TESTIMONY OF

WM. H. NAST

Presented Before the

House of Representatives Judiciary Committee

March 2, 1995

Re: 1995 Jt. Resol. 10 & 1995 HB 838
Amendments and Implementing legislation to the Pennsylvania Constitution, Article V

HURSH & HURSH, P.C.
Attorneys and Counselors at Law
229 State Street
P.O. Box 301
Harrisburg, PA 17108-0301
(717) 238-5509

I am honored to have been asked for my views regarding the Joint Resolution, 1995 HB 10, Pr's No. 849, introduced on Valentine's Day, which would amend Sections 1, 2, 10 and 13 of Article V of the Pennsylvania Constitution to:

1) establish a Judicial Council;
2) rescind the power of the Supreme Court to suspend statutes;
3) provide for gubernatorial selection of the Chief Justice of the Supreme Court; and
4) provide for judicial budgetary affairs.

I have also reviewed 1995 HB 838, Pr's 923, also introduced on Valentine's Day, which would implement the constitutional changes provided for in the proposed Constitutional Amendment by adding a new Subchapter C to chapter 3 of title 42, creating the Judicial Council and amending various provisions of the Judiciary Code.

My remarks on the constitutional changes will be brief. My viewpoint is that of a lawyer who applauded the 1968 constitutional convention's forthright recommendation that a strong, unified judiciary--modelled at least spiritually on the New Jersey experience--was necessary to end the chaos then existing in the patchwork court systems of the Commonwealth. Does anyone here remember the twelve president judges of Philadelphia County--one for each of the ten separate, independent Courts of Common Pleas, the separate Orphans' Court and the County Court? My viewpoint then is also of a lawyer who had occasion to deal with the representatives of the adopted unified judicial system from 1970 until 1991 as a representative of the General Assembly in my capacity as counsel, and then director, of the Joint State Government Commission.

The painful experience I report to you is that while the administration of the pre-1970

judiciary was horrible, and the 1970 changes had to improve the system, we had, in our haste to do good, forgotten Lord Acton's admonishment that "power corrupts and absolute power corrupts absolutely."

The arrogance of the Supreme Court's dealings with the legislature exemplified by, among other matters, its "opinion letter" declaring a provision of the Judiciary Code (§ 1703) unconstitutional on separation of powers grounds without having a case or controversy before it (482 Pa. 522 (1978)), the infamous County of Allegheny case, its heavy handed treatment of constables, its lining of the jurists' pockets through "constitutional" interpretations of the State Retirement System which overlooked factual reality, its secret unaccountable expense accounts and its amazing disregard of common decency and civility toward the bar and litigants has been detailed elsewhere--better than I am prepared to do at this juncture. I of course refer to Professor Bruce Ledewitz's 1994 article in 32 Dusquene Law Review at 409, "What's Really Wrong with the Supreme Court of Pennsylvania".

And so, to allow for the strength and unity of purpose necessary to efficiently operate the judiciary department, we created a monster that lead to serious accusations of personal corruption against more than one member of the Court. But note that the foregoing examples which I have recalled for you are essentially institutional corruption. How do we address institutional corruption? By eliminating absolute institutional power.

It might be argued that HB10 disrupts constitutional separation-of-power, sacred to the courts, and on occasion the executive branch, a doctrine which is not explicitly found in the Pennsylvania Constitution (nor in the United States Constitution) but rather in

extraconstitutional writings such as the Federalists papers (No. 78) and the essays of the celebrated Lord Montesquieu in his Spirit of Laws and gleaned from our Constitution by the separate articles for each department.

The only source of governmental power in our state and country is the people who exercised that power by adopting state and federal constitutions which--while creating three departments of government and dividing various powers among them as checks-and-balances--explicitly in the Pennsylvania Constitution, Article I, Section 2, provides

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

and in the federal constitution, the Xth Amendment, which provides that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The effect of constitutional change upon separation-of-powers within the Commonwealth government must be argued upon the grounds that the amendments are necessary to redress a problem and that their benefits are not outweighed by the costs to the independence of the judiciary in its primary function of deciding cases and controversies before it, to the detriment of now and future litigants. In short, implicit constitutional doctrines can not be used to defeat proposed constitutional change. The arguments must be on the merits of the proposal itself.

The issue of course is governmental power. Perhaps because I worked so long for the

General Assembly I am blinded to some of my former employer's faults, but I still believe that the legislature, the collective representative of the people, is the best and only place where ultimate power, absolute power should and must reside. The people remain supreme by voting out of office those legislators perceived as violating the limits of their power. This idea might have seemed only academic and ideological until recent events proved otherwise.

The specific Supreme Court powers addressed by HB10 go, in three of the four instances, to its administrative duties, not its decisional powers over litigation.

As to the creation and composition of the Judicial Council and its powers, one positive suggestion would be to consider providing for the Council to directly adopt rules, etc., instead of requiring the Supreme Court to rubberstamp its product as stated in HB10, page 3, lines 24-26, Amendment to Article V, Section 10(c). How you force the court to do anything, of course, is the very issue before you. Why complicate the matter by requiring a two-step dance rather than delegating final rule making and administrative power to the Council initially? I also believe I would address Section One of the Schedule to Article V to clarify that inherent powers, i.e., King's Bench power, could be modified by the General Assembly. The section would seem clear enough as it is, but my experience is that a court attempting to justify its retention of power will use any suggestion of justification necessary to do so.

As for the deletion in Article V, Section 10(c) of the power of the Supreme Court to suspend laws inconsistent with judicially promulgated rules, this was a power newly acquired by the Pennsylvania Supreme Court in 1970. Its federal counterpart, and the Pennsylvania Supreme Court from its conception in the 18th century until 1970, never had such power. It would seem

to me that the Judicial Council should be given the authority by statute to recommend rules described in Section 10(c) to the legislature for prompt passage into law thereby avoiding constitutional deadlocks and quibbling. Separation of power ideas do not preclude the departments of government from cooperating to address common concerns.

As for the selection of the Chief Justice, I would suggest that the person selected by the Governor be given--in the constitution itself--a minimum term, say five years or until the end of the chief's term, whichever first occurs. I certainly don't think each newly elected governor should automatically be able to select a new chief--this would result, it seems to me, in enthrusting the court even further into the political thicket than it already is.

As for the provisions of proposed Section 19 of Article V, at page 5, regarding financial, budgetary and auditing affairs, the recent revelations regarding suspect practices by the court certainly warrant specific attention. I would suggest some technical changes in this language such as eliminating the suggestion on page 5, line 25, that there can be a "separate appropriation bill" rather than keeping the judiciary as part of the "general appropriation bill" process. Finally, I would either put the composition of the Judicial Council into the constitution or specifically authorize the legislature to determine it.

While abolishing King's Bench powers doesn't particularly trouble me conceptually, I believe there must be some room for the Court to take extraordinary jurisdiction in an extraordinary case. Perhaps a review of this situation in other states might suggest a way to deal with it.

I now turn my attention to the implementing legislation, HB 838. Most of my suggestions might well be characterized as of the nit-picking variety. I have no brief for any particular composition of the Judicial Council but I would note that the present composition places eight appointees of the Chief Justice on the council out of twelve and the twelve select the thirteenth, the Court Administrator. Does this place absolute power in the Chief Justice's domain?

I would add specifically to proposed Section 347 authority for the Judicial Council to recommend to the legislature bills which would address areas of the laws over which the Court now exercises jurisdiction pursuant to Article V, Section 10(c).

As a resident of Dauphin County and a member of its Bar Association, I certainly applaud the proposal to establish a seat of court at the seat of government, Harrisburg. I might give some flexibility to the Superior Court as panels in various regions of the Commonwealth while maintaining the Court's offices and exclusive chambers in Harrisburg.

I of course am pleased that Section 1703 has been revived, thereby requiring the Council and the various rule recommending committees to be sunshined when performing that function. I wrote that provision back in 1978 and it of course is the one the court unceremoniously declared constitutionally still born immediately thereafter.

Finally, I would recommend that Section 12 of the bill which deals with its effective date be given some more thought to clarify that the bill would take effect upon the adoption by the people of appropriate constitutional authority. The provision seems too subject matter specific to me as it stands.

I would congratulate the bipartisan sponsorship of these proposals for bringing forth provocative proposals for discussion and action which address serious issues long simmering on the judicial stove. Maybe future boilovers can be prevented by proceeding with thoughtful and deliberative legislative action now.