
14 example.

15 REPRESENTATIVE MANDERINO: My question  
16 is, and I made this comment this morning during  
17 somebody else's testimony, is, we're fixing or  
18 not fixing things for the long term; not to  
19 address particular personalities on a particular  
20 court at a particular date in time, at least I  
21 hope not.

22 Given that as a framework, what I'm  
23 saying is, I mean, I don't want to over-  
24 exaggerate what you are talking about with  
25 regard to arrogance, but I'm hearing House Bill

1 10 and 838 are good ideas so that we can slap  
2 down the arrogance of the individuals that are  
3 on our Supreme Court right now.

4 MR. NAST: No, no, no, institutional.

5 REPRESENTATIVE MANDERINO: If that's  
6 not what you're saying, then my question is,  
7 what are we fixing long term that got broke when  
8 we gave them those Article V powers back in the  
9 '68 Constitution?

10 MR. NAST: What you're fixing is, the  
11 fact you did a terrible thing; that is, you gave  
12 them not only the last word which they always  
13 had anyway, but you gave the last word in  
14 Article V, Section 10 (c) to strike down  
15 statutes, which there was no basis for doing,  
16 but it was done. And it was done in the spirit  
17 of 1970 that we had to create a strong court and  
18 that they should have control over their agenda,  
19 and they are the experts in procedure so they  
20 should decide procedure; and so, they decide  
21 procedure. And then they decide that things  
22 that others stuff were substantively procedure.  
23 Then they thought -- and on and on.

24 That wasn't individual justices. That  
25 was the Courts doing, or at least it may have

1           been individual justices promoting it, but it  
2           was an institutional arrogance vis-a-vis the  
3           legislature. The Blue decision's done and over.  
4           I'm not trying to change that or any other  
5           decision.

6                         But, you have to take that away.  
7           Where do you take it way? You take it away by  
8           prohibiting them from suspending statutes. You  
9           take it away by requiring them to come to the  
10          General Assembly if they want financing and not  
11          write an opinion that says there is unified  
12          judicial system. See, the Constitution says  
13          there is, and the unified judicial system should  
14          be funded by the Commonwealth so, therefore, the  
15          Commonwealth should fund it. That's arrogance.  
16          And they should come to the legislature with  
17          their needs and present a budget and ask you for  
18          money like everyone else does, which is done in  
19          the United States, federal system which is done  
20          as far as I know in every other state. That's  
21          institutionalized. I'm not speaking to  
22          individual members of the Court.

23                         REPRESENTATIVE MANDERINO: Okay. My  
24          only other question then is, we heard a couple  
25          of folks say, in essence, the same thing that

1           you are saying about the rule-making authority.  
2           You referred to some speakers this morning using  
3           the federal system as a good model. Your remark  
4           was that, although what I hear you saying we  
5           should do, sounds like what they were saying is  
6           what's done in the federal system. Yet, you say  
7           you are suspicious of a federal model.

8                       MR. NAST: Any federal model.

9                       REPRESENTATIVE MANDERINO: Why?

10                      MR. NAST: Because --

11                      REPRESENTATIVE MANDERINO: Because  
12           before you --

13                      MR. NAST: -- they're federal models.

14                      REPRESENTATIVE MANDERINO: -- know  
15           whether to recommend that as a potential model  
16           for Pennsylvania, what are the shortcomings that  
17           you see?

18                      MR. NAST: The federal model is  
19           essentially the same as was the Pennsylvania  
20           model before 1970. Before 1970 there was an  
21           advisory committee on civil court rules by the  
22           Supreme Court. They proposed rules and they  
23           submitted them to the General Assembly and the  
24           General Assembly could act on them or let them  
25           go into effect, I think without action. I think

1 that was part of it, as the federal model.

2 Every time we have a problem we look  
3 at the field government. I think 9 times out of  
4 10 the federal government is probably doing it  
5 wrong, so we shouldn't look there. We look back  
6 to our own history. Our own history for 200  
7 years short 2 years was -- 250 years short 2  
8 years was, they didn't have the power to suspend  
9 statutes. They had to come to the legislature  
10 and change the law.

11 I was always amazed by that. I  
12 remember war stories, but I remember as in my  
13 capacity as representing the General Assembly, I  
14 would call the Court and say, could you have a  
15 judge sit on our advisory committee that's  
16 dealing with eminent domain. I don't know which  
17 one; one of them. They would say, oh, we don't  
18 want to get involved that because that puts us  
19 in the political arena and we might have to  
20 decide a case. Very good, sir.

21 Then I would be in a legislator's  
22 office and hear the Supreme Court, I know the  
23 Supreme Court justice had just called to lobby a  
24 bill. Come on. Let's call it the way it is. I  
25 mean, they're as political as anybody else when

1           it suits their necessity. Maybe they should be,  
2           but shouldn't they be out front, out in the  
3           public eye being political and not some other  
4           way. I'm not saying that we shouldn't  
5           participate because -- They should never  
6           participate in a bill, or whatever, when it  
7           involves a case that's before them, of course  
8           not. That's standard stuff.

9                         REPRESENTATIVE MANDERINO: Thank you.  
10           Thank you, Mr. Chairman.

11                        CHAIRMAN PICCOLA: Any other  
12           questions?

13                        ( No response )

14                        CHAIRMAN PICCOLA: Thank you, Mr.  
15           Nast; very illuminating. Next witness is  
16           Professor Erwin C. Surrency of the University of  
17           Georgia School of Law, presently retired, I  
18           understand, who has come up to see us from  
19           Georgia. We very much appreciate the time and  
20           effort that it took for him to be here today.

21                        MR. SURRENCY: Mr. Chairman, I'm very  
22           happy to be here this afternoon. I enjoyed the  
23           trip up and to come back to Pennsylvania. I  
24           don't come here as a Georgia rebel to tell the  
25           people in Pennsylvania how to run their courts.

1 I used to take great pleasure, Mr. Chairman, in  
2 taking my Union friends over to Gettysburg and  
3 showing them how the South won the Battle of  
4 Gettysburg. Because, you go to the cemetery  
5 over there all you see is monuments to  
6 Pennsylvania, Rhode Island or Minnesota. But,  
7 you don't see Confederate things.

8 CHAIRMAN PICCOLA: You have to go to  
9 Seminary Ridge. That's where the Confederate  
10 line is.

11 MR. SURRENCY: I have had the  
12 privilege of many years of serving on the  
13 faculty of Temple University Law School. While  
14 I was there I founded the American Journal of  
15 Legal History, participated in establishing  
16 American Society for Legal History, as well as  
17 Historical Society of United States Supreme  
18 Court. My interest has been on the  
19 institutional history of courts. I'd like to  
20 add that my wife, who is with me today, we both  
21 miss Pennsylvania. She served as a township  
22 commissioner in another province in Pennsylvania  
23 for a number of years.

24 As you can see both of us have  
25 sentimental ties to the state, and we were

1 willing to drive up and privileged to be invited  
2 to come here.

3 I must say I appear as a strong  
4 supporter of government. It seems like today  
5 everybody is knocking the government, but I feel  
6 like the government has a role to play. The  
7 courts have been a long -- has been a very  
8 interesting study for me. I realize that it  
9 takes centuries to change the courts.

10 All you have to do is look at England  
11 and look how it took centuries to get rid of the  
12 Court of Tannery (phonetic) and others which you  
13 could name which had long ceased their  
14 effectiveness. And sometimes the Court of  
15 Helertry (phonetic) which was called into  
16 session after about 300 years of neglect, about  
17 20 years ago because somebody found it had never  
18 been abolished.

19 Judicial reform is not for the faint  
20 heart, and I'm using a quotation from Chief  
21 Justice Vanderbilt there. He said that many  
22 times. I think in all of this that the time has  
23 passed for more judges, more secretaries, more  
24 courtrooms, and there are fundamental changes  
25 necessary. I guess I can return to Georgia



1 tomrrow knowing I will be safe because some of  
2 the things I say may not sit well with judges,  
3 and I have suffered twice from citation Rule 11  
4 in the federal court so I know that sometime  
5 they can disagree with you and cite you for the  
6 contempt.

7 Now, what I'm pleased about more than  
8 anything is the fact that we are at a point  
9 where we can talk about changing courts. I give  
10 you my testimony of Roscoe Pound appearance  
11 before the American Bar Association in 1906,  
12 they were about to lynch the man. I mean, such  
13 things as, one of the leader said that he speaks  
14 with a more drastic attack upon a system  
15 procedure could scarcely be devised. One member  
16 considered the speech so radical he didn't want  
17 to have it printed in ABA proceedings. One  
18 speaker predicted that those who seek to destroy  
19 the wisdom of centuries are generally  
20 disappointed.

21 Now, after that it seems like to me  
22 that I'm impressed by -- one thing I am  
23 impressed by is how much one person can make a  
24 difference. Of course, my judicial hero has  
25 always been Arthur T. Vanderbilt of New Jersey,

1 who pushed, pushed, pushed to change the courts  
2 in New Jersey. It's a long story. It took him  
3 quite a few years to do that.

4 The other man I always like to talk  
5 about is Harry Olson because he was the judge,  
6 the founding judge of the municipal court in  
7 Chicago. It shows, if you follow what the Court  
8 did, it shows you what a judge with  
9 determination and everything can do if he makes  
10 up his mind to do it. He had such innervated  
11 ideas as to traffic court in Chicago--now this  
12 is 1906. I mean early part of the century--was  
13 a court to make better drivers; not to get  
14 revenues. Another innovation was a Clerk to the  
15 Courts would have to fill out necessary papers  
16 for the small investor. He made many other  
17 innovations at the time.

18 The legislature of this state,  
19 Pennsylvania had a connection with that because  
20 they patterned the Municipal Court of  
21 Philadelphia after that Court. They made one  
22 fatal change; that was, imposing a fee system on  
23 the Court of Common Pleas on the Municipal Court  
24 which defeated any idea of an inexpensive court.  
25 I recommend anybody to study the innovations

1           that Olson made.

2                       I must say that things have changed in  
3           Pennsylvania in the last 2 decades. One can  
4           only mention the Administrative Office of the  
5           Courts. I wish it were stronger. I wish it  
6           would take a more active part in administrating  
7           the courts, but that's another story. You might  
8           say the last decades in Pennsylvania has been a  
9           minor revolution.

10                      Pennsylvania is unique in the fact it  
11           has the last Supreme Court that travels. It is  
12           a tenant over there in the Philadelphia  
13           courthouse, and I think sometimes I get the  
14           impression it is treated like a tenant. Now,  
15           this doesn't end the fact that the judges leave  
16           as soon as court session is over with and go to  
17           all parts of the state does not contribute to a  
18           collegiate body.

19                      I have heard rumors about the wonders  
20           of modern communication, but this does not  
21           replace personal contact between the judges and  
22           people who can get together. I add in my  
23           cynical way, it's more important for the law  
24           clerks to get together. Some of us will argue  
25           the law clerks are becoming more important than

1 the judges themselves, but we can get into that  
2 argument later.

3 I also commend the bill for the fact  
4 of bringing the Court to Harrisburg, because in  
5 reaching judicial decisions the book is still  
6 absolutely necessary. You don't have to have  
7 books in front of you to study decisions.

8 I tried my very best to find an  
9 example I used in class institutional history at  
10 Temple where I contrasted 2 decisions, one from  
11 New Jersey and one from Pennsylvania out of the  
12 same issue of the Atlantic Reporter advance  
13 sheet, and when you're dealing with the long-arm  
14 statute.

15 On the other hand, I was trying to use  
16 it as an example of technique, the New Jersey  
17 Court cited many institutional writers, law  
18 review articles and everything; yet, the  
19 Pennsylvania case was much stronger. It grew  
20 out of Delaware County, and I won't go into the  
21 facts; but nevertheless, Pennsylvania's opinion  
22 cites nothing but Pennsylvania cases. But  
23 long-arm statutes were needed at that time and  
24 was creating a big great deal and quite  
25 controversial.

1                   There are many intangible advantage  
2 would flow from the court being located in the  
3 Capitol. I was always been impressed when I  
4 lived in Pennsylvania that everybody seemed to  
5 think that Philadelphia was the government, if I  
6 may say so. But, certainly the Supreme Court is  
7 one part of the state government, one of the 3  
8 major branches, and it should be associated with  
9 the Capitol in the mind of the citizens.

10                   If you want to see the impact of  
11 having a building, look at the history of the  
12 United States Supreme Court. Until 1930 it met  
13 in rooms designated in the Capitol Building.  
14 Can you imagine going in there and asking some  
15 clerk, some employee of Congress where the  
16 Supreme Court had only a hearing room, a chamber  
17 for the clerk who was kicked around from post to  
18 post in that building. I certainly think it has  
19 now more prestige by having that big building.  
20 You may have other opinions about it, but I'm  
21 impressed by it.

22                   Of course, bringing the Supreme Court  
23 to Harrisburg will save money. I remember one  
24 day visiting the Prothonotary's office when they  
25 didn't want me around and seeing all those foot

1 lockers being gathered up to put the robes and  
2 records and everything for the Prothonotary and  
3 his staff to take that day to shift to  
4 Pittsburgh. It was quite an interesting fact.

5 Now, I commend you for limiting the  
6 power of the Supreme Court to suspend the  
7 legislative enactments. I'm afraid that the  
8 details behind that is not something we get full  
9 coverage in the local Georgia papers. I  
10 apologize for that. I hadn't been reading the  
11 Legal Intelligent for the last 4 or 5 years as I  
12 used to. I am concerned with the proper role of  
13 the courts in the constitutional scheme  
14 especially at the federal level.

15 During the 19th Century, what  
16 impressed me is the fact that what we overlooked  
17 is the fact when the courts said the legislature  
18 would not deliberately do something  
19 unconstitutional. Today, we are in a fix where  
20 we think that nothing is constitutional unless  
21 the Supreme Court tells us it's constitutional.

22 Contrast constitutional law books of  
23 an earlier era you will find excerpts from  
24 debates in Congress, and Webster, and John  
25 Calhoun and those types of people, and other

1 writers of institutional writers today, but  
2 today you look at constitutional law books are  
3 based entirely on the decisions of the Supreme  
4 Court of United States. May not be a great  
5 departure, but I think it is a significant  
6 departure.

7 In other words, I'm in favor of some  
8 limitations. I think we ought to address the  
9 limitation of the Court's authority to  
10 substitute its own judgment for that of elected  
11 representatives. I don't think I'm wrong.

12 In this state, of course, we have 2  
13 appellate courts, the Superior Court, and I  
14 remember some animosity between the Superior and  
15 the Supreme Court at one time. There was bitter  
16 rivalry. I am not familiar with them enough now  
17 to know whether this still exists or not, but I  
18 hope that some closer relation has grown up  
19 between them in the 2 decades that I have been  
20 away; a decade and a half.

21 I would like to point out, at least  
22 argue for it, the fact that the Superior Court  
23 ought to be divided up. I would propose  
24 dividing the state into 3 districts, roughly 3;  
25 putting a Superior Court in each one of them,

1           having the Supreme Court being the overview;  
2           certain jurisdiction, definite jurisdiction,  
3           certain steps you take of appeals to come to it.

4                   I also want to point out that the  
5           boundaries must be flexible.  If you look at  
6           history of courts how one district will grow and  
7           another one right next to it will not, and one  
8           judge would be busy and another will not be, we  
9           ought to be able to at least even it out  
10          somehow.

11                   I suggest also, one thing I'm  
12          impressed about Georgia where I am now is the  
13          fact that the Court -- the 2 Appellate Courts  
14          refer cases which I feel like they belong on  
15          their dockets do not belong on their docket to  
16          each other.  I don't think the courts abuse  
17          this.  Also, they use a question of a  
18          certification.  In other words, the Court of  
19          Appeals can certify to the Supreme Court a  
20          question which they feel like should be answered  
21          or successful conclusion of a case before them.

22                   Let's face it, litigation is going to  
23          grow, but -- and with the population.  I feel --  
24          I hope I'm not a professor getting into wartime  
25          stories, but I always like to say, you're on an



1 island by yourself you don't need any laws. You  
2 get 2 people on an island you've got to have  
3 some understanding. You get a hundred people,  
4 you've got to have more, so forth and so on, and  
5 that is true.

6 As I said before, more judges, more  
7 courthouse I don't think answers the question.  
8 I would like to suggest some ideas. I know this  
9 is not before you in the bill, but nevertheless  
10 I'd like to take the opportunity. I would like  
11 to see and urge more specialized courts, courts  
12 like tax courts, so forth. Everybody talks  
13 about arbitration. What makes arbitration so  
14 appealing is because it's simple rules of  
15 procedure, simple rules of evidence, so forth.  
16 I think courts can reach that ideal too, and  
17 would.

18 The Commonwealth Court I read is  
19 divided between the appellate jurisdiction and  
20 trial jurisdiction. I think it is 2 different  
21 functions. It should be separated.

22 I applaud the fact that I'm a strong  
23 supporter in appointment process. I think the  
24 Chief Justice ought to be appointed because you  
25 are not going to get the personnel necessary

16 1 unless you have somebody devoted to the idea of  
2 carrying out these reforms. Some senior justice  
3 does not necessarily assure that this selection  
4 will happen. I think it's time we address the  
5 issue of appointing judges and getting more  
6 effective judges.

7 I think it's high time we don't, in my  
8 estimation, discuss underlying issues. I think  
9 it's time that we ought to define what is a good  
10 judge, what we expect the judges to do.

11 I'm always impressed with the  
12 importance of the 19th Century that the public  
13 gave to being a judge. It was almost a sacred  
14 trust. You find that time and time again in the  
15 literature. Of course, being a person  
16 interested in legal history I point out to you,  
17 that legal profession grew out of the clergy,  
18 and many of the judges on the Court were  
19 clergymen and certainly from the Chancellors of  
20 England and until the time of Henry the 8th were  
21 all clergymen. So, there is an interesting  
22 correlation.

23 One thing which the bill doesn't  
24 address, which is overlooked, is a minor court.  
25 Those courts, traffic courts and so forth, I

1 think this is an overlooked area that allows a  
2 judicial process. I don't think we are too much  
3 aware of what goes on in those courts. I have  
4 been impressed, certainly in Georgia with the  
5 lack of courtesy, the lack of explanation that  
6 people get in these courts. I think they ought  
7 to be.

8 As I said, I was kind of overshocked  
9 when I first went to Georgia. We had a process  
10 of the law professors visiting class to  
11 determine how effective you are in teaching. It  
12 kind of upset me at first, but I got all use to  
13 it and I think it has helped me out. What I'm  
14 saying is, I think that certainly visiting the  
15 courts, have somebody visit the courts and talk  
16 to the judges a certain amount. I'll go back to  
17 my Navy days and tell you that a captain of a  
18 large vessel should not ask his supply officer  
19 how the food is in the mess for the crew. Go  
20 down there and have it.

21 I apologize for the fact that I don't  
22 bring any specific comments about your bill to  
23 this hearing. I do have some historical insight  
24 and I don't think there's a more interesting  
25 part of history than how the Supreme Court has

1 grown from a trial court, extensive jurisdiction  
2 to its narrower and narrower of being more of an  
3 appellate court. I think it's time you gave up  
4 its anything pertaining to trial jurisdiction.  
5 I would support a bill there.

6 Judicial Council, I think it's high  
7 time we had somebody in Pennsylvania. Certainly  
8 in Georgia, of course, we split it up too much  
9 in Georgia, but how a Judicial Council would  
10 consider the problems of the courts; have a  
11 chance to make comments. I also strongly urge  
12 and I support that you have in your judicial  
13 bill, judicial conference a layman and I see you  
14 do have some laymen on there. You can't expect  
15 an institution with its own ranks to reform  
16 itself. They just don't do it.

17 Mr. Chairman, I apologize if I sound  
18 too much like a law professor, but I do like to  
19 talk legal history. I do like to point out that  
20 that voice in the Pennsylvania Supreme Court is  
21 now 270 odd years old. I'm not good at  
22 calculating real fast, but it has a long  
23 history. It has come a long ways, but it still  
24 could use some changes.

25 I think the biggest change you can

1 make is to bring the Court to Harrisburg; make  
2 it be in Harrisburg. Get this bill. I applaud  
3 that. I think it's a well worth while. I don't  
4 know, I get distressed because we seem to pick  
5 on judges, if I can use that term, but I think  
6 judges and clerks and other officials ought to  
7 be made to be proud of the work they are doing.  
8 It is a noble work. It is something to bring 2  
9 people who dispute and try to bring order and  
10 keep order in society. That's what courts are  
11 suppose to do, is to keep order in society. I  
12 think we ought to reconsider --

13 I don't think there would be a greater  
14 thing you could do to convene conference or  
15 something to discuss what the courts, the way  
16 the judges ought to be doing, what the courts  
17 ought to be doing. I apologize for my history,  
18 but I'd like to talk more about it, but I know  
19 you don't have the time to do so.

20 CHAIRMAN PICCOLA: As a history major  
21 I'm fascinated by your background and  
22 particularly your comments about Gettysburg  
23 because I went to Gettysburg College and am very  
24 familiar with the Battle of Gettysburg, but  
25 that's not the subject of the hearing.

1 I would like to ask you a couple of  
2 questions to draw on your legal history. I  
3 don't know if you were here this morning when we  
4 began the hearing. One of the provisions of  
5 House Bill 10 is to take away from our Supreme  
6 Court the so-called King's Bench authority. Are  
7 you familiar with the King's Bench authority?

8 HONORABLE SURRENCY: Yes.

9 CHAIRMAN PICCOLA: I made the point  
10 this morning and I would just like to make it  
11 again, maybe you would comment on it. Taking  
12 aside the fact that the use of the King's Bench  
13 authority in the modern era appears to me to  
14 subject the Court to questions as to why it  
15 exercised that authority in one case and did not  
16 exercise it in another case of identical facts  
17 and circumstances and law. I think that raises  
18 questions about the propriety of the Court.

19 But leaving that question aside, in  
20 the modern era is it even relevant any longer to  
21 have King's Bench authority for a Supreme Court,  
22 given the fact in the nature of the history of  
23 the King's Bench being that -- here's where your  
24 historical knowledge may be better than mine.

25 King's Bench originated in England

1 when all the courts were the courts of the king.  
2 It was the power of the sovereign to reach down  
3 and do whatever the sovereign pleased through  
4 the exercise of the King's Bench and his courts.  
5 We don't have a king anymore. We threw him out  
6 200 some odd years ago. We have a system of 3  
7 co-equal branches of government and I'm not  
8 certain the King's Bench is relevant anymore. I  
9 would ask you to comment.

10 JUDGE SURRENCY: It is not relevant.  
11 The reason it came into being, in 1722, when the  
12 act -- the final judiciary act, you know  
13 Pennsylvania had several judiciary acts which  
14 the king disallowed. If you know and no doubt  
15 remember the king could disallow any piece of  
16 Pennsylvania legislation that they wanted to,  
17 that he wanted to if he found anything wrong  
18 with it. One of the things was that some of the  
19 provisions about the -- I can't remember the  
20 details. Anyway, in 1722, the bill finally  
21 passed.

22 In England at that time there was a  
23 multitude of courts. They weren't all king's  
24 courts. They were manorial (phonetic); they  
25 were charter courts, you name it. There were

1 over a hundred courts. But the King's Courts  
2 were the 3 common law courts. It was put in  
3 there because they say in the book, you have the  
4 power of all 3 of these courts; not just one of  
5 them; not 2. Of course, they never gave it the  
6 power of the Court of Chancery. That came  
7 later. So, it has no relevance. It means  
8 nothing today.

9 CHAIRMAN PICCOLA: It certainly  
10 doesn't mean what it meant back in the 18th  
11 Century or before.

12 JUDGE SURRENCY: Not in 1722, it has  
13 no meaning at all. If you look at the King's  
14 Bench in England today, it's called a Queen's  
15 Bench today, but for obvious reasons. It's a  
16 far different court than it was in 1722.

17 CHAIRMAN PICCOLA: Do other members of  
18 the committee have questions? Representative  
19 Manderino.

20 REPRESENTATIVE MANDERINO: Thank you,  
21 Mr. Chairman. Is it okay to call you professor?

22 JUDGE SURRENCY: You can call me  
23 anything you want to.

24 REPRESENTATIVE MANDERINO: Professor,  
25 as a Temple Law grad myself and not having been



1 there when you were there, but I just wanted to  
2 welcome you back to Pennsylvania. Actually, the  
3 questions that I wanted to ask was exactly the  
4 same thing that Representative Piccola just  
5 asked. I don't want you to think that it was  
6 any deficiency in my wonderful Temple Law  
7 education. But I'm still not convinced that I  
8 understand what this whole notion of King's  
9 Bench power that was there or that were  
10 supposedly -- or that we're proposing to appeal  
11 what all it entails.

12 So, I guess my question goes more to  
13 the example you gave talked about whether the  
14 courts can come over and say to another branch  
15 of government, the Legislative Branch of  
16 government, we don't like what you did so we're  
17 going to say that you didn't have the authority  
18 to do that.

19 JUDGE SURRENCY: That was not a part  
20 of King's Bench policy. You wouldn't have  
21 dared. In fact, today in England Parliament is  
22 considered the supreme authority. They can't do  
23 anything wrong.

24 REPRESENTATIVE MANDERINO: It went  
25 only to, within their own branch, correct?

1 JUDGE SURRENCY: That's right.

2 REPRESENTATIVE MANDERINO: Does it not  
3 still make sense in today's modern times -- One  
4 of the examples that was in a prior testimony, I  
5 don't know if it was just in the written  
6 comments or in the oral comments, was an example  
7 of the exercise of King's Bench powers at a  
8 trial court level where the courts would not  
9 open a proceeding; that there was no reason for  
10 it to be closed and wouldn't open it for public.  
11 It was through the exercise of this power that  
12 people were able to go to the Supreme Court and  
13 say, make the Court of Common Pleas open up this  
14 proceeding and they did.

15 JUDGE SURRENCY: That's right,  
16 mandamus.

17 REPRESENTATIVE MANDERINO: Okay.  
18 Shouldn't we still have that power? I mean,  
19 shouldn't that power vest somewhere in the  
20 judicial structure?

21 JUDGE SURRENCY: Oh yes.

22 REPRESENTATIVE MANDERINO: And is it  
23 now called something else other than King's  
24 Bench? Do we just throw that terminology out  
25 and say, within your own branch of government

1 you are still the top dog--I'm going to put it  
2 in real layman's language--in saying what  
3 happens when it comes to your procedure. Just  
4 don't cross over here onto this other branch and  
5 tell them what they are supposed to do? Can't  
6 we say it? Can't we do that?

7 JUDGE SURRENCY: I think you can say  
8 that the Supreme Court has the power of  
9 prohibition or writ of mandamus when it's  
10 necessary. That would take care of it. I think  
11 that over, if I may say so and I hope there's no  
12 justice of the Supreme Court sitting here, they  
13 have abused the King's Bench. They have  
14 forgotten what the King's Bench was.

15 The King's Bench was a court that had  
16 extraordinary powers. If the Court and the  
17 bishop and the Tannery (phonetic) Court in  
18 Cornwall had a case before it which they  
19 shouldn't have. Well, the King's Bench issued a  
20 mandamus to cease or a writ of certiorari,  
21 bring that case before us. It was necessary in  
22 that particular time to address in that  
23 particular type of power. But they, of  
24 course, -- Just say to the Supreme Court, look,  
25 if the Court of Common Pleas, if the judge of

1 the Court of Common Pleas won't sign a paper,  
2 then issue a writ of mandamus.

3 CHAIRMAN PICCOLA: Could I jump in  
4 here? I apologize, but couldn't the General  
5 Assembly, the Legislative Branch in the event it  
6 wanted the Court to have extraordinary -- the  
7 opportunity to exercise extraordinary relief  
8 when it passes the statute, for example, the  
9 Sunshine statute that I think was cited where we  
10 require open meetings. If we felt strongly  
11 enough that the Court should be able to go down  
12 into a lower court proceeding and bring that to  
13 the attention of the Supreme Court immediately,  
14 that we could insert that power into the statute  
15 that we pass, if we feel that's appropriate.

16 JUDGE SURRENCY: I agree with you. I  
17 agree with you a whole lot. Wait a minute. I  
18 want to point out something.

19 Between 1722 and today we had a very  
20 radical event take place--the American  
21 Revolution. We didn't continue on with the  
22 government of England and its concept in this  
23 country. We departed a great way from the  
24 English Government. So, there was a break. We  
25 shouldn't try to go back, in my judgment anyway.

1                   CHAIRMAN PICCOLA: I'm sorry to  
2 interrupt.

3                   REPRESENTATIVE MANDERINO: That's  
4 okay. Too bad I didn't have a gavel, though.  
5 That's a joke because the Chairman attempts to  
6 gavel me out of order.

7                   CHAIRMAN PICCOLA: And the lady is  
8 absolutely correct.

9                   REPRESENTATIVE MANDERINO: Professor,  
10 I just wanted to thank you for your comments  
11 that were more future, forward looking and to  
12 let you know that in Pennsylvania we have --  
13 there's startings-up of and actually our first  
14 kick-off meeting I'm pleased to be a part of the  
15 group of Pennsylvania Future's Commission on  
16 Justice in the 21st Century which is looking at  
17 a lot of broader issues and some of the things  
18 that you said about. We don't need necessarily  
19 more judges and courthouses. We have to start  
20 looking beyond and saying, what do we need to  
21 address the justice areas? To let you know, I  
22 know other states are working on this, but  
23 Pennsylvania is too.

24                   JUDGE SURRENCY: I appreciate that.  
25 One flaw which many of these states have, just

1 like the Federal Court Study Commission. The  
2 only thing they did was just address band-aid  
3 things. You don't find anything in that study  
4 about the future of the courts other than in the  
5 context of statistics. We've got this many  
6 cases filed and they are going to mean this, but  
7 no fundamental examination of what we are doing  
8 right or wrong.

9 REPRESENTATIVE MANDERINO: Exactly.

10 Thank you.

11 REPRESENTATIVE BOSCOLA: I'd like to  
12 make a comment if I can.

13 CHAIRMAN PICCOLA: Representative  
14 Boscola:

15 REPRESENTATIVE BOSCOLA: Professor, I  
16 really appreciate what you said today because I  
17 was a former Court Administrator in Northampton  
18 County. Some of these things that we are  
19 talking about, this House Bill I have some  
20 problems with, and it's being pond off as  
21 judicial reform. There are other areas that we  
22 need to look into and you touched upon them, our  
23 minor courts, an area where I don't think we are  
24 using them efficiently and effectively. They  
25 can be doing things and taking work away from

1 the Court of Common Pleas which we need to look  
2 into.

3           You mentioned the APOC, Administrative  
4 Offices of Pennsylvania's Courts, which I think  
5 we need to look into as a legislative body  
6 because they are not providing the type of  
7 services that the judges and the court  
8 administrators in the counties need. If they  
9 are not going to do their job, then we've got to  
10 do something about how we are funding them. I  
11 think that's something we can look into. Jeff,  
12 I'll talk to you more about that.

13           The reason I'm bringing this out is  
14 because you, as looking into the whole picture,  
15 bring out some of these things that I would like  
16 to also see after we talk about this House Bill.

17           Lastly, I'd like to say that my  
18 biggest concern is, we're talking about a  
19 unified judiciary. From my standpoint it didn't  
20 come from any kind of arrogance out there that  
21 William Nast referred to. It's the frustration  
22 that counties have with how they are going to  
23 fund these additional judgeships, and so forth,  
24 which I agree we don't need.

25           But, when you talk about a unified

1 judiciary and you start to take the courts out  
2 of the counties and place more state  
3 responsibility as far as funding on the states,  
4 then what you begin to do is, there's more  
5 uniformity out there as far as rules because  
6 every county has a different set of rules and  
7 it's frustrating. It adds more staff to each  
8 county. I mean, there are so many different  
9 ways that we can make the courts efficient. I  
10 really appreciated every comment you made today.  
11 Thank you.

12 CHAIRMAN PICCOLA: Thank you,  
13 professor. We really appreciate the time that  
14 you took to come up from Georgia to be with us.  
15 I'm sure we have your address, telephone number,  
16 we may be in touch with you if we run into some  
17 historical road blocks that we will need some  
18 clarification.

19 JUDGE SURRENCY: Please feel free to  
20 call upon me. I'm always happy to talk about  
21 legal history, because I feel like no one pays  
22 any attention to it.

23 CHAIRMAN PICCOLA: I think you are  
24 correct. I think we are too wedded to the here  
25 and now. We don't look at the past, and we



1 don't often look at what the future might bring  
2 about. Those who forget the past, of course,  
3 are condemned to repeat it.

4 JUDGE SURRENCY: Thank you very much.

5 CHAIRMAN PICCOLA: Thank you.

6 MR. SURRENCY: My pleasure.

7 CHAIRMAN PICCOLA: Our last witness  
8 Barry Kauffman, Executive Director of Common  
9 Cause of Pennsylvania.

10 MR. KAUFFMAN: Good afternoon,  
11 Chairman Piccola, distinguished members of the  
12 House Judiciary Committee. I thank you this  
13 opportunity to present some of Common Cause's  
14 views on the need to reform this state's  
15 judicial system. My name is Barry Kauffman and  
16 I serve as Executive Director of Common Cause,  
17 which is a public interest advocacy organization  
18 representing 12,000 Pennsylvanians who are  
19 committed to promoting open, accountable and  
20 responsive government.

21 For over 15 years Common Cause has  
22 been actively pursuing major reforms in  
23 Pennsylvania's judicial system. For the most  
24 part, our efforts are focused on improving the  
25 way we select and discipline judges. Only

1 recently has Common Cause turned its attention  
2 to some of the other critical elements of  
3 judicial reform, such as those before us today.

4           During last session of the General  
5 Assembly our Constitution was amended to provide  
6 some extremely modest changes in the state's  
7 judicial discipline system. Perhaps we got the  
8 cart before the horse in that case. Because, if  
9 we make major improvements the way we select our  
10 judges, the need for the other reforms probably  
11 diminish. For that reason Common Cause urges  
12 you to make merit selection of judges a priority  
13 issue, and move with determination to achieve  
14 its passage.

15           Nevertheless, the reforms proposed in  
16 House Bill 10 and House Bill 838 are important  
17 on their own terms. Some of the components of  
18 these measures address concerns and  
19 recommendations which have surfaced in similar  
20 forms over the past 20 years, including those by  
21 the Committee of 70, the Pomeroy Commission, the  
22 Special Senate Committee on Judicial Conduct and  
23 Administration, the Beck Commission, and, of  
24 course, recently the Grand Jury in the Larsen  
25 affair. Since the proposals in House Bill 838

1 appear to be dependent on the passage of a  
2 constitutional amendment such as House Bill 10,  
3 I will first address those constitutional  
4 changes.

5 Common Cause strongly supports 3 of  
6 the major components of House Bill 10, and hopes  
7 the citizens will have the opportunity to vote  
8 on them at the earliest possible date. These  
9 reforms are the elimination of the Supreme  
10 Court's King's Bench powers, elimination of the  
11 Court's power to suspend laws which conflict  
12 with its own rules, and changes in the  
13 methodology for selecting the Chief Justice of  
14 the Supreme Court of Pennsylvania

15 There has been a trail of abuses of  
16 the King's Bench powers by the Pennsylvania  
17 Supreme Court over the years. One certainly  
18 needs to look no further than the records of the  
19 Larsen impeachment matters to find ample reason  
20 to support the immediate termination of King's  
21 Bench authority. We encourage you to proceed  
22 aggressively with this amendment.

23 Rarely has there been more  
24 ill-conceived constitutional provision than the  
25 one which gives the state Supreme Court the

1 power to suspend laws it perceives to be in  
2 conflict with its own rules. If the Court  
3 determines a law to be unconstitutional and  
4 permanently strikes down its application for  
5 all, so be it. But, to have the authority to  
6 suspend a law, duly passed by the General  
7 Assembly and signed by the Governor, merely for  
8 the convenience of pursuing rules which this  
9 tiny body agreed upon for itself is nothing less  
10 than an abomination. The sooner this sordid  
11 practice is terminated the better.

12 Thirdly, a change in the methodology  
13 for selecting the Chief Justice must be enacted  
14 as well. The ability to simply hang around the  
15 longest certainly should not be the determining  
16 qualification for selecting a Chief Justice.  
17 The individual who ascends to this important  
18 position must be a person characterized by  
19 vision, energy, intellectual prowess, and  
20 unquestioned integrity. The current seniority  
21 system fails to meet any of these tests.

22 In the past Common Cause has supported  
23 the Beck Commission proposal to have the Chief  
24 Justice elected by his or her peers on the  
25 Supreme Court. However, we are revisiting this

20

1 matter, and certainly find the alternative of  
2 having the Chief Justice selected by the  
3 Governor superior to the current system. Both  
4 options have strong and weak points. While  
5 campaigning among one's peers could cause  
6 dissension and serious problems in court morale,  
7 purely political selection by the Governor could  
8 lead to accusations of cronyism.

9 Under an appointment system which  
10 requires a Chief Justice to be selected from the  
11 miniscule group of sitting elected judges, a  
12 Governor may find it difficult to find a truly  
13 qualified candidate. This lends additional  
14 support to the need for a merit selection of all  
15 judges. Therefore, if the Commonwealth is to  
16 move to a system in which the Governor appoints  
17 the Chief Justice, we strongly recommend  
18 permitting the Governor, with the aid of a merit  
19 selection commission, to search a talent pool  
20 much broader and richer than one restricted to  
21 the incumbent members of the Court.

22 The General Assembly should consider  
23 applying a uniform selection process for the  
24 president judges of all other courts as well.  
25 You also should strongly consider changing the

1 confirmation requirement in the Senate from a  
2 two-thirds majority to a simple majority.

3 In Section 10 (d) of House Bill 10, it  
4 appears that if the person serving as Chief  
5 Justice resigns from that post, he or she would  
6 then also be removed from the Court. Perhaps,  
7 that specific intent should be clarified.

8 I'd like to present some comments  
9 about the key element of House Bill 10 and House  
10 Bill 838, the creation of a Judicial Council.  
11 While this concept is not new, in fact, it was  
12 employed to some degree in the 1970's, it is one  
13 on which Common Cause has just recently begun to  
14 focus.

15 Broadening input and responsibility  
16 for the rule-making and administrative authority  
17 of Pennsylvania's judiciary beyond the Supreme  
18 Court appears to make a lot of sense, and should  
19 improve the quality of both functions. As for  
20 the Judicial Council components of House Bill 10  
21 we do have some suggestions.

22 We are troubled that the composition  
23 of the Judicial Council is not contained in the  
24 constitutional amendment, but instead is left to  
25 statutory authority such as proposed in House

1 Bill 838. We believe the composition of the  
2 Judicial Council must be included in the  
3 constitution.

4 The requirement of constitutionally  
5 mandated audits of a unified judicial system by  
6 the Auditor General also is an important step  
7 forward. We applaud this provision.

8 If the constitutional amendment  
9 proposed by House Bill 10 is implemented, then  
10 provisions such as those proposed in House Bill  
11 838 become essential. The comments which we  
12 made pertaining to House Bill 10 obviously carry  
13 over to their companion components in this bill.  
14 We have some additional suggestions for your  
15 consideration on this measure.

16 With regard to the composition of  
17 Judicial Council, 9 of the 13 members sit on the  
18 benches of various state courts. Three of the  
19 remaining 4 are attorneys, and the fourth is the  
20 Court Administrator. We would suggest that at  
21 least one member of the Judicial Council be an  
22 individual which is in no way under the  
23 professional jurisdiction of the Judiciary. It  
24 could be an important safety valve to have at  
25 least one council member who is not in a

1 position to be professionally intimidated.  
2 Perhaps, this could be a gubernatorially  
3 appointed lay person or gubernatorially  
4 appointed dean of a law school. If such a  
5 person is added or substituted, that person  
6 should have a restricted number of terms to help  
7 guarantee his or her independence.

8 In Section 343 (c) on "Compensation",  
9 we see a train wreck waiting to happen.  
10 Subsection (a)(9) gives the Chief Justice  
11 authority to appoint the non-judge members of  
12 the Bar, and then Subsection (c) permits that  
13 same Chief Justice to prescribe their  
14 compensation.

15 Let's head off a scandal before it  
16 happens by establishing limits on the  
17 compensation in this section, perhaps, at a  
18 level not exceeding a rate equivalent to the  
19 daily compensation for a member of the General  
20 Assembly.

21 Furthermore, this subsection should  
22 limit expense reimbursements, again perhaps, at  
23 a rate not to exceed that permitted for members  
24 of the General Assembly, and require all  
25 reimbursements to be paid only after the



1 submission of receipts.

2 Under Section 344 (d), which addresses  
3 proceedings of Judicial Council meetings, we ask  
4 inclusion of a specification requiring all  
5 minutes of meetings be made available for public  
6 inspection and copying, and that all meetings be  
7 subject to the provisions of the state Sunshine  
8 law.

9 In Section 345 (a), we are concerned  
10 about the purpose and priority of language which  
11 states in part, either House of the General  
12 Assembly may, by resolution, enter any question  
13 or matter which could be regulated by statute  
14 upon the agenda of the Judicial Council. We  
15 have difficulty understanding the purpose of  
16 this provision, because it seems to be wholly  
17 inconsistent with the role of the Judicial  
18 Council.

19 Under Section 346, we believe it may  
20 be prudent to require the Judicial Council to  
21 have a public comment period when proposing or  
22 revising rules, similar to that required for  
23 executive branch agencies. In certain  
24 circumstances public hearings also may be  
25 beneficial.

1           We concur with the bill's proposals in  
2 Sections 504 and 543 which centralize the  
3 Court's operations in Harrisburg. This makes  
4 sense from operational, administrative and  
5 economic standpoints.

6           We believe there may have been a  
7 drafting oversight in Section 1722, Subsections  
8 (a)(3) and (a)(4). Our understanding is that  
9 these provisions would give the Judicial Council  
10 authority to modify or prescribe rules for the  
11 recently created Judicial Conduct Board and  
12 Court of Judicial Discipline. These new bodies  
13 were supposedly developed in an effort to  
14 provide a more independent judicial discipline  
15 system.

16           Since the Judicial Council is heavily  
17 dominated by members of the bench, such  
18 provisions could have the dangerous impact of  
19 diminishing the independence of these  
20 disciplinary bodies, and potentially reverse any  
21 modest gains the public achieved in passing the  
22 1993 amendments. Providing such authority to  
23 the Council should be reconsidered.

24           Other parts of this bill and House  
25 Bill 10, recind law permitting the courts to

1 suspend statutes which conflict with court  
2 rules. To solidify this effort, you may want to  
3 correct what appears to be a drafting oversight  
4 by placing a period after the word absolutely on  
5 page 17, line 30, and delete the remaining  
6 language in Subsection (b).

7 Finally, you should strongly consider  
8 requiring financial disclosure for members of  
9 the judicial branch to that in place for the  
10 legislative and executive branches. Such a  
11 requirement can only enhance the courts'  
12 integrity.

13 In closing, Common Cause wants to  
14 commend the sponsors of House Bill 10 and House  
15 Bill 838 for their efforts to improve the  
16 unified judicial system, and urges this panel  
17 to move forward as aggressively as possible on  
18 the issues of judicial reform. The general  
19 goals of this legislation are extremely  
20 laudable.

21 However, we must reiterate our strong  
22 recommendation that the General Assembly act  
23 decisively on merit selection as well, so the  
24 voters can have the opportunity to approve this  
25 important reform in 1997. The legislature also

1 must take decisive action on campaign finance  
2 reforms which will improve the integrity of  
3 judicial elections until we achieve a  
4 responsible merit selection system.

5           The quality of justice is unavoidably  
6 influenced by quality of justices. We have  
7 recently witnessed some painful, faith-  
8 destroying disclosures about our courts.  
9 We have absolute and irrefutable proof that our  
10 current judicial system does not inspire public  
11 confidence. We have evidence beyond a  
12 reasonable doubt that major reforms such as  
13 those before us today are long overdue. This is  
14 a time for legislative courage, for legislative  
15 responsibility, and for taking a stand in  
16 support of the best interest of the public.

17           We hope the efforts for real judicial  
18 reform will move ahead swiftly and with  
19 sincerity. Thank you.

20           CHAIRMAN PICCOLA: Thank you very  
21 much, Barry, for your strong endorsement of the  
22 concepts contained in this legislation. We do  
23 appreciate your technical suggestions, and we'll  
24 certainly review all of this because you may  
25 very well have identified some shortcomings in

1 the legislation.

2 I would like to just re-emphasize, I  
3 don't know whether you were present this morning  
4 when Judge Spaeth testified, I did indicate that  
5 I shared his view, and is also your view about  
6 the need for merit selection. I did indicate  
7 that this committee will be dealing with that  
8 issue in the course of this year in some  
9 fashion. But, we felt that this particular  
10 reform could go forward faster and we wanted to  
11 get it moving. There's a great opportunity for  
12 quick adoption, so I would like to -- that's why  
13 I wanted to move on this. But, that did not in  
14 any way indicate that there's less of a  
15 commitment on the part of the Chairman to move a  
16 merit selection bill if at all possible during  
17 the current session.

18 MR. KAUFFMAN: We thank you for your  
19 attention in all of those matters.

20 CHAIRMAN PICCOLA: Do any members of  
21 the committee have any questions?  
22 Representative Manderino.

23 REPRESENTATIVE MANDERINO: Thank you,  
24 Mr. Chairman. At the onset, Mr. Kauffman, I  
25 agree with both you and the Chairman that we

1 need to also move on merit selection. I just  
2 disagree that moving on this -- whether moving  
3 on this will preclude moving on merit selection.  
4 I tend to think that if we move on this and if  
5 we are successful, that will kill merit  
6 selection because people will say, since they  
7 don't want to touch the political hot potato of  
8 merit selection. They will say, we did  
9 something and you didn't give it a chance to  
10 work.

11 I would actually ask you, not  
12 necessarily today, but as an organization to go  
13 back and think of these 2 things in light of  
14 each other. And if the long term goal is merit  
15 selection, that might make a difference in terms  
16 of prioritizing the legislative efforts on all  
17 of our past.

18 I either didn't understand something  
19 you were saying or I'm very surprised by it.  
20 So, I'll just be real direct. When you were  
21 talking about the methodology for selecting a  
22 Chief Justice, and maybe part of it is, you were  
23 just throwing a couple of different  
24 hypotheticals at us.

25 As I read and hear your testimony,

1           what you were saying is, even if we don't get  
2           merit selection, not only should the Governor  
3           appoint the Chief Justice compared to letting it  
4           be by seniority, but he should appoint that  
5           Chief Justice by not necessarily somebody on the  
6           bench so, therefore, we should either always  
7           leave one spot vacant on the bench that could be  
8           filled by merit selection or he can kick one of  
9           the guys or gals off that he doesn't like so  
10          that he could put his person in here. I framed  
11          it fairly controversial, but that's what I heard  
12          you saying. If that's not what you were saying,  
13          what do you mean? What was your point?

14                   MR. KAUFFMAN: I guess that's  
15          partially what we were saying. As my team  
16          helped to draft the testimony, reviewing our  
17          position they were troubled by some of the same  
18          things you're saying with our own testimony;  
19          realizing, what we're actually proposing is  
20          probably a hybrid system where you have elected  
21          justices, but merit selected set of Chief  
22          Justice. Maybe that's not inappropriate to have  
23          a mix of selection of processes. But certainly,  
24          we would rather see a fully merit selected  
25          Supreme Court rather than a hybrid system of

1 merit selection Chief Justice and an elected  
2 bench.

3 Again, this is, as I said before, is  
4 an approach you are presenting is somewhat new  
5 to us. But we do recognize the need to change  
6 from simply saying the person that hangs around  
7 the longest is the best person, and we feel it's  
8 wholly inappropriate, whether it's the Beck  
9 Commission system or a directly appointed  
10 system.

11 REPRESENTATIVE MANDERINO: I'm going  
12 to not talk about a hybrid type of system  
13 because, as much as I want to see systematic  
14 change, I think that would be crazy. Assuming  
15 our options to the current system of person with  
16 the most seniority were, the Governor chooses  
17 from among the 7 seated justices or the justices  
18 choose among themselves. Do you perceive one  
19 way as being better than that other and why?

20 MR. KAUFFMAN: Up to and just recently  
21 our position was backing the Beck Commission  
22 proposal that we would allow the justices to  
23 pick amongst themselves. My project team has  
24 decided to go back and revisit that and review  
25 it to see if we want to change our position. We



1 think either would be an improvement. Our  
2 existing position is to let them choose among  
3 themselves, but we don't necessarily have a --  
4 That's our preferred position. Obviously, the  
5 Governor selecting is still preferable than some  
6 person who hangs around the longest.

7 REPRESENTATIVE MANDERINO: The other  
8 thing that I found somewhat incongruent with my  
9 presumption where Common Cause would be, so  
10 excuse me if my presumption is incorrect, was  
11 the notion that the confirmation -- assuming  
12 there was a confirmation process for a Chief  
13 Justice or for anyone who -- We also talked  
14 earlier this morning about a confirmation  
15 process possibly for the Judicial Council  
16 members. But, assuming there's some kind of  
17 confirmation process by the Senate, you are  
18 recommending a simple majority rather than the  
19 two-thirds. Why?

20 MR. KAUFFMAN: I guess historical  
21 precedent has led us to that conclusion now. We  
22 have seen the Senate far too often break down on  
23 confirmation process and prepackages of people.  
24 In other words, we will not approve this person.  
25 We will not deliver the extra number of votes,

1           which our party happens to be in minority at the  
2           moment. We will not deliver the sufficient  
3           number of votes for you to confirm this person  
4           unless you give us this person and this person  
5           in the lower court. We don't think the nature  
6           of the Judiciary should be, you know, behind the  
7           scenes, back-room deals, packaging of judges.  
8           Therefore, we think it's probably advantageous  
9           to go to a simple majority for the confirmation  
10          of judges.

11                         REPRESENTATIVE MANDERINO: If the  
12          whole purpose for a confirmation process is to,  
13          and maybe this assumption is incorrect; that the  
14          whole purpose of the confirmation process is to  
15          lend additional credibility and review over a  
16          political appointment, what if any -- I don't  
17          believe you accomplish anything by allowing a  
18          simple majority approval. I think a simple  
19          majority approval just allows for the given time  
20          and it could be R's this time or D's next time.  
21          It doesn't really matter. It just allows a  
22          rubber stamp of the original political choice  
23          and not the check and balance that a two-thirds,  
24          even recognizing the reality of what you are  
25          saying -- and we have all talked about this.

1           Even knowing those of us who are  
2           proponents of merit selection, that we are not  
3           taking all of the politics out of a system or  
4           way of doing it. It would be impossible to do  
5           so. Again, more food for thought about, is the  
6           tradeoff worse than the potential disenchantment  
7           you've seen you are trying to get around.

8           MR. KAUFFMAN: I agree to a degree  
9           with what you are saying. I think our position  
10          that our Board developed is a response to  
11          frustration they see with the current problems,  
12          of maybe current personalities in the Senate  
13          where there seems to be this packaging of a  
14          series of judges rather than approving people on  
15          their own individual merits or disapproving them  
16          on their own individual merits.

17          Having said that, I think there's some  
18          very strong points what you made about,  
19          especially in the case where the Governor and  
20          the Senator of the same party, you are probably  
21          right. It could just be a rubber stamping and  
22          people are not acting with conscience. This is  
23          not a fall-on-the-sword component for Common  
24          Cause, except that we think it's preferable to  
25          have a simple majority, but we're not going to

1 fall on our sword on that issue.

2 REPRESENTATIVE MANDERINO: Thank you.

3 I said it this morning, but I take all of this  
4 very seriously. I know we all do, and I guess  
5 I'm just concerned when we look at all of these  
6 proposals that we are not -- that we're looking  
7 beyond a particular bad experience or a  
8 particular Larsen hearing, or a particular  
9 whatever, for the long term, because we know  
10 whatever system we change to, even if we know  
11 it's not working right away, history tells us  
12 it's going to take us another 10 or 15, 20 years  
13 to change it again.

14 I'm just asking for some very  
15 thoughtful thought upon all of our parts going  
16 into some of the things we are recommending or  
17 endorsing or not endorsing. And with that,  
18 thank you.

19 MR. KAUFFMAN: Your last comment is a  
20 point well taken because, what we often see is,  
21 you know, reforms need to be revisited on a  
22 regular basis because the systems change and  
23 people get used to them. Systems themselves can  
24 become corrupted and can lead good people to do  
25 bad things. I agree with what you're saying.

1                   REPRESENTATIVE MANDERINO: I don't  
2                   mean to get into a long philosophical debate,  
3                   but people who -- when we talk about campaign  
4                   financing reform now people will say, wait a  
5                   minute. Remember back in the '60's when PACs  
6                   were developed, they were campaign finance  
7                   reform and now we are reforming ourselves from  
8                   the reform, or whatever.

9                   So, you're right. Systems are dynamic  
10                  and have to change, but we also recognize  
11                  that -- Even if we recognize they are always  
12                  dynamic and having to change, but we also  
13                  recognize that change is a long-term process.  
14                  That was my only point. Thank you.

15                  CHAIRMAN PICCOLA: Any other questions  
16                  by members or staff?

17                  ( No response )

18                  CHAIRMAN PICCOLA: Thank you very  
19                  much, Mr. Kauffman. I'd like to thank all of  
20                  the witnesses, the staff and the members of the  
21                  committee who has sat through this hearing,  
22                  particularly Representative Manderino who, with  
23                  me, sat through the entire hearing. I would  
24                  also like to apologize for violating my own rule  
25                  of interrupting her during her one point of

1 question. She's absolutely correct. I should  
2 have had myself gaveled down at that point.

3 I would like to indicate to the  
4 members and to the interested parties, it was  
5 originally my intention to place these bills on  
6 the committee agenda for next week. I think  
7 this hearing, however, has been extremely  
8 valuable. It's raised a lot of technical and  
9 policy questions that I would like to have staff  
10 and members take some time in sorting out. Not  
11 a lot of time, but some time. I would like to  
12 receive the suggestions of staff and members  
13 from both sides of the aisle on this issue  
14 because I do think it is important.

15 It will be the subject of a regular  
16 session committee meeting within the next month  
17 or so, so we will be advancing this piece of  
18 legislation. I do want to sit back and take a  
19 little bit of time to address some of the  
20 concerns that have been raised by various  
21 witnesses both for and against this legislation.  
22 I would ask the members and staff to give it a  
23 lot of thoughtful consideration in the interim.

24 If there's nothing else to come before  
25 the committee, this committee stands adjourned.

(At or about 2:45 p.m., the hearing  
concluded)

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## C E R T I F I C A T E

1  
2  
3 I, Karen Meister, Reporter, Notary  
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5 for the County of York, Commonwealth of  
6 Pennsylvania, hereby certify that the foregoing  
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