Testimony of Erwin C. Surrency in support of House Bill 838

It is a pleasure and more of a priviledge to be invited to testify before your committee this afternoon. Now should you wonder why a person from Georgia should have an interest in the Pennsylvania judiciary, this interest stems from an association and an academic interest in the Pennsylvania courts. For some twenty-eight years, I had the priviledge of being on the faculty of law at Temple University in the great city of Philadelphia as a professor of law and law librarian. During my tenure at that institution, I was the the founding editor of the American Journal of Legal History and its editor for some twenty-five years. I participated in the founding of the American Society for Legal History and the Historical Society of the United States Supreme Court. My teaching interests included the history of American Courts. I sincerely regret that more attention is not directed to the history of the law - not great cases and the exploits of lawyers and judges but the institutions themselves. As a personal note, I must add that my wife and I both miss Philadelphia, and Pennsylvania for it is a beautiful state with many interesting sights. One only has to come up to this area in the fall to admire the leaves in all their splendor! My wife had the priviledge of serving as township commissioner in Nether Providence, Delaware County. I am proud of having had a small part in the 250th celebration of the founding of the Supreme Court in 1972 and I take great pleasure in showing off the silver coin commenerating the ocassion. As you can see, we both have sentimental ties to the state and both of us were willing to drive up for the purpose of appearing before this committee, and incidently, of visiting Harrisburg and walking again along the Susquehanna River.

The courts and their structure has been a life long study of mine and I have been

impressed with the difficulty of changing the courts once they are established, even when it is perceived that they are ineffective. It took England some centuries to get rid of some of their courts whose puprose had long ceased to exist. It is an arduous task to bring about meaningful change and this task is not for those with a faint heart. It is a sign of progress that questions are being discussed about the effectiveness of the courts but its remains a long difficult road to implement meaningful change. The time has passed for more of the same - more judges, more secretaries, more court rooms, etc. Fundmental change is necessary. Since I must return to Georgia tomorrow, I can make some radical proposals without fear of some judge citing me for contempt!

If you do not think that the climate for changes in judicial administration has improved, recalled the reception accorded to Roscoe Pound by the members of the American Bar Association after his speech on "Popular Dissatisfaction with the Administration of Justice" in 1906. It was characterized by one speaker as "a more drastic attack upon the system of procedure could scarely be devised." In fact, some members considered the speech so radical that they did not want the speech printed in the proceedings. One speaker predicted that "Those who seek to destroy that which the wisdom of the centuries has evolved are generally disappointed." This may be a warning for law professors. However, a few individuals took up the challenge and the one person who should be singled out for his efforts was Arthur T. Vanderbilt of New Jersey. A lesser known individual to whom many kudos are due is Harry Olson, who created the Municipal Court in Chicago at the beginning of this century and who introduced such concepts as a traffic court whose objective was to make better drivers, not a source of revenue, clerks helping those with small claims to

prepare the necessary papers, and many other innovations. The Legislators of this state visited that court and patterned the Municipal Court of Philadelphia after it. But one fatal change made was imposing the fees of the Court of Common Pleas of Philadelphia county on the Municipal Court which defeated any concept of a court noted for its inexpensive and sympathetic proceedings. Olson provides a good example of what a judge who is determined can accomplished in improving the administration of justice.

Much has changed in Pennsylvania in the last two decades. I would rank at the head of the list, the enactment of the Judiciary Code. One can mention other changes including the establishment of the Administrative Office of the Courts. The State has adopted most of the improvements urged by those seeking judicial reform. The last four decades has been a minor revolution in a sense, but this does not mean the ideal (if that is possible) has been reached. Answers to the more expeditious settlement of cases must be found.

Pennsylvania is unique in that it has the last Supreme Court that travels. Throughout its history, it has travelled all over the state when travel was not easy. It has evolved from a court of trial jurisdiction to an appellate body. The designation as "Supreme" is no meanlessness title. In a sense, the court does not have a home. It is a tenant! Yes, the prothonotary's office is in Philadelphia but the judges live all over the state and come together to hold hearings. This does not contribute towards establishing a collegiate body. I have heard the arguments about the wonders of modern communications, but this does not replace the frequent personal contact where one colleague can drop in to discuss some issue, or probably more important, that law clerks can consult one another. Study is an important element in reaching a judicial decision and the book remains the source of study. In short,

the Court should access to a first class library which is provided in the bill before you.

Many intangible advantages would flow from the court being located at the capital where all its business would be conducted. Conceptually, the Supreme Court is a part of the state government - one the three branches of government. It should be associated with the capital of the state in the minds of its citizens. One only has to look at the history of the Supreme Court of the United States for it was not until the late 1930's that it was housed in its own building. I would argue that this move gave the Court greater respect. Imagine if you can going into the Capitol in Washington and asking an employee of Congress where the Supreme Court was located?

Besides this benefit, locating the Supreme Court in Harrisburg will save money. I can remember one day going up to the prothonotary's office and seeing all those foot lockers, some forty of them, with the robes and records of the court being shipped to Pittsburgh!

Another interesting aspect of this bill 838 is limiting the power of the Supreme Court to suspend legislative enactments. I am not familar with the issues behind this for I am afraid that this type of news is not covered in the local Georgia papers. But I am concerned with the issue of the proper role of the courts in the Constitutional scheme, especially on the Federal level, an issue that is not raised in academic circles and must be addressed on a political level. During the Nineteenth Century, the federal courts recognized the premise that the legislature would do nothing deliberately that would be unconstitutional. Today, it is generally assume that nothing is constitutional until the Supreme Court declares the issue constitutional! Contrast constitutional law books of an earlier period in our history. You would often find excerpts from debates in Congress and other writings in the majority of

institutional writers but today, the theories of Constitutional law are based upon the decisions of the Supreme Court of the United States. This is due to our law schools and not the practical realities. In short, I am in favor of some limitation on the courts' authority to substitute its own judgement for that of elected representatives.

In this state, there are two appellate courts. The evolution of the Superior Court has resulted in two distinct bodies with limited working relationship between the two. At one time, there was bitter rivalry between the two courts but hopefully, a closer working respect between the two has grown in the last two decades.. It does take time to bridge such gaps. Since the Superior Court has become the dominant appellate court to which the great majority of appeals from the Courts of Common Pleas are taken, I would propose that the state be divided into three districts with a Superior Court in each district to which all appeals from the courts in that district would go. The boundaries of these districts should be flexible so that the area encompassed could be readily changed.

A procedural device which would bridge this gap is the authorization for each court on its own initative to refer cases to the other court when in the judgement of the courts, this motion is thought to be in the best interest of settlement. To this should be added the device of certification where the Superior Court or the Commonwealth Court could ask for a ruling on an issue which is a constitutional matter or some other type question which is essential to the proper determination of a case before either of these courts. Structural changes do not necessarily bring about good will.

The amount of litigation will grow as the population of this state and the nation increases and some radical changes must be made to accommodate this. As I have said, more

of the same - more judges, more court houses - does not answer this need. Although, this is not an issue before you, I would like your indulgence to suggest some ideas.

A structural device which has not been favored in this country although it holds great potential for the prompt decision in certain types of cases, are courts of specialized or limited jurisdiction. Arbitration is favored by many but determine what makes arbitration desirable. I suggest it is the simple rules of procedure and evidence. I would perfer and I think it is greatly desirable that the State perform the function of settling disputes rather than a private body.

The Commonwealth Court has both an appellate and trial function, which is an awkward combination. These functions are today so fundementally different that they should be separated. One court should be a trial court with essentially jurisdictiion over cases against the state and the other, as appellate court from the various state agencies. The trial court should proceed without a jury and with its own procedure designed to disposed of cases expeditiously. There should be a tax court with its own procedure and which would decide cases without a jury. One of the greatest needs on the part of judges is a recognition that a court is for the purpose of settling disputes and lawyers should be kept from stringing out cases by procedural devices. A judge should be impartial which implies he should be seeking the truth and deciding what facts are needed to reach a conclusion. To mention a comtemporary event, the O. J. Simpson trial is a disgrace and a blot on American justice and any one who pays the slightest attention should ask if there is not a better way.

Another issue addressed by your bill is the appointment of the Chief Justice by the governor which is another change long overdue. The success of any system depends upon the

drive and determination of the person in charge. The senior justice does not necessarily assure such a selection although it has happened. But more significantly, the duties of the office has changed from a presiding officer at each session of the court and its conferences to overseeing the functioning of the entire judicial system. This bill adds more responsibility to the office and if these changes are to be meaningfull and carried out to their fullest intentions, the governor should seek the best individual to fill this role.

But more importantly, it is time for the State to consider the appointment of all judges so that selection of the ablest is possible. Let me assure you that appointment of judges by the governor and with the imput of any group selected does not guarantee the selection of the very best, but it would be a great improvement over our present system. I am afraid that in our current culture, selection is now nothing more than a question of whether the person meets the paper qualifications and wants a job. There is nothing in the training of lawyers that develop the qualtities of a judge. You can take the testimony of one who has spent forty-four years as a legal educator that judges who render the decisions are rarely mentioned. The qualities of a good judge should be defined and lawyers be told that more than a membership in the bar is essential to take their place on the bench. The historical connection between the clergy and the judge has been forgotten. In England, the judges of the common law courts were laymen from about the Twelfth Century but the Chancellors of England were clergymen until Henry VIII in the Sixteenth Century. Barristers in the early centuries of this millennium were the only group of laymen who received a secular education in the Inns of Court. Judges should be aware that the administration of justice is a trust, not a job.

Another area of judicial administration which concerns me are what are designated as

"Minor Courts". Generally, these courts are dismissed in any discussion as having no significance but I submit that they do. More people come into these courts than in any other court. Those officials in these courts are comfortable with their daily routines but for the general public, this is often their only encounter with the judicial system. These citizens are entitled to courtesy and explanation of what is going on. It is the responsibility of the presiding officer to shield the accused from the overbearing policemen or prosecutor. I am keenly aware of the doctor who jests about the patient's concern over an operation which, medically speaking, is routine. For the patient, no cutting on one's body is routine!

A final concern which I feel must be addressed in the future is more administrative control over the court. This issue is addressed partially in the bill before you but I feel something more is needed. Certainly, educational programs for new clerks, and other officials is a partial answer. However, there is nothing that keep one's on his toes than a visit by a representative of the head office - in this case the administrative office. Yes, it is necessary that field visits be made to audit accounts of the finances as this bill provides but is it not equally important to determine how the various courts on all levels are daily administered? It took me sometime to overcome my resentment of colleagues visiting my classes to determine my effectiveness. Should not courts be visited likewise? Just as the Captain of a large naval vessel should not ask the supply officer about the quality of food served the crew, but he should go and determine for himself by eating meals in the crew's mess.

I hope that my testimony and the few historical insights I have shared here today has some value and will prove helpful to you. I feel strongly that lawyers and judges have paid

very little attention to the details of their history and the results of decisions made decades previously. What was the meaning of the rule of the Pennsylvania Supreme Court adopted early part of the last century to the effect that the court would not grant a writ of certiorari to a justice of the peace court? This was no idle pronouncement and was one of the first steps in the long road to limiting the trial function at the Supreme Court. I feel that court officials from judges down to the clerks and other officials should be reminded, forcefully, about their role in contributing to the well being of society. Again, thank you for listening to a professor with strong opinions on the structure, functioning, and history of our courts.