

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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King's Bench Authority
of Pennsylvania Supreme Court

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House Judiciary Committee

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

Thursday, August 3, 1995 - 9:00 a.m.

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BEFORE:

Honorable Jeffrey Piccola, Majority Chairman
Honorable Brett Feese
Honorable Al Masland
Honorable Robert Reber
Honorable Jere Schuler
Honorable Thomas Caltagirone, Minority Chairman
Honorable Lisa Boscola
Honorable Michael Horsey
Honorable Harold James
Honorable Kathy Manderino

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ALSO PRESENT:

Brian J. Preski, Esquire
Chief Counsel for Judiciary Committee

Karen Dalton, Esquire
Counsel for Judiciary Committee

David L. Krantz
Minority Executive Director

Daniel DeLash
Minority Committee Secretary

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Former President Judge
Commonwealth Court 95Bruce Ledewitz, Professor of Law
Duquesne University School of Law 141

1 CHAIRMAN PICCOLA: The hearing of the
2 House Judiciary Committee will come to order.
3 Before we begin taking testimony this morning,
4 I'd like to share with you the primary reason
5 for this hearing.

6 Our Supreme Court is vested with a
7 bundle of powers which are called King's Bench
8 Authority. The current source of this authority
9 is the Pennsylvania Constitution and the
10 Statutes of Pennsylvania.

11 This morning we are focusing on that
12 portion of those powers which allows the Supreme
13 Court to take cases away from any lower court at
14 any point in the proceedings and to assume
15 plenary, or full and complete jurisdiction of
16 that case. We will be hearing from witnesses
17 who are currently involved with King's Bench
18 litigation, from a former member of the
19 Appellate Bench who has had extensive experience
20 with King's Bench cases, from a legal scholar,
21 and from a representative of the Administrative
22 Office of the Pennsylvania Courts.

23 By hearing from such diverse and
24 learned sources, it is the committee's intention
25 to shed some additional light on the nature of

1 this power and the manner in which it has been
2 exercised most particularly and most recently in
3 the case of Thermal Pure Systems versus DER.

4 Let me state what this hearing is not
5 about. It is neither about any actual
6 impropriety on the part of our Supreme Court,
7 nor is it about Justice Zappala's brother's
8 interest in the aforementioned case. I have
9 seen nothing which would lead me to believe that
10 the Supreme Court has acted in any manner
11 contrary to law.

12 However, as Chairman of this committee
13 and as a practicing member of the Pennsylvania
14 Bar, I am concerned with more than actual
15 impropriety. Being actively involved in the
16 impeachment of Former Justice Rolf Larsen and
17 other issues which bear directly upon whether
18 the hard-working men and women of Pennsylvania
19 have confidence in their courts, I am left with
20 the unshakable belief that the appearance of
21 impropriety is as damning as actual impropriety.

22 I am not the only person who believes
23 the Supreme Court invokes King's Bench
24 jurisdiction in a haphazard and inscrutable way.
25 Practicing attorneys and some legal scholars

1 have also been critical of this practice.

2 Trial judges have told me that
3 attorneys in their courtrooms raise the specter
4 of intervention by the Supreme Court when faced
5 with an adverse ruling; thus, disrupting and
6 delaying lower court proceedings.

7 The credibility of the Court is at
8 stake, as is our citizen's faith in the
9 integrity of our courts.

10 In March of this year, this committee
11 held a public hearing on House Bill 10 and House
12 Bill 838, a thoughtful and bipartisan judiciary
13 reform package. That legislation will eliminate
14 King's Bench Authority of the Supreme Court and
15 instead let the General Assembly grant that
16 power to the Court through statute. I believed
17 then and I believe now that this reform is
18 desperately needed. The procedural history of
19 this case only reinforces that belief, as I
20 believe the committee will see.

21 At this time we will call our first
22 witness, Mr. Zygmunt A. Pines, Chief Counsel to
23 the Administrative Office of the Pennsylvania
24 Courts. Before we ask Mr. Pines to begin his
25 presentation, I would like the other members of

1 the committee to introduce themselves beginning
2 at my far left, Representative Masland.

3 REPRESENTATIVE MASLAND: Thank you,
4 Mr. Chairman. I'm Al Masland. I'm from
5 Cumberland County.

6 REPRESENTATIVE BOSCOLA: Lisa Boscola,
7 Northampton County.

8 REPRESENTATIVE CALTAGIRONE: Tom
9 Caltagirone, Berks County.

10 REPRESENTATIVE HORSEY: Mike Horsey,
11 Philadelphia County.

12 REPRESENTATIVE FEESE: Brett Feese,
13 Lycoming County.

14 REPRESENTATIVE SCHULER: Jere Schuler,
15 Lancaster County.

16 REPRESENTATIVE JAMES: Harold James,
17 South Philadelphia County.

18 REPRESENTATIVE REBER: Bob Reber,
19 Montgomery County.

20 CHAIRMAN PICCOLA: Mr. Pines.

21 MR. PINES: Good morning, Mr. Chairman
22 and members of the House Judiciary Committee. I
23 want to thank you for your kind invitation to
24 address an issue which concerns the unified
25 judicial system. I will be happy to answer any

1 of your questions to the best of my ability, but
2 first I would like to offer to you the following
3 statement.

4 I come to you today briefly to speak
5 on a topic that is as old as any fact that
6 predates this memorable Commonwealth. I speak
7 the so-called King's Bench Jurisdiction of our
8 Supreme Court. First, let me say that my legal
9 career began first as a litigator in private
10 practice, followed by approximately 17 years
11 with the unified judicial system; first, as
12 Assistant Chief Staff Attorney for the
13 Pennsylvania Superior Court and now as Chief
14 Counsel for the Administrative Office of
15 Pennsylvania Courts.

16 In addition, I have written on
17 appellate court matters and have taught at
18 various institutions. Therefore, I am somewhat
19 familiar with the concept of King's Bench
20 jurisdiction in Pennsylvania.

21 The term King's Bench is, of course, a
22 misnomer for we have neither a king nor the 3
23 principal English courts of Westminster.
24 Therefore, I shall refer to the modern King's
25 Bench jurisdiction as it should be properly

1 called; that is, plenary or extraordinary
2 jurisdiction.

3 The creation of extraordinary
4 jurisdiction in this Commonwealth goes back to
5 the Act of 1722 when the newly-created Supreme
6 Court of Pennsylvania was given the authority to
7 exercise King's Bench jurisdiction, a
8 jurisdiction that was exercised historically by
9 the judges of the King's Bench, Common Pleas and
10 Exchequer at Westminster. Historically, the
11 King's Bench Powers included of necessity the
12 right to supervise and manage the other courts.

13 The exercise of extraordinary
14 jurisdiction by our Supreme Court has existed
15 since 1722 without substantial disturbance.
16 Today, the importance of that jurisdiction is
17 given flesh by the Constitution of our
18 Commonwealth, specifically Article V, Sections 2
19 and 10 (a), in which the Supreme Court is
20 designated as the highest court of this
21 Commonwealth with the powers of superintendence
22 over all other courts.

23 The Supreme Court's extraordinary
24 jurisdiction is also recognized by statute and
25 Supreme Court rule. At the 1968 Constitutional

1 Convention, a respected authority on our
2 Constitution, Delegate Robert Woodside, who, by
3 the way, served as a Superior Court Judge and
4 Attorney General in this Commonwealth, referred
5 to the King's Bench powers as an inherent
6 jurisdiction, quote, powers which, in effect,
7 are the Commonwealth's powers.

8 It has been commonly stated in
9 academic journals and cases that the principal
10 historical purpose of extraordinary jurisdiction
11 is to prevent a subordinate judicial tribunal
12 from exceeding or abusing its jurisdiction and
13 to protect the Court's appellate jurisdiction.

14 However, as I had read the various
15 reported Supreme Court cases since 1803, to me
16 the truly essential purpose of extraordinary
17 jurisdiction has been to protect the citizens of
18 this Commonwealth from damage and injustice that
19 would likely follow if Supreme Court
20 intervention were not expeditiously exercised.
21 In effect, extraordinary jurisdiction has
22 operated as a necessary, and often only, safety
23 valve to provide expeditious, economical and
24 definitive justice on critical issues of public
25 importance.

1 While the theory of extraordinary
2 jurisdiction is fluid and broad, and some may
3 say even ambiguous, the exercise of such
4 authority is rare. Its exercise is purely
5 discretionary with the Court. On many occasions
6 the Supreme Court has stressed the very limited
7 availability of this jurisdiction. For example,
8 in one case the Supreme Court stated:

9 The writ of prohibition is one which,
10 like all other prerogative writs, is to be used
11 only with great caution and forbearance and as
12 an extraordinary remedy in cases of extreme
13 necessity, to secure order and regularity in
14 judicial proceedings if none of the ordinary
15 remedies provided by law is applicable or
16 adequate to afford relief.

17 In another case, where the Supreme
18 Court was faced with balancing the right of the
19 press to access criminal pretrial proceedings
20 with a defendant's right to a fair trial, the
21 Court again cautioned:

22 The presence of an issue of immediate
23 public importance is not alone to justify
24 extraordinary relief. We will not invoke
25 extraordinary jurisdiction unless the record

1 clearly demonstrates a petitioner's rights.
2 Even a clear showing that a petitioner is
3 aggrieved does not assure that this Court will
4 exercise its discretion to grant the requested
5 relief.

6 How rare is this concept that we are
7 discussing? Well, based on statistics provided
8 by the Prothonotary of the Supreme Court, there
9 were approximately 97 extraordinary jurisdiction
10 cases that proceeded from briefing to decision
11 in the Supreme Court from 1979 through 1994.
12 Thus, during that 16-year period, an average of
13 less than 6 cases per year were adjudicated by
14 the Supreme Court pursuant to its extraordinary
15 jurisdiction.

16 This figure of 6 cases per year should
17 be placed in its proper context; namely, the
18 Supreme Court's annual total caseload of
19 approximately 3,000 to 4,000 filings per year.
20 As the Prothonotary told me, many extraordinary
21 jurisdiction cases are filed, but few are
22 chosen.

23 How do these matters come before the
24 Supreme Court? The relevant statute states that
25 the Supreme Court can invoke its extraordinary

1 jurisdiction on its own or in response to a
2 petition by a party in a proceeding pending in
3 any court. The procedural mechanism that brings
4 these cases to the Court includes petitions for
5 writs of mandamus, prohibition, stay and
6 sometimes certiorari. They all basically serve
7 the same purpose. These extraordinary petitions
8 are circulated to the entire Supreme Court for
9 its review and vote.

10 It is, of course, difficult to isolate
11 any one factor that may influence the Court's
12 decision to grant these petitions. However, one
13 respected treatise on appellate practice has
14 identified the following factors as important:
15 The need for a prompt final decision, the impact
16 on the administration of justice, the presence
17 of important constitutional issues, and the
18 expeditious disposition of criminal matters.

19 Extraordinary jurisdiction cases are
20 varied. The Supreme Court Prothonotary's
21 categorization of the cases from 1979 through
22 '94 include the following:

23 In civil cases there were 5 election
24 cases, 12 judicial election cases, 6 labor
25 cases, 11 government-related cases, and 18

1 others.

2 In criminal cases, there were 2 Grand
3 Jury cases, 29 others, and 4 media-related
4 cases.

5 And, in judicial administration cases,
6 there were 4 court funding cases and 6 others.

7 To illustrate these categories, the
8 Supreme Court has exercised extraordinary
9 jurisdiction in the following cases or issues
10 which can be substantiated by reported opinions:

11 In a case of first impression holding
12 the quasi-judicial immunity insulated
13 Commonwealth officials of the Department of
14 Labor and Industry from criminal liability and
15 prosecution for acts taken without bad faith or
16 corruption; a case upholding the constitutional
17 power of the General Assembly to confer tort
18 immunity upon political subdivisions; a case
19 involving the validity of an injunction
20 prohibiting a strike which crippled the
21 Philadelphia school system for almost 3 months;
22 a case involving the power of an investigating
23 Grand Jury to call witnesses after a defendant
24 had been formally charged with a crime; the
25 constitutionality of over-crowding conditions

1 for prison inmates in which the Supreme Court
2 held that one man/one cell was not
3 constitutionally required.

4 The constitutionality of procedures to
5 recall the mayor of Philadelphia; the
6 Commonwealth's right to demand on its own a jury
7 trial in criminal cases; the validity of a
8 primary election for judicial office; the number
9 of candidates who may be nominated for office
10 for county commissioner; the power of a lower
11 appellate court to review the decision of a
12 county's Civil Service Commission; and the power
13 of a judge to make or change judicial
14 assignments in a criminal matter.

15 And, in a recently publicized case,
16 the Supreme Court granted a petition for
17 extraordinary jurisdiction in a Commonwealth
18 Court matter involving the safekeeping and
19 disposal of infectious waste and the right of
20 our citizens to a safe environment under a
21 relatively new statutory scheme.

22 Personally, this is the very type of
23 case that, I think, justifies and demands the
24 intervention of our highest court to secure
25 final justice for our concerned citizens, who

1 demand a safe environment, for the owner-
2 operator who face the risk of financial ruin,
3 and for our Commonwealth officials who have the
4 onerous obligation of making sure that highly
5 dangerous wastes are properly handled in
6 conformity with the new regulations and
7 statutes.

8 Lastly, let me say that the exercise
9 of extraordinary jurisdiction is not only
10 grounded in the history of this Commonwealth, it
11 is a power that has been exercised in other
12 jurisdictions, including the federal court
13 system. For example, the federal All Writs Act
14 authorizes the United States Supreme Court and
15 other federal courts to issue extraordinary
16 writs necessary or appropriate in aid of its
17 jurisdiction. As with the practice in
18 Pennsylvania, the Court's power to issue such
19 extraordinary writs is broad. But,
20 discretionary principles and a due regard for
21 the Court's pressing business had made actual
22 use of this federal power also very narrow.

23 In addition, my quick research during
24 the past week has indicated that the following
25 states also recognize the common law King's

1 Bench power, or a modification thereof for their
2 highest courts: New Mexico, New York, Oklahoma,
3 Wisconsin, Florida and Virginia. Of course, a
4 similar grant of authority may exist in other
5 states under a different name.

6 Thus, as we sit here this morning, it
7 is important to remember that the so-called
8 King's Bench authority has been part of the
9 fabric of this Commonwealth since 1722. For
10 years, that authority has been there for the
11 citizens of this Commonwealth, for governmental
12 officials, for the press, for criminal
13 defendants, for political candidates, and for
14 those concerned with this Commonwealth's common
15 weal.

16 While there may be disagreement with
17 the exercise of jurisdiction in a particular
18 case, for me it is hard to argue against the
19 theoretical and practical necessity of such an
20 authority, of such an important safety valve, in
21 our rapidly changing and tumultuous world where
22 definitive and expeditious justice on matters of
23 public importance remains a cherished ideal.

24 Thank you, Mr. Chairman, and members
25 of the committee. I will be glad to answer any

1 questions that you may have.

2 CHAIRMAN PICCOLA: Thank you, Mr.
3 Pines. Could you briefly describe what
4 procedural rules, written procedural rules the
5 Court has promulgated with respect to the
6 exercising of King's Bench authority?

7 MR. PINES: The longstanding rule in
8 the rules of appellate practice I think is Rule
9 3309 of the Rules of Pennsylvania Appellate
10 Procedure. It is probably a 5-paragraph rule
11 which states how one goes about filing a
12 petition for extraordinary jurisdiction, the
13 right of the opponent or those interested to
14 file an answer, the necessity for service upon
15 interested parties, and also makes provisions
16 for the circulation of the petitions through the
17 entire court and vote.

18 Also recently within the past year the
19 Supreme Court, probably 1994, promulgated
20 internal operating procedures which also covers,
21 I think, petitions, including petitions for
22 extraordinary relief under the King's Bench
23 power. Those are the only 2 procedural rules
24 that I'm aware of that cover the matter.

25 CHAIRMAN PICCOLA: Are those internal

1 rules available to the public?

2 MR. PINES: Yes, they are. They're
3 published.

4 CHAIRMAN PICCOLA: In any of those
5 rules, is there any time limitation placed on
6 the Court to render a decision in the case that
7 it assumes under this plenary power?

8 MR. PINES: To my knowledge, no. As
9 with any other matter before an appellate court,
10 I'm not aware of any time frame that imposes an
11 appellate court to make a decision. I know, for
12 example, there are time frames in the trial
13 court with regard to petitions for
14 reconsideration and petitions to permit an
15 appeal. But, in the appellate court system in
16 Pennsylvania, as with many other appellate court
17 systems in United States, there is no specific
18 time frame for a decision.

19 CHAIRMAN PICCOLA: Now, if the
20 exercise of this plenary power, or King's Bench
21 power is for the purpose of -- I don't see this.
22 I guess I don't see this anywhere directly in
23 your testimony, but I think it's there by
24 implication; that immediate justice is required,
25 and that one of the criteria that is used for

1 the Court to assume this jurisdiction is initial
2 immediate public importance.

3 Why would the Court not place upon
4 itself time limitation to decide the cases that
5 it assumes? I cite, for example, the case that
6 we are talking about today which I believe the
7 Court assumed jurisdiction of in March or April
8 of this year.

9 MR. PINES: April and May.

10 CHAIRMAN PICCOLA: We are now in
11 August. So far as I'm aware no decision has
12 been rendered in that case relative to what the
13 Court is going to do. Am I accurate on that?

14 MR. PINES: It's my understanding that
15 petitions were granted probably in late April
16 and early -- no, in the middle of May, in the, I
17 think, the Thermal case that you are speaking
18 of. You asked a good question. I have thought
19 about it. This would be my response.

20 I think the issue of time is important
21 but it has to be placed in perspective.
22 Normally, the Supreme Court will intervene in a
23 matter where time is of the essence, but time
24 has to be viewed in a larger context. Time must
25 be viewed, for example, in the context of how

1 long would this matter take in the court system
2 before it finally reached the final tribunal,
3 the Supreme Court.

4 In the Thermal case, for example, you
5 would have a situation, at least according to my
6 understanding, a situation which the matter
7 would be proceeding for the second time in the
8 Commonwealth Court. There might very well be
9 hearings. I don't know how long that would
10 take. Then there would probably be a decision
11 by the Commonwealth Court judge, or judges.
12 That would then be subject to possibly
13 reargument and reconsideration. You may have 6
14 months there.

15 Then you would have the next stage in
16 which, for example, the petitioners or the
17 aggrieved parties who lost below would file a
18 matter in the Supreme Court either on the
19 allocatur docket or King's Bench, they could do
20 either, which is what they in fact did in the
21 Thermal Wear (sic) case.

22 In the allocatur situation you may
23 have, based on the filing of the petition and
24 time for response, you may have had anywhere
25 between 30 to 60 days. So that, if you look at

1 the question of time in a broader context, the
2 Supreme Court generally exercises King's Bench
3 power to expedite process so that a final
4 decision can be quicker.

5 Another answer to your question is
6 this, when the Supreme Court intervenes in a
7 King's Bench matter, it also has the power to
8 grant a stay, which is what I think, in fact,
9 the Supreme Court did in the Thermal case. In
10 effect, it is granting some temporary interim
11 relief while the matter is before it.

12 CHAIRMAN PICCOLA: I'm not sure I
13 totally agree with your analysis of the case,
14 the Thermal case. It's my understanding that
15 that matter was proceeding rather rapidly
16 through the appellate process; that argument was
17 scheduled in the Commonwealth Court the day
18 after the Supreme Court assumed plenary
19 jurisdiction.

20 But, more importantly, I guess the
21 question is, are there not hundreds, if not
22 thousands, of litigants out there, both public
23 and private, who believe that their litigation
24 is important to have resolved, and that the
25 issues that they are bringing to the appellate

1 courts or to the lower courts are important and
2 have some public importance, if not immediate
3 public importance? And that, the unlimited and
4 totally discretionary power of the Supreme Court
5 to exercise this jurisdiction is almost without
6 bounds and is almost without rules, and they are
7 by a vote of 4 out of 7 deciding which of these
8 cases meet the criteria and which of the
9 thousands of others do not? Am I characterizing
10 the current situation accurately?

11 MR. PINES: Well, I think that you are
12 correct. I think if you had experience as a
13 litigator or even as a litigant, your case is
14 always important. It may be important to you
15 and you may think -- I have seen cases involving
16 routine discovery matters in which a litigant
17 will say, well, this is a matter of extreme
18 public importance with regard to the exposure of
19 information before trial. So, I think that
20 could be commonly said, the fact that someone
21 says it does not necessarily mean it has merit.

22 It is true that the Supreme Court, as
23 I think almost every Supreme Court in the United
24 States has discretion, some will say unlimited,
25 to decide whether to hear a case or how to

1 decide a case. That's the very nature, I think,
2 of judicial power.

3 The concern that you have is very
4 reminiscent of what I was, for example, reading
5 last night on King's Bench power and the federal
6 courts regarding the All Writs Act. One of the
7 commentators Wrighten (phonetic) Miller on
8 federal practice and procedure talks about the
9 problem in writing about this very topic because
10 the U.S. Supreme Court has not enunciated any
11 standards with regard to how it exercises the
12 writ.

13 The only thing that you can do is, you
14 can look at those cases and see if you can
15 distill some principles or some important
16 factors that, perhaps, are common to the entire
17 constellation of cases. I offered to you this
18 morning what I considered to be some of the
19 important factors. That is not based on my
20 personal information, but, for example, on the
21 treatise on appellate practice.

22 I think although the Supreme Court may
23 not have in many cases enunciated a standard
24 that governments review, I think one could go
25 back and look at those cases and say this is

1 probably the guidance review.

2 In the Thermal Wear -- in the Thermal
3 case, for example, I think it's very clear what
4 some of the important issues may be that would
5 compel the Supreme Court to grant regional
6 matter like that.

7 CHAIRMAN PICCOLA: I'm glad you
8 brought that up because I was going to ask you
9 about that question. Before I do, with respect
10 to the federal system, would you not agree that
11 that enters significantly, from a constitutional
12 perspective in Pennsylvania, there is no
13 inherent constitutional plenary jurisdiction in
14 the United States Supreme Court?

15 MR. PINES: I don't know enough about
16 the federal court system to really answer your
17 question. I would have to defer to someone else
18 or I can even look into that for you. I'm not
19 quite sure what the basis of the All Writs Act
20 is. I don't know. I haven't seen anything as
21 to whether it's based on the federal
22 Constitution. I don't know.

23 CHAIRMAN PICCOLA: But the All Writs
24 Act is an act of Congress?

25 MR. PINES: It is an act of Congress,

1 that's correct.

2 CHAIRMAN PICCOLA: Could be repealed
3 as all acts of Congress, or modified, or
4 restricted?

5 MR. PINES: I'm sure it could.

6 CHAIRMAN PICCOLA: In Pennsylvania,
7 would you not agree that the legislature, if it
8 wished to restrict or modify the Court's King
9 Bench power could not do that by an act of the
10 General Assembly? It would require a
11 constitutional amendment?

12 MR. PINES: I think that's correct.

13 CHAIRMAN PICCOLA: On this specific
14 case, what are these immediate public matters
15 that require the Court to take this case under
16 disciplinary jurisdiction?

17 MR. PINES: Are we talking about the
18 Thermal case?

19 CHAIRMAN PICCOLA: Yes.

20 MR. PINES: This is my own personal
21 viewpoint. I have not, certainly, discussed
22 this case with anyone. I had looked at the
23 petitions for plenary review. I have seen the
24 responses. If I were a judge or a justice
25 looking at this, I would see the following

1 factors as being important.

2 Certainly, the whole issue of the
3 statutory and regulatory framework for, I think,
4 the acceptance, safekeeping and disposal of
5 infectious waste. There seems to me to be a
6 very serious question as to the current efficacy
7 of the statute and regulations governing toxic
8 chemical waste in Pennsylvania.

9 There is, I think, also a very serious
10 issue as to whether all of the statutes or
11 regulations are in limbo or in suspense by
12 nature of the Commonwealth Court's action, which
13 then puts in jeopardy the entire regulatory
14 framework with regard to the safekeeping of
15 these toxic wastes, not only in Pennsylvania,
16 but I think probably elsewhere because it has a
17 ripple effect. So, you have a wide public issue
18 regarding chemical waste in Pennsylvania.

19 You also have I think a very serious
20 issue with regard to the -- I think they were
21 petitioners in the case; those who are the
22 owner-operators of the disposal or the
23 infectious waste facility.

24 I think, probably, I mentioned in my
25 statement that perhaps they face financial ruin.

1 The state probably has alleviated that concern,
2 but nevertheless that is still there. There's a
3 very serious concern on their part because they
4 also, although they are making a profit, they
5 are also performing a very important valuable
6 public service.

7 Then from the Commonwealth's point of
8 view, I think there's a very serious concern by
9 the regulatory officials as to what do we have
10 here? How do the regulations impact on the
11 statute? I haven't read, I think it's Judge
12 Smith's Commonwealth Court opinion, but I think
13 there is right now a serious question as to
14 whether the regulation or the statute is valid.
15 Because, in the Thermal case the permit was
16 basically revoked because of the ineffectiveness
17 or the inadequacy of the current regulations. I
18 think there is a very serious issue as to
19 whether these regulations are still in effect in
20 Pennsylvania.

21 Again, I'm speaking offhand based on
22 the petition and answer that I have seen. I'm
23 sure that the litigants and the attorneys in the
24 case might be able to provide greater
25 enlightenment on the issue.

1 CHAIRMAN PICCOLA: Is it your
2 understanding or belief that the entire question
3 of the disposal of infectious waste in
4 Pennsylvania is in limbo and, therefore, we
5 don't have the ability to dispose of those
6 because of this case?

7 MR. PINES: I don't know. I think
8 that may be a lurking question or a lurking
9 issue, because certainly if the regulations or
10 if a statute would be invalidated, I think we
11 would have some serious concern as to the
12 continued regulatory framework in Pennsylvania.
13 I'm not aware of the legislature or any other
14 body looking into promulgating new statutes or
15 regulations.

16 CHAIRMAN PICCOLA: Were those
17 allegations made in any of the Pleadings or
18 petitions that were presented to the Court that
19 the entire --

20 MR. PINES: Yes, they were.

21 CHAIRMAN PICCOLA: By which party?

22 MR. PINES: I think it probably was
23 the petitioners, Thermal, in connection with the
24 request for a stay.

25 CHAIRMAN PICCOLA: What about the

1 Commonwealth? Did the Commonwealth make any of
2 those claims?

3 MR. PINES: I don't recall.

4 CHAIRMAN PICCOLA: One last question
5 and I'll yield to other members. This is more
6 of a comment or clarification, where you speak
7 of the caseload of the Supreme Court 3 to 4,000
8 filings. That is not really, technically, the
9 caseload? The Court doesn't decide 3,000 cases.
10 The Court only decides 2 or 300 cases. The rest
11 are usually petitions for allocatur that are
12 denied, is that not accurate?

13 MR. PINES: Yes and no.

14 CHAIRMAN PICCOLA: Mostly by law
15 clerks.

16 MR. PINES: The Supreme Court I think
17 decides, and I put that in quotes, 300 cases, I
18 think, formal written opinions. That certainly
19 is in addition to the decisions the Court has to
20 make on the various petitions that come before
21 it.

22 For example, petitions for allocatur
23 which I think range in the 2500 figure mark,
24 they are reviewed by the entire Court and their
25 law clerks. So, we're talking about probably

1 2 to 300 reported opinions in addition to
2 decisions that must be made on various petitions
3 including petitions for allocatur which are in
4 the range of about 2500.

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

8 REPRESENTATIVE MASLAND: Thank you,
9 Mr. Chairman. Mr. Pines, first of all, on the
10 issue as to whether or not the Supreme Court
11 should have taken this case up, I have read the
12 opinion by Judge Smith. I just read it once.
13 As you were testifying, I quickly skimmed over
14 it to try to see if I read it correctly or not.
15 I don't really see it as throwing out the
16 regulatory scheme. The way I see it is, they
17 denied a permit.

18 The question was, how they were going
19 to interpret the legislator's statement as to
20 whether this was a cradle-to-grave statute that
21 would deal with all aspects of hazardous wastes
22 or whether it just dealt with incinerating or
23 whether it could possibly extend to auto
24 emissions. I don't really see this opinion as
25 something that jeopardizes the whole regulatory

1 scheme of the Commonwealth. But, that's up to
2 an interpretation.

3 One statement you made which really
4 caught my attention in your testimony was, I
5 guess by the Prothonotary of the Supreme Court,
6 who said many cases are filed but few are
7 chosen. Well, I couldn't help but hear the
8 Biblical ring in that statement. Many are
9 called, but few are chosen. I don't want to get
10 too theological here, but there is a difference.

11 The Supreme Court's powers come from
12 the Constitution, come from statutes, which are
13 created by people, by legislators, by citizens
14 of the Commonwealth. It is not an authority
15 that is to be exercised in an omnipotent
16 fashion. That's really my problem and my
17 concern. You are a much greater scholar on
18 King's Bench issues than I am.

19 MR. PINES: Only within the past week.

20 REPRESENTATIVE MASLAND: Then you have
21 at least a week on me. That's the problem I see
22 with this; that this is not just unbridled.
23 It's really omnipotent authority when it comes
24 right down to it, and there are no checks or
25 balances. That's why I think Representative

1 Piccola has asked us to take a hard look at
2 whether or not this should be set up through
3 statute; whether the legislature should have a
4 little bit more control.

5 Finally, you talk about viewing time
6 in context. Well, everybody knows the wheels of
7 justice turn slowly. If we put this in context,
8 we say, well, anything better than 4 or 5 years
9 is expeditious because that may be how long it
10 would otherwise take to get through all the way
11 to the Supreme Court to a final decision. I
12 don't think that really satisfies anybody.

13 I think when you do take control of
14 something back in April, and it is an issue like
15 this which has an impact on -- and having read
16 the newspaper accounts and having read a number
17 of other miscellaneous things on this, it just
18 strikes me as something that if you are going to
19 take this and act expeditiously, you ought to
20 act expeditiously, and I don't think that
21 happened. I'll put a question mark at the end
22 of that.

23 MR. PINES: I understand your concern
24 about the absence of guidelines and unbridled
25 discretion. Let me just say that in doing a

1 Westlaw search in those other jurisdictions that
2 have so-called King's Bench power formally by
3 that term, I did not come across any legislation
4 or court rule that specified or provided for any
5 guidelines as to how that power was to be
6 exercised. That also, by the way, includes the
7 federal All Writs Act. I'm not aware of any
8 court system or legislature that has specified
9 the guidelines that are to be used in
10 determining whether this type of jurisdiction is
11 to be exercised.

12 REPRESENTATIVE MASLAND: It ultimately
13 is in conflict between theory and practice.

14 MR. PINES: Always.

15 REPRESENTATIVE MASLAND: In theory, as
16 you state in your testimony on page 2, when
17 there is a truly essential purpose which
18 requires the Court to act expeditiously and
19 necessary safety valve, it's difficult to
20 disagree with that. But, when you look at the
21 numbers of cases, you look at the types of
22 cases, and you have listed some good ones, but
23 unfortunately, under the current judicial scheme
24 that we are in here in Pennsylvania, we have to
25 look at practical outcomes too.

1 My concern is that those practical
2 problems with the Supreme Court that our
3 judicial systems has will not over influence the
4 legislature in how we deal with this.

5 MR. PINES: What I was trying to do
6 for the committee's benefit was to give you just
7 an illustrative list of those cases involving
8 what I consider to be fairly important issue in
9 which the Supreme Court has exercised its
10 authorities. There are legions of cases. For
11 example, you could go to Purdon's or you could
12 go to the various books, the Treatise on
13 Appellate Practice. You could get a fairly good
14 idea of the types of issues that were presented.
15 Some in hindsight may seem to be unimportant
16 today, but perhaps yesterday they were. I don't
17 know. I tried to give you an illustrative list.

18 REPRESENTATIVE MASLAND: Thank you
19 very much. Thank you, Mr. Chairman. I have no
20 further questions. I'll excuse myself and I'll
21 tell the other witnesses I will read your
22 testimony.

23 CHAIRMAN PICCOLA: Any other questions
24 from members of the committee?

25 (No response)

1 CHAIRMAN PICCOLA: As a follow-up, is
2 there not some implication in the decision of
3 the Supreme Court to assume plenary
4 jurisdiction? Isn't there some implication that
5 the majority of the Court is in disagreement
6 with either the method or the result that is
7 being obtained in the lower court?

8 Isn't that particularly true when the
9 Supreme Court is reaching into another appellate
10 court because, in theory, just take this Thermal
11 case, for example, the Commonwealth Court could
12 have resulted completely and the Supreme Court
13 could have simply ratified that result by
14 refusing to accept a writ of certiorari or
15 refused the allocatur petition.

16 So, isn't there some implication that
17 the Court by taking a case particularly from
18 another appellate court is already predisposed
19 toward what the end result will be?

20 MR. PINES: I would answer no and I'll
21 tell you why. I think it's very easy to make
22 that assumption. But, I think that probably in
23 many cases what the Supreme Court will look at
24 is not only the importance of the issue, but how
25 strong are the rights that are being asserted,

1 for example, in the petition. It may have some
2 influence. The reason I say no is this --

3 CHAIRMAN PICCOLA: Could I interrupt
4 you just a minute? You made reference to that
5 in your testimony about the rights of the
6 petitioner being asserted on the face. Isn't
7 what you are talking about basically almost like
8 asking for a Motion of Summary Judgment or
9 Motion on the Pleadings in the Court of Common
10 Pleas where the one side doesn't even have a
11 case even if it could prove all the facts it
12 alleges? Is that what the Court standard is?

13 MR. PINES: I think it probably is a
14 legal issue in a sense that, such a matter
15 before the Supreme Court would not be subject
16 necessarily to testimony or taking of evidence.
17 Basically, the Supreme Court will operate on the
18 record that was developed below in most cases.

19 CHAIRMAN PICCOLA: But it could create
20 a record, could it not?

21 MR. PINES: It may. I have not seen
22 such a case in which the Supreme Court has in
23 effect taken testimony. That would be a very
24 unusual situation. So, what the Supreme Court
25 will do then is, I guess as you put it, make a

1 decision in the nature of a summary judgment or
2 judgment on the Pleadings, in that, all the
3 Supreme Court is doing is looking at the record
4 of the court below and also hearing arguments
5 from counsel representing the various parties.
6 Yes, you are correct in that respect.

7 CHAIRMAN PICCOLA: I interrupted you.

8 MR. PINES: There was an initial
9 question that you had before that that I wanted
10 to --

11 CHAIRMAN PICCOLA: My question
12 initially was the assumption, isn't there an
13 assumption that the Court predisposed toward
14 deciding a case in a particular way when it
15 assumes the jurisdiction?

16 MR. PINES: The reason I say no is
17 that, in looking at the various reported
18 opinions in the Supreme Court, and I'll say I
19 probably looked at and read about 25 of them.
20 Surprisingly to me there were a number of cases
21 in which the Supreme Court stated in its opinion
22 that, upon vote of the Supreme Court we have
23 decided to grant and exercise plenary
24 jurisdiction, which basically means they were
25 predisposed to the petitioner who asked for

1 plenary jurisdiction.

2 The opinion goes along pretty well
3 until the very end the Court, in many cases,
4 unanimately decides not to grant the relief the
5 petitioner asked in the first place. One case
6 that I can think of was a press case.
7 Certainly, if you need cites, I can give you
8 cites.

9 So, I don't think it's easy or
10 necessarily safe to make the assumption that
11 just because a petition is granted the Supreme
12 Court will necessarily grant the petitioner's
13 relief ultimately.

14 CHAIRMAN PICCOLA: Thank you, Mr.
15 Pines. We appreciate it. One last question.
16 Staff handed me a copy of the internal operating
17 rules of the Court while you were asking other
18 members questions, Mr. Masland's questions. He
19 pointed out Rule VI, Roman Numberal VI.

20 In your opinion, has the Court -- For
21 the benefit of other members, that has to do
22 with the time frames for the Court to decide
23 motions and issues, miscellaneous petitions
24 presented to it, and it includes the exercise of
25 the King's Bench. It's stated explicitly right

1 in the rule. VI (b) sets forth certain time
2 frames in which the Court must make decisions.

3 Has the Court abided by its internal
4 operating rules with respect to the Thermal
5 case?

6 MR. PINES: I don't know.

7 CHAIRMAN PICCOLA: You do not know.
8 Because, there's a 60-day requirement that every
9 motion shall be decided within 60 days. Now,
10 does that simply apply to the motion requesting
11 the grant or does that require -- does that
12 apply to the final disposition of the case?

13 MR. PINES: Mr. Chairman, could you
14 read the portion?

15 CHAIRMAN PICCOLA: I'll read VI (b)
16 Disposition. The Chief Justice will prepare
17 memorandum setting forth the position of the
18 parties and a recommended disposition. Vote
19 proposals shall be circulated within 30 days
20 from the date of the assignment and shall
21 contain a proposed disposition date no greater
22 than 30 days from the date of circulation. A
23 vote of majority of those participating is
24 required to implement the proposed disposition.

25 Every motion shall be decided within

1 60 days. Orders disposing of motions shall
2 include the names of any justices who did not
3 participate in the consideration or decision of
4 the matter. Procedural motions, e.g., the
5 request for extension of time, requests to
6 exceed page limits and to proceed in forma
7 pauperis are to be disposed of by the
8 prothonotary's office after screening by the
9 deputy prothonotary.

10 MR. PINES: Thank you. From what I
11 know about the Thermal case, I think the Supreme
12 Court was well within the time frame. If I
13 remember correctly, I think a petition for
14 plenary review was filed sometime in March,
15 probably the latter part of March. I think the
16 Supreme Court considered the petition and
17 granted the petition sometime in April; probably
18 within 30 days. So, it had acted on the
19 petition for extraordinary relief within, I
20 think, 30 days.

21 CHAIRMAN PICCOLA: But there is no
22 further time limitation on the Court to finally
23 dispose of these matters even though they are
24 brought to the Court because of the supposed
25 need to expedite justice.

1 MR. PINES: I'm not aware of any time
2 frame or timetable for any appellate court in
3 Pennsylvania to render a decision.

4 CHAIRMAN PICCOLA: I think there
5 should be. In your personal opinion?

6 MR. PINES: I think every litigant and
7 every attorney likes quick decisions, but most
8 of all they like favorably decisions.

9 CHAIRMAN PICCOLA: Well, we in
10 legislature likes justice. With that we'll
11 conclude your testimony. Thank you very much.

12 Our next witness is Zulene Mayfield,
13 Chairperson for Chester Residents Concerned for
14 Quality Living. Good morning. You may proceed.

15 MS. MAYFIELD: Good morning, Chairman
16 Piccola, members of the House Judiciary
17 Committee, and ladies and gentlemen: My name is
18 Zulene Mayfield. I live at 2820 West Front
19 Street in the City of Chester, Delaware County,
20 Pennsylvania. I am the Chairperson of Chester
21 Residents Concerned for Quality Living.

22 In late 1992, Chester Residents was
23 formed to address the environmental injustices
24 in our city. I am here today on behalf of the
25 residents of Chester to give testimony as to the

1 impact of the Pennsylvania Supreme Court's
2 decision to invoke its power of King's Bench
3 jurisdiction with regard to Thermal Pure
4 Systems, Chester, Pennsylvania.

5 In April 1995, a group of residents,
6 including myself, made the journey from Chester
7 to Harrisburg to witness the highest court in
8 Pennsylvania administer the laws of the
9 Commonwealth. However, within minutes of our
10 arrival into the Supreme Court, we saw justice
11 elude us. Even though we didn't understand all
12 of the legal posturing by both the lawyers and
13 justices, it was clear that something was wrong
14 in the court. What we did understand was, our
15 lawyer Jerome Balter wasn't being afforded the
16 same amount of time or leeway with the Court
17 that Thermal Pure's lawyer was being given. It
18 seemed as if we had walked into the lion's den.

19 So, we returned home without due
20 process, without justice, and without a ruling.
21 We came home to a company being allowed to
22 operate in Chester, Pennsylvania, without a
23 valid permit, even though we had read the
24 Pennsylvania law that says waste processors need
25 authorization from the state by way of a permit

1 to operate. Thermal Pure processes infectious-
2 chemotherapeutic medical waste, waste from 4
3 states outside of Pennsylvania. Yet, the
4 Supreme Court basically said, they don't have to
5 bother with such a tedious rule, i.e., a valid
6 permit.

7 Prior to the King's Bench takeover,
8 the community was so adversely affected by
9 Thermal Pure's operation that we initiated
10 litigation to protect ourselves. The action was
11 taken because the Department of Environmental
12 Resources failed to protect us. The initial
13 assault on us by Thermal Pure, however, only set
14 the stage for what our lives are now subjected
15 to.

16 Since the Supreme Court exercised its
17 power in this case, it has allowed a bad
18 decision to worsen. Before the Department of
19 Environmental Resources issued a Cease and
20 Desist Order, and when they still had a valid
21 permit, Thermal Pure had already demonstrated
22 its inability to operate in compliance with the
23 regulations of the Commonwealth. Now that they
24 no longer have a permit, this is a small
25 sampling of Thermal Pure's operation. June 17,

1 1995, Notice of Violation issued for Malodors;
2 June 25, 1995, Notice of Violation issued for
3 Malodors; and as recently as July 26, 1995,
4 Notice of Violation issued for Malodors.

5 The grossest violation of Pennsylvania
6 law happened on July 14, 1995, when Thermal Pure
7 experienced a malfunction of their boiler,
8 rendering them unable to process 19 truckloads
9 of infectious-chemotherapeutic medical waste on
10 site. Thermal Pure neglected to notify either
11 the Department of Environmental Protection or
12 the City of Chester Bureau of Health that they
13 could not process the waste. DEP and Chester
14 Bureau of Health were notified of the situation
15 by residents and not Thermal Pure, even though
16 Thermal Pure is required to notify DEP and
17 Chester City. They did not comply.

18 The infectious medical waste was kept
19 in unrefrigerated trailers while temperatures
20 exceeded well above 100 degrees. July 17, 1995,
21 DEP informed the community that they were
22 working with Thermal Pure to find alternative
23 sites to send the waste. On July 18, 1995, a
24 DEP official, Mr. John Kennedy, told the
25 community that moving the waste was not feasible

1 because it would not be safe to move it, and
2 that DEP was going to allow the waste to sit in
3 unrefrigerated trucks until Thermal Pure would
4 either be able to process the waste or find the
5 necessary refrigerated trucks to store it in,
6 the same refrigerated trucks that Thermal Pure
7 had promised to have on the site at all times.
8 They were all lies.

9 Finally, on July 20, 1995, the
10 situation was resolved when Thermal Pure
11 processed the last truck on site. Six days
12 later, 6 days of germs incubating, feeding and
13 growing; 6 days of mental anguish of not knowing
14 what we were being exposed to; 6 days of even
15 more smells; 6 days of Thermal Pure totally
16 ignoring the Commonwealth's laws. This is the
17 type of irresponsible operations management that
18 the Supreme Court is protecting.

19 A visitor in my home likened our area
20 assaults of odors to the bombing in Sarajevo.
21 The odors come like incoming shells, and no
22 matter what you are doing you immediately are
23 overcome with the urge to run. In Sarajevo,
24 they listen for the whistles and sirens to take
25 cover. In Chester, we watch the sky for the

1 white smoke to come from Thermal Pure's
2 facility. When we see that white smoke, almost
3 in automatic robotic movements, all outside
4 socializing cease, and people will take cover
5 inside of their homes. In Sarajevo, the Serbs
6 hold people hostage by bombarding the city. In
7 the City of Chester, Thermal Pure holds us
8 hostage by odors, constant truck traffic,
9 mismanagement and greed.

10 The Supreme Court of Pennsylvania is
11 holding us hostage by taking away the only
12 defense that we have.

13 We have lost the right to enjoy our
14 homes; homes that we have worked hard to pay
15 for. We are no longer able to sit on the
16 porches that we pay taxes for and socialize with
17 our neighbors. Since this ruling we no longer
18 feel as if we have rights. The degradation of
19 our lives continues, sanctioned by the Supreme
20 Court.

21 It appears that even in the highest
22 court of Pennsylvania, that money and who knows
23 who or who can afford who, prevails. How can
24 the highest judicial body in Pennsylvania appear
25 so biased? How can justices who are supposed to

1 be the fairest interpreters of Pennsylvania law
2 show such disregard for the law, by allowing the
3 a company like Thermal Pure to continue to do
4 everything wrong?

5 Bad decisions every day harm people.
6 This was a bad decision by the Supreme Court
7 and as a representative for Chester, I can tell
8 you it's killing us.

9 Before the judicial body here makes a
10 decision, we strongly urge that you come to our
11 city, the entire body, and meet with us and see
12 where we live and see what we are exposed to.
13 Right now I'm offering that invitation. We'd
14 very much like an answer.

15 CHAIRMAN PICCOLA: We thank you for
16 the invitation. I can't compel every member of
17 this committee to come to Chester, but I
18 certainly personally would like to at some point
19 in time take a look at the factual circumstances
20 surrounding the case.

21 Would you be agreeable to submitting
22 to some questions from members of the committee?

23 MS. MAYFIELD: Yes.

24 CHAIRMAN PICCOLA: First of all, I
25 would like to thank you for taking some time to

1 The residents were already formed. We were
2 aware that this company had applied for this
3 permit. We were very vocal in opposing it prior
4 to the permit, and since then.

5 CHAIRMAN PICCOLA: After the
6 Department issued the permit, it's my under-
7 standing you took your case to the Environmental
8 Hearing Board and lost at that level. Is that
9 correct?

10 MS. MAYFIELD: Yes.

11 CHAIRMAN PICCOLA: After going through
12 the procedures before the Department of
13 Environmental Hearing Board, you then filed an
14 appeal to the Commonwealth Court of
15 Pennsylvania?

16 MS. MAYFIELD: Yes.

17 CHAIRMAN PICCOLA: That appeal was
18 filed in March of 1994 or thereabouts?

19 MS. MAYFIELD: Yes, somewhere around
20 there.

21 CHAIRMAN PICCOLA: And in February of
22 this year, the Commonwealth Court reversed the
23 Environmental Hearing Board and announced its
24 decision that the permit that had been issued by
25 the Department of Environmental Resources was,

1 in fact, invalid because the Department -- or
2 because the permit was in violation of the
3 Infectious Waste Act?

4 MS. MAYFIELD: Yes. They did not
5 invalidate the permit. That was left up to DER.

6 CHAIRMAN PICCOLA: Okay. But they
7 found that the permit was a violation -- the
8 issuance of the permit was in violation and DER
9 later, or DEP I guess now, told Thermal Pure
10 that the permit was no longer valid because of
11 the Court decision.

12 MS. MAYFIELD: Yes.

13 CHAIRMAN PICCOLA: Now, up until that
14 point in time, which would be early this year,
15 had you ever heard of anything called King's
16 Bench authority?

17 MS. MAYFIELD: No, not at all.

18 CHAIRMAN PICCOLA: Has your lawyer
19 ever discussed the possibility with you that up
20 until that point in time that the other side
21 might seek some extraordinary relief from the
22 Pennsylvania Supreme Court?

23 MS. MAYFIELD: No.

24 CHAIRMAN PICCOLA: Did he discuss with
25 you the possibility that there might be an

1 appeal of the Commonwealth Court decision?

2 MS. MAYFIELD: Yes, he did.

3 CHAIRMAN PICCOLA: Did he discuss with
4 you what the time frame of that appeal might be
5 if it, in fact, was ever taken?

6 MS. MAYFIELD: He may have, but I do
7 not remember the specifics of what he told me.

8 CHAIRMAN PICCOLA: When was the first
9 that you had an understanding that this matter
10 was going to go before the Supreme Court of
11 Pennsylvania on something called King's Bench?

12 MS. MAYFIELD: That was in April.

13 CHAIRMAN PICCOLA: Right before the
14 Court had its hearing?

15 MS. MAYFIELD: Yes.

16 CHAIRMAN PICCOLA: Do you understand,
17 as a layman, nonlegal person, do you understand
18 what King's Bench authority is? I don't mean to
19 put you on the spot, because if you don't --

20 MS. MAYFIELD: My understanding is
21 that, they can take any case that's in the legal
22 system of the Commonwealth Court and assume
23 jurisdiction over it. Now, what they do after
24 it, I'm not clear on. We are finding out from
25 personal experience not too much because of a

1 decision or -- To me it appears like it's just
2 in limbo. That lesson came after April when our
3 lawyer said, well, they are doing something with
4 King's Bench. None of us understood that.

5 CHAIRMAN PICCOLA: Do other members of
6 the committee have any questions?

7 Representative James from South Philadelphia
8 County. (laughter)

9 REPRESENTATIVE JAMES: Thank you, Mr.
10 Chairman. Thank you for your indulgence. I
11 would also like to thank Ms. Mayfield for her
12 testimony because I think you being the average
13 citizen of the Commonwealth, as our Chairman
14 brought out, and for you taking an interest in
15 the community and a concern. It's just sad to
16 see that some business or corporation seemingly
17 did not care about the people in the community.

18 In terms of Chester City, you
19 mentioned that Thermal Pure was supposed to
20 notify DEP and they didn't and Chester City did
21 not comply. Did they subsequently comply, if
22 you know?

23 MS. MAYFIELD: In my opinion, no, they
24 did not. What they were able -- What happened,
25 they had the infectious waste there. The law

1 state is that, we will make the mistake. We
2 won't fix it, but we will tell you that we are
3 putting steps in place so that this will never
4 happen again. But, there's no protocol to
5 prevent it from happening again.

6 Even now to this day, Thermal Pure has
7 still not submitted a plan to the state where
8 the waste would go when in case they have
9 another breakdown. So, in response to that, the
10 state is limiting the number of trucks that they
11 can have in the facility, of which they can't
12 enforce because no one is down there to see how
13 many trucks are actually going in there, but us.

14 REPRESENTATIVE JAMES: I think I want
15 to thank you and I'm glad to see that the state
16 representative from Chester is here; that is
17 Curt. I didn't think our Chairman was aware of
18 that.

19 CHAIRMAN PICCOLA: No, I wasn't.

20 REPRESENTATIVE JAMES: I think maybe
21 the next person who testifies, Mr. Chairman, is
22 Jerry Balter. He's the attorney that
23 represented you both, Public Interest Law
24 Center.

25 MS. MAYFIELD: Yes.

1 REPERSENTATIVE JAMES: There may be
2 some other questions that you might probably
3 hear from the attorney and maybe have some
4 questions for you later if it's okay with our
5 Chairman. Thank you.

6 CHAIRMAN PICCOLA: Representative
7 Horsey.

8 REPRESENTATIVE HORSEY: I want to ask
9 you one question. What do you think the
10 breakdown --

11 HONORABLE CRAIG: Excuse me, Mr.
12 Chairman. Can I ask that all the members of the
13 committee wait to hear all sides of the matter?
14 There are more witnesses to be heard.

15 CHAIRMAN PICCOLA: Judge Craig, the
16 members of the committee are asking Ms. Mayfield
17 questions.

18 HONORABLE CRAIG: Well, the
19 representative is leaving. One has already
20 left.

21 CHAIRMAN PICCOLA: I can't compel
22 members to stay.

23 HONORABLE CRAIG: All I can do is ask
24 the members of the committee to hear all sides.
25 There are many sides to this matter.

1 REPRESENTATIVE HORSEY: My question is
2 on the subject of what you think as an average
3 citizen of the breakdown in government occurred?

4 MS. MAYFIELD: For us the breakdown
5 occurred -- it's an anomaly. I don't think
6 there was a breakdown per se for the people who
7 are in these systems. We feel as though as
8 residents, we were totally left out of the
9 entire loop. As far as the courts are
10 concerned, we don't know -- It's a very
11 difficult question.

12 REPRESENTATIVE HORSEY: I'm not going
13 to ask you to relate that question for an
14 answer. The point is, we are the government.
15 We are here to service people. Evidently,
16 something occurred that resulted in you as an
17 average citizen not being serviced properly.
18 That's part of why we are here today. Thank
19 you.

20 MS. MAYFIELD: Thank you.

21 CHAIRMAN PICCOLA: Representative
22 Schuler.

23 REPRESENTATIVE SCHULER: Thank you,
24 Mr. Chairman. Mrs. Mayfield, on your second
25 paragraph is where I have some questions. It

1 appears to me that we have 2 issues here, one
2 dealing with court and one dealing with DER.
3 I'm going to address my question toward the
4 Court.

5 You made some statement, you made a
6 very strong statement, we saw justice elude us.
7 Then you went on to state that your attorney had
8 less time than I assume the other side. Is
9 there anything else that you could give to me,
10 or would you wish to have the attorney address
11 that issue that's going to testify next?

12 MS. MAYFIELD: I cannot speak to the
13 legalities. I can speak as a person.

14 REPRESENTATIVE SCHULER: That's fine.

15 MS. MAYFIELD: To me it was very
16 obvious what was occurring there. We were
17 referred to as -- One of the justices referred
18 to us, well then, if that's the case, Mr.
19 Balter, then any citizen anywhere can shut down
20 any company. We were made to feel very
21 insignificant; like, how dare we even pursue
22 litigation from this wonderful company. That's
23 from me.

24 REPRESENTATIVE SCHULER: I understand
25 that's your perspective how you felt. Whether

1 that's real, we don't know yet. That's a pretty
2 serious comment in my opinion. I'd like to find
3 out exactly what did occur.

4 MS. MAYFIELD: They would cut our
5 attorney off. Thermal Pure made some arguments
6 as to the health care workers. My understanding
7 of that case was, that was not the issue of why
8 we were there. It had nothing to do with health
9 care workers or with the waste sitting in other
10 states, that had nothing to do with why we were
11 there that day. But, he was allowed to make
12 this great long argument. For us it was very
13 hard to follow, but it made no sense as to the
14 specific reason why we were there in court.

15 REPRESENTATIVE SCHULER: Thank you,
16 Mr. Chairman.

17 CHAIRMAN PICCOLA: Representative
18 Boscola.

19 REPRESENTATIVE BOSCOLA: Ms. Mayfield,
20 we are here discussing King's Bench power in
21 Pennsylvania. I want to ask you this because
22 you sat here and listened to the testimony of
23 Mr. Pines indicating why he felt that in some
24 instances we do need King's Bench power here in
25 Pennsylvania. He gave reasons why he felt that

1 this was important for the state.

2 Now, I understand that you are not
3 happy with the result of this case in your city.
4 But, just as a citizen, I understand that maybe
5 in this instance the Supreme Court should not or
6 should not have taken this case which is, in my
7 opinion, let's look at it; but broadly, do we
8 need King's Bench power in Pennsylvania is the
9 question?

10 I'm asking you because you listened to
11 somebody that gave you reasons why, beyond this
12 case, why it was important. What do you think
13 about the power of the Supreme Court has to take
14 a case because of what's needed in Pennsylvania
15 sometimes for immediate action that affects the
16 entire residents of Pennsylvania? A really
17 honest answer. That's all I'm looking for.

18 MS. MAYFIELD: If there is a case
19 where it's life and death, then I would say that
20 we should have King's Bench.

21 REPRESENTATIVE BOSCOLA: Okay. Thank
22 you.

23 CHAIRMAN PICCOLA: Thank you, Ms.
24 Mayfield. I would want to advise you that,
25 obviously, this committee does not have any

1 jurisdiction over your specific case. What the
2 issue is that we are considering is the issue
3 that was brought into your case, and which I
4 happen to believe is the basis for your feeling
5 that somehow justice was denied to you in this
6 case.

7 You as an individual citizen and as a
8 group of citizens exercise your right to engage
9 in litigation. That right is guaranteed under
10 the Commonwealth. You lost on the first level.
11 You appealed, which is your right. You won on
12 the appeal, and, in fact, in reconsideration, as
13 I read the record, the Commonwealth Court
14 eminent appellate court of this Commonwealth,
15 agreed with your position and denied Thermal
16 Pure their position and told the Department that
17 the permit had been granted invalidly.

18 After having gone through that
19 process, you felt pretty good about our judicial
20 system.

21 MS. MAYFIELD: Yes.

22 CHAIRMAN PICCOLA: Then in a procedure
23 that up until that point in time you had no
24 knowledge about, didn't even know it existed,
25 the Supreme Court of this Commonwealth took that

1 victory and apparently has put you over the
2 precipice of possible defeat. We don't know at
3 this point in time, but at the very least they
4 have stayed the lower court's proceeding which
5 has allowed Thermal Pure to continue to operate
6 under this permit.

7 Your testimony, obviously, is that
8 they even to this day continue to violate even
9 the terms and conditions of that permit. That
10 is an issue that really is not relevant to our
11 proceedings, but it certainly adds to your
12 frustration and the frustrations of the people
13 that you represent.

14 It seems to me that the Supreme Court
15 of the Commonwealth of Pennsylvania should have
16 had some very, very good, clearly enunciated
17 reasons for taking this case under its plenary
18 jurisdiction. And, out of deference to you and
19 the people of the City of Chester, they should
20 have expeditiously decided the case one way or
21 the other. They are 7 very intelligent people
22 on the Pennsylvania Supreme Court. They could
23 have decided that case by now.

24 The fact that you and your
25 representatives from the City of Chester have to

1 come to Harrisburg and tell the legislature
2 about it, in my mind is an abomination. It
3 should not have had to take place. You should
4 not have to be here.

5 Our Supreme Court is made up of people
6 who are servants of the people, just like
7 everyone at this table are servants of the
8 people. Their role is slightly different. But,
9 they had better get down off of their high bench
10 and remember from whence they came, because in
11 my opinion, the exercise of this awesome power
12 of King's Bench was exercised improperly in this
13 case and should not have been exercised. If it
14 was going to be exercised, it should have been
15 exercised expeditiously.

16 I want to thank you for coming. I
17 hope that sometime in the near future to get
18 down to the City of Chester to see your
19 situation. But, I have to tell you I don't want
20 to raise your expectations. There's very little
21 I can personally do about that in my position as
22 Chairman of the Judiciary Committee. I do want
23 to thank you for coming.

24 MS. MAYFIELD: Thank you.

25 CHAIRMAN PICCOLA: Our next witness is

1 Jerome Balter, Esquire, who is an attorney for
2 the Public Interest Law Center of Philadelphia
3 and who represented, I believe, the Chester
4 Residents Concerned for Quality Living. Mr.
5 Balter.

6 MR. BALTER: Good morning, Mr.
7 Chairman, ladies and gentlemen of the House
8 Judiciary Committee. My name is Jerome Balter.
9 I am an attorney with the Public Interest Law
10 Center of Philadelphia. I am the attorney for
11 Chester Residents Concerned for Quality Living.
12 I appear here today at the invitation of
13 Representative Jeffrey Piccola, Chairman of the
14 House Judiciary Committee. He has asked me to
15 share with you my recent experiences with the
16 Pennsylvania Supreme Court's exercise of King's
17 Bench authority.

18 By way of introduction, I wish to
19 provide the committee with some background to
20 the Supreme Court's exercise of King's Bench in
21 respect to Thermal Pure Systems' infectious
22 waste facility in Chester, Pennsylvania. I urge
23 you to pay particular attention because some of
24 the statements by a previous speaker, Mr. Pines,
25 you will find are at considerable variance from

1 reality.

2 In 1988, the Pennsylvania General
3 Assembly enacted the Infectious and
4 Chemotherapeutic Waste Disposal Act. The act
5 instructed the Department of Environmental
6 Resources to promulgate a comprehensive plan to
7 regulate the capacity and geographical
8 distribution of commercial facilities for the
9 incineration or other disposal of infectious
10 waste; thereby, to minimize the transportation
11 of infectious waste from places where the waste
12 generated such as hospitals, medical offices,
13 laboratories, et cetera, to the places where the
14 waste is to be made noninfectious.

15 Pursuant to the act, DER in 1990
16 promulgated an infectious waste plan which
17 regulated the capacity of incineration
18 facilities, but did not regulate the capacity of
19 steam sterilization facilities.

20 Subsequently, in July 1993, DER issued
21 a permit to Thermal Pure Systems for an
22 infectious waste facility in Chester,
23 Pennsylvania. Because Thermal Pure facility
24 operates by means of steam sterilization, its
25 capacity was not subject to the capacity

1 controls of the Infectious Waste Plan. The
2 largest possible incineration facility under the
3 plan would have a capacity of less than 30 tons
4 a day, but the Thermal Pure permit was for steam
5 sterilization has a capacity of 288 tons per
6 day, almost 10 times as large. The entire State
7 of Pennsylvania generates less than 80 tons of
8 infectious waste per day, and that gives you the
9 perspective on the size and capacity of Thermal
10 Pure. It is the largest infectious waste
11 facility in the United States.

12 It was obvious that the purpose of the
13 Infectious Waste Act, that is to develop a
14 geographical distribution of facilities so as to
15 minimize the transportation of infectious waste
16 was absolutely destroyed by the permit to
17 Thermal Pure.

18 Chester Residents objected to the
19 Thermal Pure's permit and appealed. This past
20 February the Commonwealth Court upheld the
21 residents' appeal. The Court ruled that DER's
22 arbitrary exclusion of steam-sterilizing
23 facilities from the comprehensive plan,
24 invalidated the plan, and consequently
25 invalidated Thermal Pure's permit.

1 Thermal Pure requested the
2 Commonwealth Court to stay that judgment, but
3 the request was denied by the Commonwealth
4 Court. Thermal Pure requested the Supreme Court
5 to issue a stay of the Commonwealth Court order,
6 but a unanimous Supreme Court denied the
7 request. I want you to understand, the Supreme
8 Court denied the request to stay that
9 Commonwealth Court judgment.

10 The Thermal Pure again went to the
11 Supreme Court, asked them to reconsider and to
12 issue a stay, and again the Supreme Court denied
13 the request, but this time something was
14 happening. I got a call in my office from the
15 Prothonotary telling me that the Supreme Court
16 had denied the request for a stay again.

17 A half hour later I got another call
18 from the prothonotary told me, hold that, I'm
19 not sure. Then following days came through,
20 yes, they denied it, but as you see the vote was
21 3 to 3. the peculiarity was that the original
22 order denying was dated 4/10, the dissent by
23 Judge Flaherty was dated 4/12 and you can see
24 the distribution of votes there.

25 The fact that Thermal Pure had lost

1 its permit and no court would stay that loss of
2 permit imposed a statutory duty on DER to shut
3 down Thermal Pure's operations as required by
4 the Solid Waste Management Act. Accordingly, on
5 April 7th, DER issued a Cease and Desist Order
6 to Thermal Pure.

7 As you can imagine, DER's order
8 triggered considerable legal maneuvering.
9 Thermal Pure hired 4 law firms and they, acting
10 simultaneously, were operating in the
11 Commonwealth Court of Pennsylvania, the Supreme
12 Court of Pennsylvania, and the U.S. District
13 Court under any possible pretense.

14 In response to the DER Cease and
15 Desist Order of April 7th, Thermal Pure on April
16 11 filed a so-called Petition for Review with
17 the Commonwealth Court. In fact, this was a
18 misnomer. It was not a Petition for Review
19 because Thermal Pure had never submitted an
20 appeal to the Environmental Hearing Board, which
21 is the path that they are supposed to take.

22 The Petition for Review to the
23 Commonwealth Court complained that DER did not
24 have the right to close down Thermal Pure even
25 though Thermal Pure did not have a permit. This

1 action against DER was a separate action,
2 distinct from the Chester Residents' action to
3 invalidate Thermal Pure.

4 I want to stop there and point out
5 that at this point with respect to the case of
6 Thermal Pure versus DER, there was absolutely no
7 record at all. It was filed as a separate case.
8 Indeed, Chester Residents wasn't even a party.
9 We had to appeal for the right to intervene.

10 The day after they filed in
11 Commonwealth Court, Thermal Pure on April 4
12 petitioned the Supreme Court to assume King's
13 Bench Authority of its petition for review
14 against DER. Chester Residents and DER both
15 opposed the petition on 2 grounds:

16 The first ground was, the Supreme
17 Court did not have subject matter jurisdiction
18 because Thermal Pure had failed to exhaust their
19 available administrative remedy through the
20 Environmental Hearing Board.

21 Secondly, this was not a case of
22 immediate public importance, a condition that is
23 prerequisite for King's Bench jurisdiction.

24 On April 19, the Supreme Court
25 responded to Thermal Pure's petition with an

1 order; an order; no hearing yet; an order. The
2 order said the following: The Supreme Court
3 stayed all proceedings in the Commonwealth
4 Court. The Commonwealth Court had scheduled a
5 hearing for April 20.

6 The Supreme Court stayed DER's Cease
7 and Desist Order, in effect, allowing Thermal
8 Pure to continue to operate without a permit.
9 The Supreme Court granted Chester Residents
10 petition to intervene, and the Supreme Court
11 ordered a hearing for the 24th of the month.

12 The Supreme Court's April 24th
13 emergency hearing was held pursuant to the
14 Court's King's Bench authority, but as a
15 threshold matter, the Supreme Court had need to
16 determine whether it had subject matter
17 jurisdiction and whether the case presented a
18 matter of immediate public importance to warrant
19 the exercise of King's Bench jurisdiction.

20 The April 24th hearing was convened
21 without the benefit of any previous record with
22 respect to Thermal Pure's Complaint against DER
23 and without benefit of any lower court opinion
24 with respect to the objections from DER and
25 Chester Residents. Therefore, at the April 24th

1 hearing, the Supreme Court was, in fact, a trial
2 court, but it conducted the hearing as if it
3 were an appellate court, without witnesses,
4 without cross-examination to determine facts and
5 without a court reporter; no court reporter; no
6 means of recording these proceedings.

7 I would point out that in order to
8 determine whether this was a matter of immediate
9 public importance, you cannot make that
10 determination by sucking it out of your thumb.
11 You have to have some facts presented.

12 Fact, that 16 months before there was
13 no Thermal Pure and there was no crisis in the
14 State of Pennsylvania. Fact, that DER is the
15 organization in Pennsylvania that determines how
16 to control and handle waste, and they were
17 opposing this motion for a stay.

18 It is now almost 100 days since the
19 April 24th emergency hearing, but the Supreme
20 Court has still not issued any opinion or issued
21 any order based on the hearing. During these
22 100 days the Supreme Court's April 19 stay of
23 DER's Cease and Desist Order remains in effect
24 and Thermal Pure continues to operate.

25 During these 100 days Thermal Pure has

1 violated the emission regulations on numerous
2 occasions causing discomfort, mucus membrane
3 disorders, respiratory problems amongst the area
4 residents and very recently, as Ms. Mayfield
5 told you, they had this breakdown in their
6 entire system. They were out of business for 6
7 days, and there was a crisis in Chester, but it
8 wasn't a crisis for the State of Pennsylvania.

9 The Supreme Court's grant of relief to
10 Thermal Pure has been sustained for more than
11 100 days under the aura, the aura of King's
12 Bench jurisdiction even though the Supreme Court
13 has never declared that it has assumed King's
14 Bench Authority.

15 In response to Chester Residents
16 recent motion to the Court for them to vacate
17 their April 19th order, former Supreme Court
18 justice Bruce Kauffman, who is the attorney for
19 Thermal Pure, declared in his brief on July 27,
20 5 days ago, the following: The Supreme Court
21 has not yet assumed jurisdiction over Thermal
22 Pure's petition, but rather has only conducted a
23 hearing on whether such jurisdiction should be
24 exercised.

25 So, we have here a user patient that

1 goes that they don't even to have King's Bench
2 to give relief to those who they want to give
3 relief to.

4 The action of the Supreme Court in
5 respect to the petition of Thermal Pure
6 demonstrates an obvious and dangerous abuse of
7 King's Bench power.

8 First, the Court reached down to
9 assume trial court status over the petition.

10 Second, it granted the relief
11 requested prior to any hearing and before
12 determining whether the Court even had subject
13 matter jurisdiction, or whether the matter was a
14 matter of immediate public importance.

15 Third, the Court convened an
16 appellate, but not a fact-finding hearing
17 without a court reporter.

18 Fourth, more than 100 days have passed
19 since April 24th, but the Court has failed to
20 issue an opinion or order;

21 And fifth, the April 19th court order
22 remains in effect.

23 The Supreme Court's assumption of
24 power to act as both a trial court and an
25 appellate court, as they have done in behalf of

1 Thermal Pure, is a violation of the Pennsylvania
2 Constitution and of the statutory authority of
3 the Supreme Court.

4 The general powers ascribed to the
5 Supreme Court are stated in 42 PA Consolidated
6 Statutes 502 which says: The Supreme Court
7 shall have the power vested in it by the
8 Constitution of Pennsylvania, as fully and amply
9 to all intents and purposes, as the justices of
10 the Court of King's Bench, Common Pleas and
11 Exchequer at Westminster, or any of them could
12 or might do on May 22, 1722.

13 Thus, the General Assembly established
14 the Supreme Court's King's Bench authority to be
15 similar to that of the Supreme Court in
16 pre-revolutionary Pennsylvania. The Act of 1722
17 however, provided that the Pennsylvania Supreme
18 Court decisions in cases of original
19 jurisdiction were to be appealed to the House of
20 Peers--today the House of Lords--in Westminster.
21 The House of Peers was, in fact, the court of
22 last resort, but it had no jurisdiction with
23 respect to being a trial court.

24 The inherent benefit and protection
25 provided by this system which denies a trial

1 court the power to be the court of last resort
2 was also recognized in post-revolutionary
3 Pennsylvania when the legislature by the Act of
4 1780 created Pennsylvania's High Court of Errors
5 and Appeals whose only jurisdiction was to hear
6 appeals from the Supreme Court. The High Court
7 consisted of members of the Supreme Court, the
8 Court of Admiralty, the President of the
9 Executive Council and 3 persons of known
10 integrity and ability.

11 Thus, the present day statutory
12 designation of Supreme Court jurisdiction is a
13 remainder that the Supreme Court was never
14 intended to be the Court of Last Resort in cases
15 where it assumes original jurisdiction as a
16 trial court.

17 The Pennsylvania Constitution of 1968
18 reinforces this view. In unequivocal terms,
19 Article V, Section 9 of the Pennsylvania
20 Constitution guarantees litigants in
21 Pennsylvania that they are entitled to at least
22 one judicial appeal as a matter of right.
23 Quote, there shall be a right of appeal in all
24 cases to a court of record from a court not of
25 record, and there shall be a right of appeal

1 from a court of record or from an administrative
2 agency to a court of record or to an appellate
3 court.

4 The Supreme Court itself has
5 acknowledged that every litigant is entitled to
6 one right of appeal. I quote the case there.
7 It's the case of the Department of Aging versus
8 Lindberg, and that's a 1983 decision.

9 Accordingly, our Constitution in
10 combination with the limited jurisdiction
11 provided for the Supreme Court by Section 502
12 makes clear that the Supreme Court cannot have
13 trial court jurisdiction under its King's Bench
14 authority because the legislature has not
15 established a court, such as the High Court for
16 Errors and Appeals, to hear appeals from
17 original judgments of the Supreme Court.

18 The Supreme Court attempts to avoid
19 this constitutional limitation on its
20 jurisdiction in Rule 3309, which was referred to
21 by Mr. Pines before, of the Pennsylvania Rules
22 of Appellate Procedure, where it declared that
23 the exercise of King's Bench authority, even as
24 a trial court, shall be deemed, quote, the
25 taking of an appeal of right. That is an

1 allegation to itself that certainly defies the
2 Constitution of Pennsylvania. The Right of
3 Appeal has meaning only when the appeal is
4 reviewed by a court other than one which made
5 the original judgment. It would be in error to
6 make the Right of Appeal a mockery.

7 The Supreme Court's exercise of King's
8 Bench authority to assume trial court status of
9 Thermal Pure's petition for review, demonstrates
10 that the Supreme Court does not recognize this
11 constitutional limitation on its jurisdiction.
12 This question is the subject of a pending motion
13 presented by Chester Residents to the Supreme
14 Court. The fact that it will be the same
15 Supreme Court which will rule on the motion
16 suggests that this question may not receive the
17 friendliest of receptions. It is up to the
18 General Assembly, therefore, to make clear the
19 limits of the Supreme Court's King's Bench
20 authority under the Pennsylvania Constitution.

21 There is also a need for the
22 legislature to establish limitations on the
23 Supreme Court's exercise of King's Bench
24 authority whether as a trial court or as an
25 appellate court.

1 In the Thermal Pure case, the Supreme
2 Court issued an order providing the petitioner
3 with relief even before the Court had convened a
4 hearing and before the Court had any basis for
5 determining whether the matter at issue was of
6 immediate public importance. Thus, the Supreme
7 Court on April 19th acted under the guise that
8 the King's Bench jurisdiction was warranted.
9 The abuse that such -- that such abuse of
10 authority makes possible is manifest.

11 The Supreme Court should be prohibited
12 from providing relief under the appearance of
13 King's Bench authority. There must be a
14 reasoned opinion by the Supreme Court to justify
15 any action under King's Bench jurisdiction. And
16 such a determination must be based on a factual
17 determination in which the parties have the
18 opportunity to present witnesses and cross-
19 examine witnesses, and the hearing before the
20 Court should be recorded to preserve the
21 evidence and the ruling of the Court.

22 The Supreme Court, in the Thermal Pure
23 case, issued its order staying the DER Cease and
24 Desist Order on April 19, 5 days before the
25 April 24th hearing. It is now August 3rd, some

1 100 days after the hearing and the Supreme Court
2 still has not said whether King's Bench applies.
3 Nevertheless, Thermal Pure has benefited from
4 the April 19th order and Chester Residents have
5 suffered from that order.

6 The King's Bench authority should not
7 provide jurisdiction for the Supreme Court to
8 exercise jurisdiction over cases for which it
9 does not have subject matter jurisdiction, a
10 practice which the Court has undertaken from
11 time to time to enlarge its jurisdiction. Such
12 a practice opens up the opportunities for great
13 abuse and undermines the credibility of the
14 courts.

15 In this case, Thermal Pure totally
16 bypassed the Environmental Hearing Board, named
17 a complaint, a petition for review, took it to
18 the Commonwealth Court and the next day went to
19 the Supreme Court where the Supreme Court could
20 take it out of the hands of the Commonwealth
21 Court.

22 Since there are untold numbers of
23 cases in which the Commonwealth Court and the
24 Supreme Court have stayed, the Commonwealth
25 Court cannot assume original jurisdiction of

1 appeal from DER orders. There is no subject
2 matter jurisdiction. Now, if the Supreme Court
3 wishes to arrogate to itself the ability to take
4 any case where a lawyer throws a writ on a table
5 and say we can take that case, that would be a
6 terrible abuse, and clearly that's something
7 they should not be allowed to do. But, my
8 reading of the cases recently seems to indicate
9 that that's what they are in the direction of
10 wanting to do.

11 I want to finish by bringing the
12 committee's attention to an article in the 1994
13 Duquesne Law Review. It is article by Common
14 Pleas Court Judge Bernard Scherer on King's
15 Bench in Pennsylvania. He concludes his article
16 as follows: The unfettered King's Bench
17 prerogative both as a fact finder and a court of
18 final recourse, differs markedly from the role
19 intended for the Supreme Court of Pennsylvania.

20 Thank you.

21 CHAIRMAN PICCOLA: Thank you, Mr.
22 Balter. I have just a couple of real brief
23 questions. Were you here when I read to Mr.
24 Pines that portion of the internal rules of the
25 Court relative to time limitations?

1 MR. BALTER: I was, yes, sir.

2 CHAIRMAN PICCOLA: Are you familiar
3 with that.

4 MR. BALTER: I am not.

5 CHAIRMAN PICCOLA: I'm glad your
6 testimony clarified the procedural history of
7 this case because, the way I interpret the way
8 you have described the procedure, the Court is
9 still considering the Thermal Pure's motion for
10 it to assume plenary power. If that is in fact
11 the case, and I think you agree with that.

12 MR. BALTER: I quoted from Mr.
13 Kauffman who is the opponent. He answered that
14 just 5 days ago. He was the Supreme Court
15 justice, I want you to understand, who wrote one
16 of the original decisions on King's Bench.

17 CHAIRMAN PICCOLA: If you and Justice
18 Kauffman are correct, and I believe that you
19 are, then the Court, I believe, and maybe you
20 don't agree; maybe you do agree, has violated
21 its own internal operating procedures.

22 MR. BALTER: From what you read I
23 would have to agree with that.

24 CHAIRMAN PICCOLA: Because, the matter
25 is not on substance at the present time, it's on

1 procedure in terms of whether the Court is going
2 to assume plenary jurisdiction or not.

3 MR. BALTER: That's correct.

4 CHAIRMAN PICCOLA: Do other members of
5 the committee have any questions?
6 Representative James.

7 REPRESENTATIVE JAMES: Thank you, Mr.
8 Chairman. Thank you, Mr. Balter, for
9 testifying. I would be remiss if I didn't say
10 that I have been working with Mr. Balter for a
11 number of years. It's going back to when I was
12 in the police department. Mr. Balter has always
13 been an advocate for the community and people
14 and a well public servant.

15 I'd just like to thank you for
16 clarifying the issue a little bit clearer to me.
17 I'm not being a lawyer, this seems strange to me
18 that, or it makes me wonder if somebody -- For
19 example, in this instance this company would go
20 to Supreme Court, go through the proper process,
21 get turned down once, get turned down twice and
22 continue to go back, makes me think they must
23 have known something. Because, why do you keep
24 on going back when you already got turned down?

25 We maybe should go to Chester. I

1 would be willing to go to Chester with the
2 Chairman to further explore or to do any other
3 matters and seeing what needs to be done about
4 this, or why have they been allowed to continue.

5 It's my understanding that the company
6 is still continuing and the matter is still
7 being held up by the Supreme Court?

8 MR. BALTER: You are right on both
9 accounts, Representative James. The company is
10 still operating and the case is in the Supreme
11 Court. I want to see if I can add one little
12 bit of clarity here.

13 What we have essentially are 2 cases
14 interlaced. There's no question they are
15 interlaced. I would have understood, I might
16 not have liked it, but I would have understood
17 had the Supreme Court issued a stay on the
18 Commonwealth Court's Order of February, because
19 it now is in the Supreme Court on allocatur.
20 The final result will come through that
21 adjudication.

22 But, what happened here is so
23 peculiar. The Supreme Court had to understand
24 that when it denied stays with respect to that
25 Commonwealth order that DER had to close them

1 down. In effect, the Supreme Court was
2 mandating DER to shut them down. Then when DER
3 shuts them down, then they issue a stay and they
4 issue a stay without saying, it's a big deal to
5 stop it. You get the feeling that they are
6 operating sort of by the seat of their pants.
7 That kind of operation, when one starts to lose
8 respect for the manner in which decisions are
9 coming out -- I related to you how I heard about
10 the second denial of stay from the Supreme
11 Court. That was a very peculiar deal.

12 What was clear if you look at the
13 orders that were issued by the Supreme Court,
14 there was going to be another per curiam
15 unanimous decision, the second one, and
16 something happened. That kind of sense of
17 arbitrary decision power is very important.

18 I would like to appeal for one other
19 thing for your consideration. The hearing on
20 the 24th was approximately an hour long. I
21 mentioned in my remarks that there was no court
22 reporter and no means of transcribing. That was
23 hard for me to believe, so that when I got back
24 to my office I wrote to the Supreme Court and
25 asked them for a copy and the prothonotary wrote

1 me back and said, no, they don't do that.

2 I think it is very important that in
3 all the courts of Pennsylvania there be court
4 reporters and transcripts possible because these
5 are matters of great importance and you hear
6 people talk, this was said and that was said. I
7 have not gone into that at all. I don't want to
8 get into that, but I think as a protection.

9 For instance, if one had to take an
10 appeal from the decision or judgment of the
11 Supreme Court, what would you go on? How would
12 an appellate court have any idea of what was
13 said, what was proved in terms of whether this
14 is a matter of immediate public importance?

15 It was Justice Kauffman who in 1983
16 wrote a decision, or perhaps 1981, wrote a
17 decision that said, we don't take cases even if
18 they are matters of immediate public importance.
19 They have to be special. The only thing special
20 here was the financial loss of Thermal Pure.

21 Let it be understood, nobody but
22 Thermal Pure is to blame because Thermal Pure
23 built this plant before it had a permit that was
24 free and clear. They took the gamble and they
25 are trying to turn that gamble and that loss

1 into an asset so that they can continue, and
2 that is a bad business, because that says to
3 everybody, don't worry about permits; build it
4 and then plead. Look at all the money I'm going
5 to lose.

6 REPRESENTATIVE JAMES: If I may
7 continue so, it would just seemingly
8 disregarding the people's concern.

9 MR. BALTER: Absolutely.

10 REPRESENTATIVE JAMES: Again, I want
11 to thank you, Mr. Balter, for the testimony.
12 Again, I think that maybe something that we as a
13 committee need to look into further. Are you
14 also suggesting that in these hearings that
15 maybe something the legislature can do to ensure
16 that there be some type of recordings are taking
17 place? Is that a loophole that needs fixing?

18 MR. BALTER: I think it is something
19 that the committee might look into as to whether
20 or not in terms of the division of powers and so
21 on; whether it is something that you could get
22 the courts to agree to undertake. That would be
23 a preferable way to do it.

24 REPRESENTATIVE JAMES: Just in
25 reference to, I think, it's Justice Craig and

1 his concern that some of us may be leaving and
2 not listening to the other side. We have Shelly
3 tire who is an attorney here from our research
4 office will be here to definitely get the other
5 side.

6 HONORABLE CRAIG: I'm sorry, sir.
7 just reading the statement won't do it. I'm
8 here to answer your questions. I think that in
9 this extraordinary situation of a case in the
10 Supreme Court being in effect appealed to this
11 committee by this attorney--I'm not on either
12 side of the Supreme Court or the parties in that
13 case--I think this committee needs to consider
14 the legislative issue.

15 As the Chairman correctly said, you
16 are not sitting here in an appeal to consider
17 reversing the Supreme Court. You are here as a
18 legislative committee and it's a legislative
19 matter. The long-term story of the
20 extraordinary jurisdiction part of it counts, I
21 think you will agree.

22 REPRESENTATIVE JAMES: Okay.

23 MR. BALTER: Judge Craig, in none of
24 my remarks have I asked this committee to deal
25 with any of the appeals, motions before the

1 Supreme Court. My remarks were to illuminate my
2 experience for this committee as to how in this
3 case the Supreme Court has acted. I have not
4 made any judgments as to how they are going to
5 judge the case or not. But, I think that it is
6 perfectly proper for a lawyer who is in a case
7 in which King's Bench maybe or maybe not has
8 been exercised to come before this committee and
9 let the committee know how the Court is
10 operating. That has nothing to do with the
11 substantive aspect of the case.

12 CHAIRMAN PICCOLA: Mr. Balter, I have
13 a couple of more questions. We do transcribe
14 all of our hearings, I might point out, off the
15 record.

16 Mr. Balter, as I understand the issue
17 before the Supreme Court right now in this
18 matter is simply the issue of whether or not it
19 is -- the Court is going to assume the King's
20 Bench power. Under that decision-making
21 process, they must make a finding of, according
22 to their own cases and statute, that there is an
23 immediate public importance. Obviously, that
24 would require some sort of a record. Were there
25 any affidavits filed in that case?

1 MR. BALTER: There were some
2 affidavits, but I don't think there were any
3 affidavits that dealt with the question of
4 immediate public importance. Most of the
5 affidavits dealt with the question of how much
6 money Thermal Pure was going to lose.

7 CHAIRMAN PICCOLA: Could our committee
8 obtain copies of those affidavits that are
9 apparently the extent of the record before the
10 Court?

11 MR. BALTER: Sure. I will make
12 available to you the briefs and the affidavits
13 attached thereto by both sides.

14 CHAIRMAN PICCOLA: Is there any
15 evidence before the Court on the issue of
16 whether Thermal Pure has any competitors? In
17 other words, on the issue, if Thermal Pure shut
18 down today, who would handle the infectious
19 waste in the Commonwealth of Pennsylvania?

20 MR. BALTER: I heard no evidence to
21 that.

22 CHAIRMAN PICCOLA: Are you aware of
23 who or whether there are any competitors for
24 Thermal Pure in the Commonwealth?

25 MR. BALTER: Let me answer it this

1 way. As part of its permit, Thermal Pure lists
2 the companies that it could send the waste to in
3 the event that it cannot operate, so that there
4 are companies. As I said, 18 months ago these
5 people weren't even in business. The world
6 hasn't changed that much in 18 months.

7 CHAIRMAN PICCOLA: Thank you very
8 much. Representative Manderino.

9 REPRESENTATIVE MANDERINO: Thank you,
10 Mr. Chairman. Mr. Balter, I just want to go to
11 the end of your testimony because my concern is,
12 while I understand your experience with King's
13 Bench rises out of this particular case, as many
14 others have stated, what I'm here to do today is
15 to understand the extent to which we as a
16 legislature should take any actions, at least
17 that's what we are exploring, with regard to the
18 definition of King's Bench power and what's in
19 the purview of the courts today.

20 Is it my understanding from your
21 testimony that you are not recommending a
22 complete abolishment of King's Bench authority,
23 but that you are recommending that we as a
24 legislature establish some limits and some of
25 the things that you suggested were an opinion by

1 the Court to justify whether they take action, a
2 recorded transcript of the hearing to preserve
3 any evidence?

4 The other part I wasn't quite sure of
5 was some sort of distinction between when they
6 are acting as a matter of trial court or a
7 factual determiner versus when it's procedural
8 or appeal. Maybe you can explain that a little
9 more.

10 MR. BALTER: I can appreciate a need
11 for something like the King's Bench. There
12 comes in all societies certain crises in which
13 there is need for quick decision making.
14 Therefore, I don't have an objection
15 philosophically.

16 What I think is important is to
17 somehow -- When you put such a great power in
18 the hands of a small group of people, there is
19 always the possibility of abuse. I think in
20 this case there was some abuse, but I don't ask
21 you to buy that.

22 I think the fact that in England,
23 today, they still can take appeals to the House
24 of Lords, it says, we want somebody, some group
25 of people who are not involved in the trial

1 work, who are not involved in making the first
2 judgment to have an opportunity to review.

3 That's what I think is here.

4 I don't have a problem that if there
5 were a matter in the Court of Common Pleas and
6 the Court of Common Pleas issued a judgment, I
7 don't have a problem of King's Bench pulling
8 that up so it doesn't have to go either through
9 the Commonwealth Court or Superior Court. I
10 don't have a problem with that, because there
11 the Supreme Court would be acting truly as an
12 appellate court.

13 My problem is when they want to act as
14 the trial court and the appellate court. I
15 believe that that is unconstitutional under
16 Article V, Section 9.

17 REPRESENTATIVE MANDERINO: Are they,
18 in fact, and again because I was -- I mean, I'm
19 trying to learn. I'm trying to understand this.

20 MR. BALTER: We are learning together.

21 REPRESENTATIVE MANDERINO: I have been
22 asking questions at all the hearings we have to
23 just try to understand the whole concept of
24 King's Bench power and what it all entails.
25 Today for the first time I have gotten an

1 understanding of a new notion that I never heard
2 before, and that is the Court acting as a court
3 of first impression and a fact finder. My
4 impression up until this point was only as you
5 just described; meaning, being able to reach
6 down and kind of pull it up for expeditious
7 purpose, but still acting as court of review or
8 an appellate review.

9 Am I understanding correctly, you
10 don't know for a fact yet whether the Court is
11 acting in your case as an appellate review court
12 or a fact-finding first impression court, or you
13 do know that?

14 MR. BALTER: I do know.

15 REPRESENTATIVE MANDERINO: Was it just
16 an assertion by Mr. Kauffman in his brief that
17 this is the way I want you to act or how do you
18 know that's what is happening now?

19 MR. BALTER: No, no; start off with
20 the Complaint. I believe you are a lawyer, Ms.
21 Manderino. There's a Complaint. The Complaint
22 was filed in the Commonwealth Court. It was a
23 Complaint Thermal Pure versus DER. Now, before
24 the Commonwealth Court could do anything because
25 they scheduled a hearing for April 20. On April

1 19 the Supreme Court said, we stay all activity
2 in the Commonwealth Court and we have the Court.

3 REPRESENTATIVE MANDERINO: That was a
4 fact-finding hearing?

5 MR. BALTER: Who knows what it was.
6 What I'm saying is, there was no fact finding.
7 What Mr. Pines was doing here was mixing up 2
8 different cases. They are interrelated, but the
9 Supreme Court really made the big separation.
10 They said no, we are not going to touch the
11 permits. Well, okay. So, now you've got an
12 order to Cease and Desist. That's the new case.

13 So, it was the Supreme Court that made
14 this. They could have issued a stay on the
15 Commonwealth judgment in the other case. I
16 think that would have been fine. I don't have a
17 problem with that. That would be practically
18 its normal course, but it wasn't done that way.

19 All I'm saying is, they have now
20 stretched King's Bench to the point where almost
21 anything that comes before them, if they think
22 it's significant or for whatever reason, they
23 can reach down and take it.

24 REPRESENTATIVE MANDERINO: I'm sorry
25 for being dense. I just want to -- So, in this

1 case, it's your contention that they have set
2 themselves up to act as both the court of first
3 impression on the findings of fact and rolled
4 into one a court of appellate review so that not
5 only do I find the facts, but I have the final
6 say and there's nowhere else to go?

7 MR. BALTER: Let me point out, Ms.
8 Manderino, at Rule 3309 because what they are
9 saying there is, that whenever they take King's
10 Bench, whenever, from whatever situation, call
11 it an appeal.

12 REPRESENTATIVE MANDERINO: And then it
13 won't be fact finding. Well, it's an appeal --

14 MR. BALTER: Well, even if they do
15 fact find, but they are trying to avoid the
16 problem, the conflict with the Constitution by
17 saying, see, it's an appeal.

18 REPRESENTATIVE MANDERINO: I hear you.
19 Thank you. Thank you, Mr. Chairman.

20 CHAIRMAN PICCOLA: Thank you, Mr.
21 Balter. We appreciate you being here today.

22 Our next witness is Honorable David C.
23 Craig, Former President Judge Commonwealth
24 Court.

25 HONORABLE CRAIG: Thank you very much,

1 Mr. Chairman, members: I'll just summarize my
2 statement which has been supplied to the
3 committee earlier and be prepared to answer
4 questions.

5 First, my own qualifications for the
6 matter, I think I have had more personal
7 experience with the plenary jurisdiction power
8 of the Supreme Court, which is what we are
9 talking about, than most lawyers or other people
10 in Pennsylvania; at least most people outside of
11 the Supreme Court itself.

12 I have had experience with it as a
13 judge on the Commonwealth Court and I'll give
14 you a couple of quick examples of that; as a
15 lawyer who has requested and obtained plenary
16 jurisdictions of the Supreme Court. Indeed,
17 when I was running for election to the
18 Commonwealth Court along with some other judges
19 that got elected as a party, to election cases
20 in which the Supreme Court granted extraordinary
21 plenary jurisdiction.

22 Incidentally, I have no personal axe
23 to grind in this. I'm retired from the
24 Commonwealth Court. I'm quietly engaged in
25 writing for a legal publishing company. I have

1 no interest in being designated as Senior Judge
2 of any court. I have not resumed and do not
3 plan to resume the practice of law as such.

4 I have had, as I said, a lot of
5 experience with the use of this aspect, this
6 200-year old aspect of Pennsylvania law. I
7 welcome the opportunity to address it.

8 I really think that the legislature,
9 your own body, has said it all and said it well
10 and has been the guiding polestar for the
11 Supreme Court in the provision of the Judicial
12 Code in which you've embodied the plenary
13 jurisdiction power. It's Section 726 in the
14 Judicial Code, which briefly reads, the Supreme
15 Court may in any matter pending before any court
16 of this Commonwealth, not just appellate court,
17 before any court of this Commonwealth involving
18 an issue of immediate public importance, assume
19 plenary jurisdiction at any stage and enter a
20 final order or otherwise cause right and justice
21 to be done.

22 Notice, I think your body has been
23 very sound in describing what we are talking
24 about is plenary jurisdiction. King's Bench
25 power, of course, has a connotation of royalty

1 and antiquity and really, as has been noted,
2 embraces a range of other matters stemming from
3 Colonial times. We are talking about the
4 plenary jurisdiction power which your
5 legislature has correctly authorized in that
6 provision.

7 You all remember here, as the other
8 witnesses have indicated, all cases ultimately
9 go or can go to the Supreme Court, the highest
10 court of Pennsylvania, under our Constitution.
11 We are really dealing with the question, should
12 they go sooner or later?

13 In addition to the polestar
14 consideration of immediate public importance,
15 just give a couple examples concerning the value
16 of the use of this power and speed is involved.
17 The members will remember that following the
18 1990 census, Pennsylvania had to reduce its
19 number of Congressional seats from 23 to 21. It
20 was therefore necessary to reapportion the
21 congressional districts of Pennsylvania
22 throughout, a challenging job because the
23 elections were fast approaching in 1992.

24 That matter the Supreme Court took on
25 plenary jurisdiction and it was, in effect, an

1 original jurisdiction matter because factual
2 determinations had to be made. The Supreme
3 Court simply designated me--I was then the
4 President Judge of Commonwealth Court--as a
5 master to receive facts for it and talk about
6 speed, that case was given to me early in
7 February of 1992, the congressional election
8 year, and actually I got it on February 12th. I
9 worked on it immediately.

10 February 24th, with my chambers
11 covered with maps, I made my report after
12 hearing all the witnesses' testimony and
13 evidence to the Supreme Court. The Supreme
14 Court acted promptly and early in March, around
15 March 10th--I think it was the 15th--handed down
16 the final decision adopting my recommendations
17 to make it possible for the voters of
18 Pennsylvania not to lose their opportunity to
19 elect their Congress members and representatives
20 in that election.

21 I mentioned I had been a party in
22 these proceedings. In 1978 when I was appointed
23 to the Commonwealth Court, I then had to run, of
24 course, in a contested election in 1979 as did
25 other judges. Members may not remember, but the

1 Commonwealth Court had an unusual election
2 provision statute at that time called the County
3 Commissioner Election type of provision saying
4 that there were 3 vacancies on the Commonwealth
5 Court. The voters could only vote for 2, like a
6 county commissioner election. Our statutes
7 actually read that way. Your legislature
8 adopted that provision.

9 It was surprising, but there were 3
10 vacancies. The vacancy left by the death of
11 Judge Kramer and temporarily filled by Judge
12 DiSalle and the 2 added positions to which Judge
13 McPhail and I had been appointed. So, there
14 were 3 vacancies and, understandably, all
15 parties interested in running for those
16 vacancies wanted it clarified as to how this
17 should be applied particularly in a primary.
18 The Supreme Court took plenary jurisdiction of
19 that and resolved it, approving that mode of
20 election at that time. Again, the voters would
21 have been deprived of their opportunity to vote
22 for Commonwealth Court judges in 1979 if that
23 had not been done.

24 Much earlier, in the early '70's,
25 Allegheny County had a very important transit

1 matter involving express bus ways and a rubber-
2 tired transit system called Skybus, all of which
3 was wrapped up in one package called the Early
4 Action Program. We tried that case. A group of
5 dissidents sought an injunction to stop the
6 transit program. After a 6-month long
7 preliminary injunction hearing, and the lawyers
8 on the committee will understand that, not
9 surprising, that was the longest preliminary
10 injunction hearing in Pennsylvania history. The
11 judge handed down first a preliminary and then
12 immediately a final injunction barring the
13 entire transit program.

14 About to be lost was very substantial
15 millions of dollars in federal subsidies. We
16 requested and received a plenary jurisdiction to
17 the Supreme Court in that case. The Supreme
18 Court after argument and a briefing rather
19 promptly thereafter in about a space of 2
20 months, I believe, reversed the trial judge
21 completely and said it wasn't a judge's job to
22 be an engineer on the project like that.
23 Although the Skybus was never built, the express
24 bus ways were built and you can travel them if
25 you are in Allegheny County today.

1 Those are some examples just my own
2 personal experience of the value of this.

3 Let me address the Thermal Pure case.
4 I welcome the fact that the Chairman has noted
5 that this is not really an appeal of that case
6 in the Supreme Court to this committee. You are
7 not the House of Lords to which Mr. Balter says
8 that one would have to have a right to go.

9 Indeed, we wouldn't like it if, for
10 example, after a bill had passed in the
11 Senate -- or rather passed in the House, one of
12 the members of the Senate took your bill and
13 sued to the courts and asking the court to
14 decide if it was constitutional or not. That
15 would be interference with a legislative matter
16 in process and obviously the committee. The
17 committee has no jurisdictions, as the Chairman
18 has said, over a judicial matter in process.
19 But, it's a good example to look at. There are
20 things to be said for both sides here.

21 First, is it a matter of immediate
22 public importance? The thing that has been
23 overlooked until now, I point out, is,
24 incidentally, the case as we know is argued
25 before a judge -- before a panel of 3 judges in

1 the Commonwealth Court on the factual record
2 made before the Environmental Hearing Board.
3 There was a record. It was argued before the
4 final court panel.

5 Incidentally, when a Commonwealth
6 Court panel decision is handed down, I think the
7 members know, every judge on the Commonwealth
8 Court, both on the panel and the other elected
9 judges, vote on the case. This represented not
10 only a majority view of the panel, but a
11 majority of the 9 elected judges of the
12 Commonwealth Court.

13 In that opinion, well written by Judge
14 Smith, the key sentence in the concluding
15 mandate is something we have to give attention
16 to here. Immediately as a basis for the
17 reversal of the Environmental Hearing Board's
18 grant of the permit, Judge Smith's opinion,
19 supported by the majority of the whole court,
20 said, because the statewide infectious waste
21 plant addresses only the citing of incineration
22 facilities and explicitly excludes -- that is, I
23 put the wrong emphasis on it, only the saving of
24 incineration facilities and explicitly excludes
25 all other infectious waste facilities, it, the

1 plant, is in violation of the act.

2 Now, there is the matter that is at
3 heart here--the entire infectious waste
4 regulation program of the state involving 26,000
5 tons a year of infectious medical of waste is
6 hanging in the balance without a foundation
7 because the statute requires that there be a
8 statewide plan to support regulation.

9 When the Commonwealth Court, after
10 full consideration said that the plant is in
11 violation of the act, the foundation came out
12 from under regulation. Frankly, I don't
13 understand why any permits are still in effect
14 or any regulation is still in effect. What we
15 should see is DEP busying itself to cure that
16 plan while the matter goes on in the courts.
17 That's all I can see is administrative action in
18 that direction. I think that's the concern of
19 the citizens here. I think it's certainly the
20 concern of -- should be the concern of all the
21 citizens of Pennsylvania.

22 Incidentally, a note to Mr. Balter, in
23 the Commonwealth Court he was puzzled by the
24 fact that this supplementary, or auxiliary, or
25 ancillary petition that Thermal Pure brought was

1 labeled Petition for Review, I can understand
2 his problem with it. Chapter 15 of the
3 Appellate Rules for some reason requires you to
4 use the label Petition for Review in original
5 jurisdiction matters or ancillary stay matters
6 for supplementary relief before the appellate
7 courts. I'd like to call it a complaint too as
8 Mr. Balter would, but it's called a Petition for
9 Review. I just wanted to get away from any
10 confusion on that score.

11 To conclude as to that case, as Mr.
12 Balter has noted, we are not dealing here with
13 the question of plenary extraordinary
14 jurisdiction as yet. But, in any event, and I'm
15 glad of this, the Supreme Court, as Mr. Balter
16 noted, has granted allocatur; has the main case
17 on appeal; has before it the question of, was
18 the Commonwealth Court correct in validating or
19 declaring invalid the entire statewide plan?

20 Really, this matter of, as Mr. Balter
21 correctly granted from his experience, granting
22 a stay pending consideration of such an appeal
23 is a normal thing. Frankly, I'm not quite sure
24 why the whole plenary jurisdiction business is
25 in here. Upon application for a stay, the

1 Supreme Court could have reversed its earlier
2 denial and granted the stay on reconsideration.
3 This has to be -- In other words, we really
4 can't throw the baby out with the bath water.
5 Because of the confusing procedure, admittedly a
6 confusing procedure in this case, tampered too
7 hastily with a matter of which is of importance
8 to all the citizens of the state.

9 Couple more examples of the value of
10 plenary jurisdiction in many cases. We know the
11 Supreme Court is the head of the unified
12 judicial system. Therefore, when issues come up
13 in the judicial system, the Supreme Court has in
14 a number of cases granted a plenary jurisdiction
15 to settle the matter.

16 Again, I was involved in one. The
17 question of whether or not the seniority of
18 judges -- that in determining seniority of
19 judges, one should count appointed periods of
20 service or only elected periods of service.
21 That came up after this 1979 election when
22 following the election in both the Superior and
23 Commonwealth Courts there were some judges who
24 had had previous appointed experience such as
25 Judge McPhail, myself, Judge Cavanaugh and Judge

1 Brosky and others. I'm sorry. Judge Brosky was
2 newly elected, and others who have been newly
3 elected. That went to the Supreme Court on
4 plenary jurisdiction which promptly decided that
5 only elected service should count. We knew the
6 rules.

7 Court-funding cases have gone up
8 there; again, on an original jurisdiction basis.
9 In Bucks County, and there have been other cases
10 that started out in Philadelphia County with the
11 Carol case. In Bucks County, the Bucks County
12 judges still being funded by the county, as we
13 know, unfortunately, they still are. Attorney
14 of the county said we want more in our budget
15 for more court reporters. The county refused.

16 The Bucks County Common Pleas Court
17 filed suit in its own court against the county,
18 decided its own case, not surprisingly, in its
19 own favor. The Supreme Court immediately took
20 plenary jurisdiction of that and again handed it
21 to me; actually, to my present judge who had
22 assigned it to me to act as trial judge to
23 decide whether or not they were entitled;
24 whether or not the function of their judicial
25 system depended on that. After about a week's

1 hearing I decided to limit the percent. About
2 25 percent they were entitled to some additional
3 funding, but not what they were asking for.

4 Then a couple of court labor cases
5 involving whether or not judges secretaries
6 should be considered confidential employees
7 exempt from being in the unit. The Supreme
8 Court has properly not let the very court
9 involved, the very trial court involved in that
10 case Philadelphia County be the decider of it.

11 It has been mentioned I think there is
12 a general agreement in constitutional criminal
13 cases is very valuable.

14 Let me mention other states and then
15 conclude. I had the good fortunate throughout
16 the 1980's to be teaching intermediate appellate
17 judges from all over the country at the summer
18 seminars of the Institution of Judicial
19 Administration at NYU. I met my opposite
20 numbers from all over the country. To my
21 surprise I found, as I think Mr. Pines has
22 indicated, that there are at least 10 other
23 states where, without any standard such as you
24 have given the Pennsylvania Supreme Court in
25 your well-stated Section 726 of the Judicial

1 Code, where the Supreme Courts have complete
2 power to decide which cases are theirs and which
3 goes to the courts below.

4 In fact, in half of them the appeals
5 are filed directly in the Supreme Court alone
6 and the Supreme Court then takes what it wants
7 to, without any standards, without announcing
8 why, and then I call it trickles down to the
9 rest to the intermediate appellate courts, which
10 my colleagues told me they found it a rather
11 boring experience because they got the
12 uninteresting cases.

13 You have given Pennsylvania a rule to
14 live by, the immediate public importance. When,
15 as in Thermal Pure case, the regulatory system
16 for dealing with infectious waste in
17 Pennsylvania is at stake in the fact that an
18 appellate court has found it necessary to
19 invalidate the underlying plan, then they should
20 take plenary jurisdiction and they should act as
21 promptly as possible.

22 Ladies and gentlemen, the Pennsylvania
23 system is really the best I found from my own
24 experience in it and from my -- by curious
25 experience with my colleagues throughout the

1 other states in the nation.

2 To use the old phrase, it is not
3 necessary to fix that which really isn't broken;
4 not to destroy this safety valve as everybody
5 agrees it is, that has protected the public in
6 Pennsylvania for over 200 years as the Supreme
7 Court's power. Every case only goes to them
8 with proper standards and you have given them
9 proper standards, it must be up to them to
10 exercise that power responsibly and in my
11 experience they have. I'm ready for questions.

12 CHAIRMAN PICCOLA: Thank you, Judge.
13 I guess with all due respect, the best I can
14 conclude from your testimony is that, Supreme
15 Court is not very competent because, as you so
16 accurately pointed out and as Mr. Balter
17 testified, the logical, simplest, most direct
18 and forthcoming way to have handled this case,
19 if, in fact, the issue was the validity of the
20 plan; thus, threatening all of the infectious
21 waste disposal sites in the Commonwealth; if
22 that was, in fact, truly the issue, then the
23 Supreme Court simply could have stayed the
24 original Commonwealth Court order pending its
25 review or acceptance of the allocatur position,

1 review of the case and final disposition on that
2 issue.

3 But, the record is absolutely the
4 opposite of that. In fact, they twice denied
5 stays. And then, Thermal Pure faced with the
6 cease and desist employed the big guns, if you
7 will, of these big Philadelphia law firms,
8 including Former Justice Kauffman to come before
9 the Supreme Court to try to get this
10 extraordinary relief. All of a sudden the Court
11 changes its mind and decides, oh, well, now this
12 is an important case.

13 Everything that you have said about
14 why we should have this kind of power vested in
15 the Supreme Court for certain kinds of cases is
16 absolutely correct. I agree with it, and that
17 principle is embedded in my legislation which is
18 an amendment to the Constitution which would
19 allow the General Assembly to grant the King's
20 Bench authority by statute.

21 HONORABLE CRAIG: If the voters agree,
22 the Constitutional amendment.

23 CHAIRMAN PICCOLA: Right. But, the
24 power would only be there by virtue of a statute
25 and we could give it to the Court for election

1 cases or we could give it to the Court for labor
2 cases.

3 The troubling thing about this is the
4 manner in which our Supreme Court exercises the
5 absolutely unlimited discretion in this case.
6 Last year I sat over in the house of peers, I
7 guess, the Senate, to try an impeachment
8 proceeding. Chairman Caltagirone sat with me
9 that last summer. There were 2 cases subject in
10 that proceeding that had been brought to the
11 Supreme Court under the King's Bench authority.
12 All sorts of horrendous allegations were made by
13 one justice against other justices. Obviously,
14 we found there was no evidences of impropriety.

15 So, because of the manner and the
16 almost lightening strike like way in which the
17 Court exercises its authority with no rhyme, or
18 reason, or standards, it brings the Court into
19 disrepute. I think you and I have to agree that
20 that is the most important issue for the people
21 of Pennsylvania that our courts, particularly
22 our appellate courts, be not subject to even the
23 appearance of impropriety.

24 In this case, these other cases have
25 already raised that specter. The haphazard

1 procedural way in which this Court handled this
2 particular case draws me into mind of what's
3 public importance one day is not immediate
4 public importance the next. It just undermines
5 the credibility of the judiciary. I have no
6 problem with keeping some limited and restricted
7 King's Bench authority with the Court, because I
8 think you have accurately pointed out some very
9 important areas where rapid justice is required.

10 But, as Mr. Balter testified, the
11 issue before the Court now on the King's Bench
12 is the issue of immediate public importance and
13 there's no record on that.

14 HONORABLE CRAIG: Yes, there is a
15 record. The record of the facts is in the
16 hearing before the EHB. That's the fundamental
17 record. We can't be instructed --

18 CHAIRMAN PICCOLA: If I can interrupt
19 you, that's not the issue before the
20 Environmental Hearing Board or the Commonwealth
21 Court. The issue of immediate public importance
22 is an issue only attributable to King's Bench.
23 Now, if Mr. Balter had known that they were
24 going to use King's Bench somewhere down the
25 line, he would have probably made that, at

1 least, with his case. I have tried enough of
2 them. You put evidence on and the issues you
3 think you are going to have to deal with either
4 at court or on appeal. I'm sure he wasn't
5 looking at immediate public importance in
6 determining the context of King's Bench appeal.

7 HONORABLE CRAIG: The question of
8 immediate public importance is apparent on the
9 face of the Commonwealth Court decision on
10 matter of law. No factual hearing is necessary.
11 Commonwealth Court in its final decision has
12 struck down, rightly or wrongly--I don't know
13 the details--had struck down the underlying plan
14 and, therefore, disembodied infectious waste
15 regulation in the state. That is apparent on
16 the face of it. That's the immediate public
17 importance.

18 It happens currently to have been
19 effectuated; that is, carrying of the case to
20 the Supreme Court has currently been effectuated
21 by an ordinary allocatur. The Supreme Court has
22 granted an appeal from that decision.

23 As Mr. Balter, an experienced lawyer
24 has correctly said, that when an appeal is taken
25 and there is no automatic supersedas, as you

1 know is the case if a governmental agency is the
2 appellant, the -- first, the Court having made
3 the decision must decide -- it must be asked
4 whether it will grant or withhold supersedas, a
5 stay. If it denies that stay, then the
6 appellate rules allow the Court to which the
7 case has been taken to grant or deny a stay.

8 Now, it's true, the Supreme Court here
9 said, no, no and then yes. But, I think the
10 legislature at times has not given its final
11 decision with its initial utterances.

12 Therefore, I think that what we are dealing with
13 here is a matter of relatively unimportant
14 procedural confusion. But the heart of the
15 matter when you look at it, the system of
16 regulation is now disembodied, lacking the
17 foundation. The Supreme Court has that matter
18 on appeal, and thank goodness for a final
19 decision.

20 Should a stay be granted or not? In
21 effect, the Supreme Court wound up granting a
22 stay. That's all demonstrative. I don't think,
23 as I say, that we should fix something when
24 another piece of the machinery has a crack in
25 it, but the fundamental machinery of the Supreme

1 Court's jurisdiction is not broken.

2 An appellate court in this situation
3 can grant a stay or not grant a stay without a
4 factual hearing. It can, and in most appeals
5 the ultimate supersedas granted by the court in
6 which the appeal is taken, it's done without a
7 trial.

8 Here the Supreme Court went further in
9 allowing oral argument on that issue whether or
10 not there would be a stay, which has -- As I
11 say, we now have expert counsel, very sound
12 counsel on both sides saying the Supreme Court
13 has not granted plenary jurisdiction in this
14 case formally yet. I have read the order of
15 April 24. It merely stayed the matter pending
16 the argument on -- for the hearing on April 24.
17 That's all.

18 I really think we have a tempest in a
19 teapot. Our chief concern should be the Supreme
20 Court as quickly as possible to decide the
21 appeal before it because of its immediate public
22 importance whether King's Bench or not.

23 Incidentally, I think there's not a
24 full understanding of the enormous work burden
25 they have despite the relatively small number of

1 cases compared to the other courts because, as
2 you know, they have an enormous administrative
3 burden also.

4 I think that you will see that the
5 outcome in this is quite different from that
6 which is, understandably, trouble the citizens.
7 I can sympathize with them a hundred percent. I
8 have seen this, and having been a municipal
9 lawyer most of my life seen this. It's a good
10 thing that they have forthright representation
11 from Mr. Balter and they deserve a decision in
12 their case. All the citizens of Pennsylvania
13 deserve to have the appeal now before the
14 Supreme Court, decided, and it will be.

15 If I sound too optimistic, I'm usually
16 not a Pollyanna. But, really I think it comes
17 down to, we all have to take as the scripture
18 for the day, Judge Smith's words carefully
19 considered by all the judges of the Supreme
20 Court that the statewide waste plan is invalid.
21 Let's fix that. That's what is necessary.

22 CHAIRMAN PICCOLA: If that's, in fact,
23 the case, why did DER, and I'm going to look to
24 Mr. Balter to verify, DER joined in opposing the
25 stay of the cease and desist order to Thermal

1 Pure? Why would DER join in a stay of an order
2 that had invalidated its own plan?

3 MR. BALTER: If I can, DER was in a
4 paranoid position. In the case that the
5 community brought against the permit, the
6 defendants, in effect, with DER which issued the
7 permit at Thermal Pure. Now we get to the point
8 where, as a result of the actions of the
9 Commonwealth Court and the Supreme Court,
10 Thermal Pure no longer has a permit. Now DER
11 has the responsibility of issuing cease and
12 desist.

13 Now, DER issues a cease and desist.
14 Thermal Pure now brings the lawsuit against DER.
15 Now they are on the other side, right? Because
16 DER said, hey, now it's our authority, our
17 authority to issue a cease and desist when you
18 don't have a permit. So, you have this
19 juxtaposition here.

20 I agree with Judge Craig that there
21 was available a more uniform and rational
22 approach to this. What is troubling, judge, is
23 that, in fact, we have the Supreme Court acting
24 in a peculiar fashion. That is, instead of
25 giving a stay on the Commonwealth Court's

1 decision that the permit is invalid, they, in
2 effect, confirm it and produced the very crisis
3 that they now jump into in a way that says,
4 well, are they operating by rules, or is it
5 they're operating by the seat of their pants, or
6 who the litigants are here? Who is representing
7 the litigants? It's a very, very peculiar
8 situation.

9 CHAIRMAN PICCOLA: I think I posed
10 that question to Judge Craig and I think he has
11 somewhat acknowledged that that's accurate.

12 MR. BALTER: I agree. I said,
13 philosophically, I don't oppose the concept of
14 King's Bench because I can see times when it is
15 needed. I think there is need to explore how to
16 overcome the abuses. That's what I was
17 testifying to here by relating how I think the
18 citizens of Chester were abused by the Supreme
19 Court.

20 CHAIRMAN PICCOLA: Judge Craig, you
21 have the floor.

22 HONORABLE CRAIG: As I say, I don't
23 think that it is justified to refer to an abuse
24 of the plenary jurisdiction power, or any other
25 power of the Supreme Court. If the Court, as

1 has occurred in this case, first denies a stay
2 and then grants it, this happens all the time in
3 courts subject to post-trial motions to
4 applications for the argument. Here the
5 petition for plenary jurisdiction was treated,
6 apparently, as if it were in part an application
7 for reargument of the stay, the request which
8 had been denied.

9 Coincident not to the permanent length
10 of the case, but only as ancillary to the
11 present consideration, the Supreme Court then
12 renewed the stay. I think, as I say, no, no,
13 and then to say yes is something that all of us
14 have been involved in, including your own
15 lawmaking body, of course.

16 CHAIRMAN PICCOLA: Representative
17 Caltagirone.

18 REPRESENTATIVE CALTAGIRONE: Justice
19 Craig, in following what is going on with this
20 case and a couple of others, especially last
21 summer, there appeared to be some very troubling
22 aspects of certain cases or certain law firms,
23 more specifically certain attorneys, appeared to
24 have more equal access to the Supreme Court,
25 especially my concerns allocatur or disciplinary

1 powers that were used, and it's not, at least
2 from my point of view, whether or not the Court
3 has the power. I think they should, but there's
4 some very troubling situations that have arisen
5 and appear to be arising again as to how and
6 when that power is used and a timely manner in
7 which, hopefully, decisions will then be
8 rendered.

9 I don't know what the answer to that
10 is. I really don't. I have the greatest
11 respect for you and the work that you have done
12 for the Commonwealth and the service that you
13 have performed for us, and I think you know
14 that. I'm a little bit troubled, though, as to
15 certain aspects, not just of this case, but
16 specifically what we heard and setting aside a
17 certain justice who was testifying last summer
18 and listening to certain things that were being
19 said, it troubled me. It still troubles me to
20 this day. It's something that has to be
21 addressed. I don't know how.

22 I don't think we should radicalize the
23 system. I think there has to be some balances,
24 some additional safeguards for the public, for
25 the other members of the judiciary, and

1 especially for the legal community and the
2 attorneys that practice in this Commonwealth;
3 that certain people are not given preferential
4 treatment over others who practice law in this
5 Commonwealth. I'd appreciate your comments.

6 HONORABLE CRAIG: I have been close to
7 it. As you know, I had one of the impeachment
8 cases in which there was an attempt by
9 litigation to tie the legislature's hand in the
10 impeachment process and I refused to let that be
11 done.

12 I really think, and I say this as
13 people altogether with the concern and love for
14 this Commonwealth, I really think that it's
15 important that we all get ourselves out from
16 under the shadow of the Justice Rolf Larsen era;
17 that we recognize that that shadow has been
18 dealt with, it's gone, and we have to assess
19 matters on their own facts, on their own present
20 facts. I don't think that that unfortunate
21 error should haunt us to the point of preventing
22 us from taking an utterly fresh look at the
23 issues before us.

24 CHAIRMAN PICCOLA: Representative
25 Manderino.

1 REPRESENTATIVE MANDERINO: Thank you,
2 Mr. Chairman. Judge Craig, I want to ask a few
3 questions about some of the cases that you gave.
4 Again, this is my understanding of -- I'm trying
5 to better understand the whole notion of plenary
6 jurisdiction and how a court can or -- act in a
7 particular case.

8 For example, you shared with us an
9 example of the reapportionment cases after the 1990
10 election and the fact that the Court stepped in
11 to act so that there would be timely disposition
12 before the next election. In that case the
13 plenary jurisdiction was taken and the Court,
14 through you, serving kind of as a master was
15 acting as a court of first impression? They
16 were fact finding and making a decision,
17 correct?

18 HONORABLE CRAIG: Yes. I was acting
19 as a master, almost as if I were -- I was acting
20 as a master appointed by the Supreme Court. I
21 suppose technically I was not acting as a
22 Commonwealth Court judge.

23 REPRESENTATIVE MANDERINO: So, in that
24 case, going back to where I got confused with
25 some of the prior testimony about whether the

1 plenary jurisdiction was being exercised as a
2 matter of an appellate review or as a trier of
3 fact or as a trial court. In that case they
4 were acting, in essence, as a trial court?

5 HONORABLE CRAIG: Yes.

6 REPRESENTATIVE MANDERINO: What
7 review, if any, was available for anyone unhappy
8 with the result?

9 HONORABLE CRAIG: The ultimate review
10 is in their hands as the highest court in the
11 state.

12 REPRESENTATIVE MANDERINO: In that
13 case they were acting as both the court of first
14 impression and a court of final review?

15 HONORABLE CRAIG: Court of first
16 impression having appointed a fact finder, they
17 didn't pay my salary. They appointed me. I
18 made recommendations as to how the district
19 should be apportioned. They, on the basis of
20 record, accepted my recommendation.

21 REPRESENTATIVE MANDERINO: Once the
22 decision was made, then it was a done deal. Was
23 there an appeal based on the subject matter that
24 could have been taken to the U.S. Supreme Court?

25 HONORABLE CRAIG: Yes. In fact, I'm

1 not sure in that case, but in many of our
2 plenary jurisdiction cases there have been
3 requests for certiorari from the U.S. Supreme
4 Court. To my knowledge in every one of them,
5 approximately 70 over the period, as Mr. Pines
6 mentioned, I don't know of any which the United
7 States Supreme Court had granted a certiorari.

8 In other words, the United States
9 Supreme Court with repeated claims that what was
10 done by the Pennsylvania Supreme Court in both
11 cases, appellate and somewhat tribunal function
12 has said, at least by denial of a certiorari,
13 that we see no breach of due process sufficient
14 for us in the Supreme Court of United States to
15 take it.

16 REPRESENTATIVE MANDERINO: In the
17 matter of the Allegheny County Port Authority
18 and the Skybus, if I understood your explanation
19 there, the plenary jurisdiction really was more
20 what I think of as a typical appellate review;
21 meaning, they weren't doing additional fact
22 finding or reviewing the decision of the
23 Commonwealth Court.

24 HONORABLE CRAIG: No. We bypassed the
25 Commonwealth Court.

1 REPRESENTATIVE MANDERINO: I mean the
2 Common Pleas Court.

3 HONORABLE CRAIG: Yes, you're exactly
4 right. There was an extensive record with
5 hundreds of exhibits and 6 months of testimony,
6 they were giving immediate appeal, an appeal
7 which had bypassed the Commonwealth Court.

8 REPRESENTATIVE MANDERINO: That's 2
9 different kind of uses, I guess we could call
10 it, for plenary jurisdiction. Does it make --
11 Do I as a litigant know by the way the Court
12 defines the question before it which mode I'm
13 in?

14 HONORABLE CRAIG: Actually, you should
15 know by the way your counsel defines the
16 question before it.

17 REPRESENTATIVE MANDERINO: So, the
18 person requesting the extraordinary relief or
19 the plenary jurisdiction defines the issue and,
20 therefore, by accepting or rejecting that
21 jurisdiction you can accept or reject the notion
22 that is brought to you before?

23 HONORABLE CRAIG: Exactly. As you
24 understand as an attorney, a court, except in
25 very rare instances is not germane here, it is

1 counsel and the parties who articulate, identify
2 and articulate the issue that is put before the
3 courts. The courts really cannot go outside
4 that issue that the counsel has articulated.

5 REPRESENTATIVE MANDERINO: Now, let's
6 go to the example that we have used the most
7 today about the Thermal Pure. I have heard
8 articulated 2 different notions of what the
9 issue was before the Supreme Court and over what
10 and which they were exercising jurisdiction.
11 One was articulated by you with regard to a
12 paramount public policy issue of the fact that
13 we now no longer have a statutory authority for
14 any kind of disposal of waste. I'm not
15 articulating that right, but then I heard
16 also --

17 HONORABLE CRAIG: Excuse me. We have
18 statutory authority but --

19 REPRESENTATIVE MANDERINO: We have no
20 plan.

21 HONORABLE CRAIG: We have no plan in
22 accordance with compliance with that statutory
23 authority, right.

24 REPRESENTATIVE MANDERINO: I also
25 heard it described that as pled by the

1 petitioner asking for that extraordinary relief,
2 but that wasn't the issue that it was brought up
3 on; that the issue that it was brought up on was
4 private economic loss should this company have
5 to cease and desist.

6 HONORABLE CRAIG: Because they filed,
7 as I think Mr. Balter indicated, they filed this
8 petition for review in the Supreme Court -- I
9 guess in the Commonwealth Court, yes, and then
10 asked the Supreme Court to take plenary
11 jurisdiction of that. That was an original
12 jurisdiction proceeding.

13 Now, the appellate rules do provide
14 for, quote, special relief in connection with
15 appeals. So, they were asking by way of special
16 relief in effect an injunction or stay against
17 DER revocation action.

18 So, in that sense, technically, it was
19 an original jurisdiction matter, but also under
20 the appellate rules it is exactly the same as
21 the special relief that the appellate rules
22 permit you to seek in connection with appeals.
23 As I say, the heart of the question is, before
24 the Supreme Court on the appeal from Judge
25 Smith's, or the Commonwealth Court's decision.

1 REPRESENTATIVE MANDERINO: If I'm
2 understanding correctly, what's before the
3 Supreme Court now, do we know that it's a kind
4 of regular appeal -- allowed as a matter of
5 right from the Commonwealth Court decision of
6 Judge Smith or, was it reaching down to the
7 hearing board? This is were I'm kind of lost.

8 HONORABLE CRAIG: Not as a matter of
9 right.

10 REPRESENTATIVE MANDERINO: It was --
11 Allocatur was granted.

12 HONORABLE CRAIG: Yes.

13 REPRESENTATIVE MANDERINO: But the
14 appeal was when I had a regular course of --

15 HONORABLE CRAIG: Not as a matter of
16 right, but in accordance with the allocatur
17 discretion. Whenever the Commonwealth Court
18 makes a decision as an appellate court, as you
19 know, it goes to the Supreme Court only if the
20 Supreme Court grants allowance of appeal or
21 allocatur. If the Commonwealth Court acts as a
22 trial court and the Commonwealth Court is unique
23 among the intermediate appellate courts of the
24 country as you know, in having many original
25 trial court functions and you get a final

1 decision there, then you have a right of appeal
2 to the Supreme Court.

3 But, in this case what the Supreme
4 Court had done was to take the appellate
5 decision, Judge Smith's decision of Commonwealth
6 Court by way of allocatur, a perfectly normal
7 approach, and understandable in view of its
8 importance; then this original jurisdiction
9 proceeding and it certainly sounds like that.
10 Mr. Balter correctly characterized it as a
11 complaint. It could have been characterized as
12 a petition for special relief under the
13 appellate rules asking for an injunction to stay
14 the revocation action of DEP, but they
15 characterized the complaint. In there may lie
16 the confusion, I agree.

17 But, in any event, the Supreme Court
18 is considering granting -- Well, it's
19 temporarily granted a stay by way of special
20 relief, but no matter how you slice it, it is
21 ancillary to the main appeal before the Supreme
22 Court, and the appeal on which we meet that
23 final decision.

24 MR. BALTER: Mr. Chairman, if I might
25 try to clarify this.

1 REPRESENTATIVE MANDERINO: I'd be glad
2 to hear it.

3 CHAIRMAN PICCOLA: Representative
4 Manderino is interested in --

5 MR. BALTER: I want to clarify this
6 issue.

7 REPRESENTATIVE MANDERINO: I will ask
8 for your input. What I was trying to understand
9 is, in your opinion and kind of where I was
10 going by way of example, is -- are both -- I
11 don't know how to word it -- both modes, both
12 potential ways for there to be plenary
13 jurisdiction meaning in an appellate mode versus
14 in a finder-fact mode? Are both of those
15 necessary functions to be retained in this
16 notion of plenary jurisdiction of the Supreme
17 Court, in your opinion, and explain why you
18 think one way or the other?

19 HONORABLE CRAIG: Yes. That was no
20 better illustrated than in the Bucks County
21 case. It was well illustrated there in the
22 Bucks County case, where the Bucks County Court
23 wanted to get more money out of its county,
24 filed a suit in its own court against the county
25 and immediately granted preliminary injunction

1 so in favor. The Supreme Court took the case by
2 extraordinary jurisdiction and then handed it to
3 me to try. That was a situation of taking an
4 original jurisdiction trial and in this approach
5 of using, in effect, the judges of the
6 Commonwealth Court to work with them on it,
7 although they, of course, reserved the power.
8 There was a clear-cut, valuable approach.

9 Another illustration was the Supreme
10 Court action in the question of the Philadelphia
11 Court of Common Pleas' definition of the
12 bargaining unit of the court employees. The
13 Supreme Court took that, I think it was before
14 the PLRB at the time, and and clearly in an
15 original jurisdiction mode, took it and then
16 handed it to the Commonwealth Court to decide.
17 It was the Commonwealth Court that then had to
18 decide whether or not judges' secretaries are
19 confidential employees.

20 So that the Supreme Court for the
21 final decision has been solicitous of making
22 sure that there is a factual record. On the
23 matter of a stay or supersedas, as I said, there
24 ordinarily is not a factual record except that
25 the factual record already existing which

1 describes the circumstances of the case at
2 issue. So, the fact that the Supreme Court in
3 this April 24th argument did not transform
4 itself into a trial by juror or a trial by bench
5 is not extraordinary at all. What it is,
6 essentially, when you cut through all the
7 understandably heated argument a supersedas
8 question.

9 REPRESENTATIVE MANDERINO: What
10 suggestions, if any, would you make based on
11 your experience with regard to plenary
12 jurisdiction and whether it should be further
13 defined, further limited or further clarified by
14 either the courts or the legislature?

15 HONORABLE CRAIG: No, I don't think --
16 As I say, I think what the legislature -- the
17 way the legislature has now embodied the
18 constitutional power is as precise as you can
19 get it. Essentially, as we have seen from a
20 variety of instances, there's a great need for
21 flexibility. After all, we elect our Supreme
22 Court. All cases ultimately have to go to it.
23 We have to trust the highest court in the land
24 to function as the highest court in the land.
25 We cannot by regulations dispel doubts and

1 concerns, particularly those stemming from a
2 past error.

3 There is a need, I dare say, and it's
4 constantly being worked on for clarifying both
5 the appellate rules and the Supreme Court's
6 internal operating procedures. The Supreme
7 Court brought in legal authorities from all over
8 the country to give it independent advice for
9 those internal operating procedures. I think
10 that was a very strikingly careful approach to
11 adopting its internal operating procedures,
12 which as we have noted in part in government in
13 this kind of thing.

14 REPRESENTATIVE MANDERINO: Thank you,
15 Judge Craig. Mr. Chairman, I am interested in
16 the point that Mr. Balter wanted to clarify. I
17 just didn't want to get sidetracked with the
18 discussion of the case at the moment because
19 that wasn't where I was heading. I would like
20 to let him speak.

21 MR. BALTER: At the present moment,
22 the Supreme Court actually has 2 cases before
23 it. The first case is the case of Chester
24 Residents against DER and Thermal Pure which is
25 going to deal with the question of the validity

1 of the infectious waste plan. That's on
2 allocatur and sort of in the normal course, and
3 that's the basic case.

4 The other case that it has before it
5 on King's Bench is the case of Thermal Pure
6 versus DER. That's a case that says, does DER
7 have the power to make Thermal Pure cease and
8 desist when Thermal Pure doesn't have a permit?
9 Judge Craig has been putting the 2 cases
10 together. Clearly they are interrelated, but
11 it's 2 different things. There never was any
12 EHB hearing on the question, does DER have the
13 power to shut somebody down? That's the
14 problem, judge. There was never any hearing,
15 never any testimony at all.

16 REPRESENTATIVE MANDERINO: So, it's
17 your contention on that second question, the
18 normal course of litigation would have been to
19 start back -- that's a new question, would have
20 been to start back at the hearing board and the
21 fact that it didn't start there and the Supreme
22 Court accepted it, that was their exercise of
23 this plenary jurisdiction; whereas, the other
24 one that was just a regular allocatur?

25 MR. BALTER: There is the other aspect

1 and, perhaps, Judge Craig will have a comment
2 about it, but in my view, the fact that Thermal
3 Pure did not take the DER action, cease and
4 desist, to the Environmental Hearing Board meant
5 that when they brought that to the Commonwealth
6 Court, the Commonwealth Court did not have
7 subject matter jurisdiction.

8 The question I raised is that, if the
9 case is in the Commonwealth Court or has been
10 placed there, a piece of paper, and the Court
11 does not have subject matter jurisdiction, is
12 that something that can be converted by the
13 Supreme Court and King's Bench into a subject
14 matter case?

15 HONORABLE CRAIG: Mr. Balter knows as
16 well and is annoyed with the idea of cases being
17 consolidated. The mere fact that the names of
18 the parties are different in the captions of
19 these 2 different series of documents does not
20 at all mean that the 2 cases cannot be
21 consolidated for treatment.

22 Mr. Balter confuses me when he
23 characterizes on the one hand the case against
24 Thermal Pure versus DER has filed in the
25 Commonwealth Court. When he characterizes, I

1 think correctly as an urgent jurisdiction case,
2 but then says there was no hearing before the
3 EHB as there would have had to be if it were an
4 appellate proceeding.

5 I suggest that that inconsistency from
6 my very competent colleague illustrates the
7 procedural confusion of biological sport almost
8 that we have gotten into here. On this business
9 of how things are captioned, we have to cut
10 through and look at the essential core of the 2
11 cases, which the Supreme Court, although not
12 with the formal label has obviously consolidated
13 for consideration because it involves the same
14 issue and the same threat to the citizens of
15 Pennsylvania and get on with deciding the merits
16 of the appeal as distinguished from concern
17 about the technicalities of the two proceedings
18 and the fact that the Supreme Court has not
19 formally said they are consolidated.

20 MR. BALTER: I just want to make one
21 final statement. I want to ease Judge Craig's
22 mind because he's made a statement several times
23 which I believe is inaccurate.

24 The import of the opinion of Judge
25 Smith in the Commonwealth Court is that, the

1 infectious waste plan is invalid. That does not
2 invalidate at all any of the infectious waste
3 regulations. The Infectious Waste Act is set up
4 essentially in 2 aspects, one is make a plan;
5 the other is have regulations for how the
6 facilities operate. That second part is not
7 involved in this at all. So that, all of the
8 existing facilities other than the ones that
9 come under this particular problem are safe and
10 are not to be touched and are perfectly okay.
11 All of them that were built before, all the
12 facilities that were built before the Infectious
13 Waste Act are in there and they are not to be
14 touched and not affected at all by the plan or
15 the act.

16 CHAIRMAN PICCOLA: And they are also,
17 as I read the opinion, they are -- it is only
18 invalid insofar as it does not -- or that it
19 only cites incineration facilities and
20 explicitly excludes all other kind of
21 facilities. So that the plan in its entirety
22 may not be totally invalid; only that aspect of
23 it.

24 HONORABLE CRAIG: I'm sorry. Of
25 course, the exact import of the Commonwealth

1 Court's decision is part of what's to be argued
2 in this appeal and not to be argued before the
3 legislature has the House of Lords that Mr.
4 Balter would like to have.

5 But, the existence of a valid plan is
6 a condition perceived in the statute for valid
7 regulation. The legislature, again, wisely says
8 to the regulatory agency, don't you go adopting
9 regulations until you have a statewide
10 perspective. Your body was absolutely right in
11 making the condition procedure.

12 REPRESENTATIVE MANDERINO: Thank you,
13 Mr. Chairman. As I tried to avoid
14 unsuccessfully when you get a bunch of lawyers
15 together, you can't concede any one little point
16 because -- I just want to close by saying, I'm
17 trying to understand legislatively here what's
18 going on in terms of King's Bench and what if
19 anything we should do. I think everyone has
20 acknowledged that this committee doesn't have
21 any ability to, nor should it reach in and get
22 involved in it in any particular case.

23 To the community folks involved, I
24 always dealt with my community group. If I had
25 to make that decision it would be easy, but it's

1 not my decision to make. With that I have no
2 more questions. Thank you.

3 CHAIRMAN PICCOLA: Representative
4 Horsey.

5 REPRESENTATIVE HORSEY: Mr. Craig, my
6 question is more of a statement than a question.
7 I'll make it short, Mr. Chairman. I understand
8 we are confined in this room today with this
9 issue of King's Bench authority. But one of the
10 things that's happened in the last 20 years
11 since I was a school teacher is, you don't teach
12 students one on one anymore. There's some
13 indisputable effects that have come out as a
14 result of this hearing that we sort of skirted
15 past.

16 Chester Township is the poorest
17 township probably in the Commonwealth itself.
18 That issue was not mentioned. We have an
19 incinerator plant in Chester that's the largest
20 in the state. Their suits and they are able to
21 hire suits, meaning attorneys, to represent
22 them. The Supreme Court whose discretionary
23 authority known as King's Bench authority sided
24 with the suits, sided with the big business and
25 companies.

1 Well, I'm a state representative. I'm
2 elected by the people. My first interest is the
3 people. Ms. Mayfield, will you stand up? She
4 is a real live human being. She comes from the
5 poorest township in the entire Commonwealth.

6 We are talking about a company, once
7 again that represents the largest incinerator
8 company in the entire state. Whether the
9 Supreme Court realizes it not, their discretion
10 with this King's Bench authority, they went
11 against the people. I'm elected by the people.
12 I'm supposed to look out for the people.
13 Special interest is second to the people. If it
14 comes a point where someone asks, someone comes
15 to me and asks me to put parameters around this
16 King Bench authority because I know it can abuse
17 people, I will do so. Thank you, Mr. Chairman.

18 CHAIRMAN PICCOLA: Further questions?
19 Thank you, Judge Craig. It was very
20 enlightening and we really appreciate you
21 sharing your expertise with the committee.

22 Our last witness for today is Bruce
23 Ledewitz, Professor of Duquesne University
24 School of Law.

25 MR. LEDEWITZ: Thank you, Mr.

1 Chairman, members of the committee: I'd like
2 to depart from my written remarks for a just
3 moment and say that I think the committee is
4 performing a great public service and has been
5 performing a great public service in keeping the
6 pressure on the Pennsylvania State Supreme Court
7 by the use of public hearings and by
8 investigations of its jurisdictional and other
9 powers.

10 I disagree with Judge Craig that the
11 problem with Justice Larsen was the bad apple in
12 a barrel. I think the problem in the
13 Pennsylvania Supreme Court is institutional and
14 endemic. I think you need only look at the fact
15 that Justice Montemuro was illegally appointed
16 in the middle of the Justice Larsen debacle.

17 Even in regards to the reform of the
18 internal procedures of the court that Judge
19 Craig referred to, the peck committee was
20 appointed by the Court in secret, met in secret,
21 no public hearings were held. Nobody saw it
22 from the outside. That is typical of the way
23 the State Supreme Court operates. I think all
24 that Judge Craig has really established here
25 today is that he is able to give a more coherent

1 account, and a fairer account of what the Court
2 does than the Court gives and should have been
3 on the Pennsylvania Supreme Court.

4 The issue before the House Judiciary
5 Committee is, as I understand it, the so-called
6 King's Bench power exercised by the Pennsylvania
7 Supreme Court. The committee is asking for
8 input as to what, if anything, should be done
9 about this power and how any reform of it should
10 be accomplished. In my view, the King's Bench
11 power should be eliminated by simple legislative
12 repeal of 42 PA C.S. Section 726, and by some
13 sort of statutory prohibition against trial
14 court jurisdiction by the Supreme Court. No
15 constitutional amendment should be needed to
16 effect this change.

17 The future of the King's Bench power
18 would attract little attention were it not for
19 the smell of scandal that continues to cling to
20 the Pennsylvania Supreme Court. The King's
21 Bench power figured prominently in the charges
22 and counter-charges of special interest that
23 swirled around the impeachment proceedings
24 against Justice Rolf Larsen. The erratic
25 application of the King's Bench power, under

1 which the State Supreme Court may take
2 jurisdiction over any case at any stage in the
3 state court system, and indeed, at least in one
4 instance take a case that has never even been
5 filed, has fed the prevalent belief in
6 Pennsylvania that it is who you are and who you
7 know, rather than the merits of your case that
8 determine the treatment of your case by the
9 state's highest court.

10 The specific exercise of the King's
11 Bench power that sparked this hearing, the case
12 of Thermal Pure Systems, which I will not go
13 into, is a perfect example of the appearance of
14 impropriety that infects this extraordinary
15 remedy. Whether this infectious waste plant
16 should be permitted to operate and under what
17 conditions is no doubt an important issue, but
18 no more significant than that contained in
19 hundreds of other cases in the state system.

20 Even in regard to the particular issue
21 raised by Judge Craig today which the State
22 Supreme Court did not acknowledge in its action,
23 but even if that is the issue upon which the
24 Court exercises the King's Bench power, as Judge
25 Craig demonstrated, there was no need for King's

1 Bench power to address that very significant
2 issue.

3 What the public sees is that, if you
4 hire a former justice of the Supreme Court, and
5 if the Zappala banking firm is involved, the
6 normal processes of justice cease to operate.
7 In this case and this case only, legal
8 proceedings, even fact-finding, are transferred
9 from Commonwealth Court operating as a trial
10 court to the State Supreme Court.

11 Justice Zappala may recuse himself and
12 all the justices may insist that they acted only
13 on the merits, and that they would have done the
14 same in anyone else's case with any other
15 attorney. Indeed, that may well be true, but
16 the public believes that the fix was in. That
17 suspicion is inevitable in a court as
18 politicized as this one and a remedy as
19 extraordinary and discretionary as the King's
20 Bench power. This is an important reason why
21 the power should be eliminated. But there are 2
22 other reasons as well to eliminate this power.

23 One is, and I'm departing here from my
24 written remarks, but one is that, it encourages
25 an attitude of judicial meddling in particular

1 issues that attract the attention of the Court.
2 The other is that, it's been the occasion for
3 the assertion of the doctrine of inherent
4 judicial power which Judge Craig even mentioned
5 here today.

6 Ironically, the King's Bench power is
7 not really significant in and of itself. Judge
8 Bernard Scherer, in an article in the Duquesne
9 Law Review already adverted to here today, has
10 shown that the King's Bench in England never
11 functioned as both trial court and court of last
12 resort. In other words, historically, the
13 King's Bench power was not intended to allow the
14 highest appellate court to function as a trial
15 court as well. A more historically justified
16 approach to the King's Bench power would,
17 therefore, narrow its scope.

18 Nor is the King's Bench power ever
19 really needed to allow an immediate decision
20 upon an important legal issue by the State
21 Supreme Court. Judge Craig's testimony today
22 has shown how the King's Bench power is really
23 unnecessary to promote and facilitate decision
24 making by the Court. Emergency appeals and
25 emergency interlocutory appeals can be heard.

1 Judgments can be stayed pending appeal.

2 In 2 dramatic examples of this sort of
3 appellate jurisdiction, the United States
4 Supreme Court was able, though exercising purely
5 appellate jurisdiction, to rule quickly in the
6 Steel Seizure case in 1952 and the Pentagon
7 Papers case in 1971, without anything like the
8 King's Bench power. Even with the elimination
9 of the King's Bench power, the Pennsylvania
10 Supreme Court can retain ample appellate
11 authority to superintend legal decisions by the
12 Pennsylvania courts.

13 I might add at this point, that even
14 in Judge Craig's testimony, what you really come
15 back to over and over again is, we need the
16 King's Bench power so that the courts of
17 Pennsylvania can sue the Commonwealth and the
18 counties. That's just an example of over-
19 reaching by the courts of Pennsylvania. In my
20 opinion all of those suits have violated the
21 separation of powers from their initiation. I
22 think it's an excellent example of the courts
23 feathering their own nests.

24 Technically, all the elimination of
25 the King's Bench power will accomplish is to

1 keep a formal separation between original and
2 appellate jurisdiction, between fact finding and
3 review. That is an important change, but not
4 earth shattering in and of itself.

5 What is important about the King's
6 Bench power today in Pennsylvania is that, it is
7 an aspect of the judiciary asserting
8 unreviewable authority and acting in
9 unpredictable ways. The King's Bench power
10 allows the Pennsylvania Supreme Court to
11 suppress the opinions and processes in lower
12 courts that might embarrass the justices in
13 writing later contrary opinions.

14 It is true you can get speed by use of
15 the King's Bench power, but you don't get the
16 reflection of the intermediate courts which in
17 this state are a higher quality than the State
18 Supreme Court.

19 The King's Bench power is the
20 mechanism by which the justices meddle with
21 controversies that, for whatever reason, attract
22 their attention and allows them to believe that
23 they can fix any problem. Justice Zappala
24 practically said as much of the court's
25 intervention under the King's Bench power in the

1 PAT bus strike in Pittsburgh that came up during
2 the impeachment proceedings.

3 I have in my testimony a summary of
4 that. I believe that this is an accurate quote,
5 but it is not a quote. It is an account in the
6 Pittsburgh Post-Gazette of Justice Zappala's
7 testimony. I will read the account even though
8 I was not able to find the key word.

9 Zappala has steadfastly denied any
10 wrongdoing, and during his testimony in the
11 impeachment trial said he was trying to mediate
12 the Port Authority labor dispute. I believe
13 Justice Zappala used that word, mediate. That's
14 what you can do with the King's Bench power.
15 Can you imagine Chief Justice Rhenquist saying
16 he is going to mediate a bus strike?

17 Unfortunately, trial judges sometimes
18 do this. They step outside the law a little
19 bit. They get the parties together, they knock
20 heads together, they try to force a settlement.
21 Trial judges do it. It's very different when a
22 state's highest court does it, because then, of
23 course, there is no review of any overreaching.
24 The King's Bench power in operation as a trial
25 court encourages Justice Zappala to have this

1 kind of attitude, which I believe was his
2 attitude. It's not a question of corruption.
3 It's a question of a wrongful institutional
4 role.

5 Worst of all, the King's Bench power
6 has been an occasion for the justices to assert
7 the novel and indefensible theory of, quote,
8 inherent power. It has been asserted and the
9 court may well believe that the King's Bench
10 power cannot be removed from the Pennsylvania
11 Supreme Court. Judge Scherer cited some of
12 those examples in his article.

13 Justice Roberts, otherwise one of the
14 ablest justices ever to sit on the highest
15 court, apparently believed that even a
16 constitutional convention and the vote of the
17 people would be ineffective in removing the
18 King's Bench power from the Court, which is why
19 I noted that Judge Craig referred to King's
20 Bench power as a constitutional power. There is
21 no mention -- the King's Bench power is not a
22 constitutional power. The jurisdiction of this
23 court is regulated entirely by this legislature.
24 It has no inherent powers. It has no inherent
25 jurisdiction.

1 Even if there were no other reason,
2 the General Assembly should eliminate the King's
3 Bench power in order to refute this theory of
4 inherent judicial authority. The source of all
5 authority in a constitutional democracy is the
6 constitution and the people. There is no
7 inherent power here. I would have hoped that
8 judges of all government officials would accept
9 that.

10 Last March in testimony before this
11 committee, I argued that since the State
12 Constitution is explicit that the Pennsylvania
13 Supreme Court shall have such jurisdiction as
14 shall be provided by law, no constitutional
15 amendment should be needed to eliminate the
16 King's Bench power. Nevertheless, because of
17 the inflated judicial language surrounding this
18 power, I suggested that such an amendment may be
19 needed.

20 I would like now to recommend to this
21 committee that the attempt at rescission be made
22 first by statute rather than constitutional
23 amendment. The King's Bench power is codified
24 in 42 PA C.S. Section 726. This section could
25 be repealed and a statutory disclaimer could

1 replace it. In this way, the General Assembly
2 would be reasserting the constitutional
3 authority that Article V plainly gives it to
4 control the court's jurisdiction.

5 If I may add at this point, the
6 Attorney General of Pennsylvania went to the
7 State Supreme Court on a claim of inherent
8 authority in his office some years ago on the
9 Carcia case. His office is regulated by similar
10 constitutional language, and the Court had no
11 trouble at all in saying that the Attorney
12 General's powers are not inherent and are
13 controlled by the legislature. I think that
14 that precedent would be applicable to the Court
15 itself.

16 Such legislative action might spark a
17 constitutional crisis in Pennsylvania, but that
18 would not be because the legislative act was
19 radical. Congress, for example, legislates and
20 controls remedies and procedures now for the
21 federal courts. Rather, any crisis that were to
22 arise would come directly to the court's
23 assertion of unshackled judicial power. That
24 assertion and the inevitable public reaction
25 against it would do more to reform the court

1 than any other action this committee could
2 recommend.

3 I do not expect any such crisis. In
4 the end, legislative authority over the Court
5 should be and will be reasserted. Eventually,
6 the court itself will welcome a restricted and
7 more traditional judicial role. The successful
8 elimination of the King's Bench power by the
9 legislature will be a first step down that road.

10 CHAIRMAN PICCOLA: Thank you. In your
11 testimony you made reference to Judge Scherer's
12 law review article in the Duquesne Law Review of
13 the Spring of 1994. Another witness, I believe
14 Mr. Balter, also referred to that. Several
15 members of the committee have inquired about it.
16 At this time I'd like to make that as part of
17 the record and see to it that every member of
18 the committee get a copy of that article because
19 it is very enlightening. Of course, if any
20 member have any questions of Mr. Ledewitz on
21 that they may ask it.

22 I really don't have any questions, Mr.
23 Ledewitz. You and I are pretty much in
24 agreement. The only place that I think we
25 probably differ is legislative strategy and for

1 possibly for an amendment to our statute. My
2 approach is to do both to ensure that we get the
3 job done. But, you testified very ably before
4 this committee before and your testimony today
5 only reinforces that. I appreciate it.

6 Members of the committee have
7 questions? Representative Manderino.

8 REPRESENTATIVE MANDERINO: Thank you,
9 Mr. Chairman. Mr. Ledewitz, your recommendation
10 is the elimination of the King's Bench power.
11 Prior to that recommendation when you talked
12 about some of the well, you used overreaching in
13 some of the problems, it seemed to me to be
14 limited to this notion of a separation between
15 an original jurisdiction or acting as a fact
16 finder in a court of first impression versus
17 appellate review. This whole notion, if you
18 were here all day, I'm still very confused about
19 it and trying to put it together.

20 Is it my understanding from your
21 testimony that you view this plenary
22 jurisdiction or this King's Bench power as
23 something that really only applies to original
24 jurisdiction cases?

25 MR. LEDEWITZ: You don't really need

1 it for any other kind of case. You can, as
2 Judge Craig showed, you can really accomplish
3 the same result under the normal appellate
4 jurisdiction.

5 REPRESENTATIVE MANDERINO: Under
6 normal appellate jurisdiction if something was
7 happening in the Court of Common Pleas in
8 Philadelphia County, I wouldn't have the ability
9 to request an expedited appeal to the Supreme
10 Court and bypass the intermediate level, would
11 I?

12 MR. LEDEWITZ: You could, however, get
13 a stay of whatever procedures were going on even
14 if the intermediate courts have their own
15 ability for expediting proceedings. The State
16 Supreme Court would be able to stay the judgment
17 in the Court of Common Pleas in the interim.
18 That's essentially what happened in the Steel
19 Seizure case and the Pentagon Papers case.

20 So, the U.S. Supreme Court is
21 operating under normal appellate procedures is
22 able to render essentially what are expedited
23 decisions. I believe that the Pennsylvania
24 Supreme Court would be able to do so without the
25 King's Bench power, and I believe does so in

1 most cases without the King's Bench power.

2 REPRESENTATIVE MANDERINO: I don't
3 mean to put before you cases that you're not --
4 because I know we all get nervous when somebody
5 tries to ask us for an opinion on something that
6 we are not very familiar with. So, if I do that
7 just tell me. You don't have to feel compelled
8 to answer.

9 Judge Craig gave 2 examples that I had
10 asked him about of instances where he thought
11 the exercise of plenary jurisdiction was
12 necessary and good for the citizens of
13 Pennsylvania. One example I remember and I
14 asked him about dealt with a reapportionment
15 plan after the 1990 census, and a final decision
16 being made before the next election so that we
17 can actually as citizens have an election and
18 vote. That was a case, if I understood because
19 I was trying to figure out what mode the Court
20 was in, that the Court assumed plenary
21 jurisdiction and acted as the fact finder, acted
22 as if they had original jurisdiction.

23 If we did as you suggested and did
24 away with the King's Bench power, how would we
25 deal with the situation like that where, at

1 least from my point of view if I'm understanding
2 it, I think it was important to do anything you
3 can to make sure citizens can vote in the next
4 election? What would we replace that with? Or,
5 if we don't need to replace it, how would it
6 have worked?

7 MR. LEDEWITZ: There is nothing
8 inherently faster about having a master at the
9 trial instead of the Commonwealth Court have the
10 trial directly or the Court of Common Pleas have
11 a trial, whichever way the jurisdiction breaks
12 down. There's nothing faster about transferring
13 the case to the State Supreme Court and having a
14 master hear the facts and then the Court review
15 those facts.

16 REPRESENTATIVE MANDERINO: Yes. If
17 you did it in Common Pleas Court, then the party
18 unhappy with the result would have appealed and
19 then it would have gone to -- probably in this
20 case Commonwealth Court and then the party
21 unhappy with that result would have appealed.
22 By then the November election would have come
23 and gone and I wouldn't have had a chance to
24 vote. What am I missing?

25 MR. LEDEWITZ: You are missing the

1 fact that expedited appeals are possible now.

2 In fact, I believe in the Philadelphia zoning
3 case, the historic zoning case, United Artist's
4 case, the case originated in the Court of Common
5 Pleas and went directly to the State Supreme
6 Court without exercising the King's Bench
7 Powers, I remember.

8 REPRESENTATIVE MANDERINO: How did it
9 go directly? I thought that was part of this
10 distinction that people were drawing for us
11 today; that there are 2 kinds of King's Bench
12 power, 2 kinds of plenary jurisdiction; one
13 where you reach down and take it and act as a
14 trier of fact, and one where you reach over some
15 other level of appellate review to jump aboard.
16 It sounds like that's what they were doing to
17 the United Artist case.

18 MR. LEDEWITZ: Right. That's correct.

19 REPRESENTATIVE MANDERINO: That's
20 still an exercise of plenary jurisdiction.

21 MR. LEDEWITZ: In the terms of the
22 trial court jurisdiction, there's nothing faster
23 about having a master, because you are going to
24 have a trial and then the review by the State
25 Supreme Court in some sense. You could do that

1 by having it tried in the Commonwealth Court and
2 then having your appeal in the State Supreme
3 Court would be the same thing. In terms of
4 eliminating that middle tier, which is faster, I
5 believe that there is this mechanisms today
6 which can serve to eliminate that tier.

7 REPRESENTATIVE MANDERINO: What are
8 those mechanisms?

9 MR. LEDEWITZ: I believe that an
10 expedited appeal is possible now but I'm not
11 certain about that.

12 REPRESENTATIVE MANDERINO: At least as
13 far as you understand today that that expedited
14 appeal that you are referring to isn't plenary
15 jurisdiction acting in an appellate mode, as was
16 described, something that I was leaving here
17 with the impression was derived from the King's
18 Bench Powers.

19 MR. LEDEWITZ: I don't believe the
20 King's Bench power is the only way to do that.

21 REPRESENTATIVE MANDERINO: Thank you.
22 Thank you, Mr. Chairman.

23 HONORABLE CRAIG: Could I have 30
24 seconds to respond to that?

25 CHAIRMAN PICCOLA: Judge, you were

1 extremely fair to me when I was before you as an
2 attorney. I will be fair to you. Respond,
3 please.

4 HONORABLE CRAIG: In short, the
5 witness is unable to cite present law aside from
6 a plenary jurisdiction power for an appeal going
7 directly from a Common Pleas Court to the
8 Supreme Court. There is no such provision
9 except the plenary jurisdiction power. You have
10 to stop it -- Without it, you have to stop in
11 the Commonwealth Court or the Superior Court.

12 Although our 2 courts are 2 of the
13 hardest working courts in the country,
14 Commonwealth Court averages less than 10 months
15 in some of the biggest appeals and you still
16 have to go through that. There is no
17 external -- Of course, the courts themselves,
18 the intermediate courts, try to expedite
19 important cases but there are limitations.
20 There are briefing periods, as lawyer members
21 know, and so forth.

22 You need plenary jurisdiction power if
23 you are going to -- As in cases I recognize, and
24 I think witness recognizes, that you are going
25 to bypass the intermediate courts you need to

1 retain the plenary jurisdiction power for that.

2 MR. LEDEWITZ: I know better than to
3 argue with Judge Craig about judicial matters.
4 I would like to point out, however, that
5 normally what will occur is, litigation on stays
6 of relief, stays of judgment; that is, you don't
7 have to have a final decision on the merits in
8 order to decide the legal aspect of a particular
9 issue. That could be done in an expedited
10 manner in terms of a stay of the judgment, which
11 was available, in fact, in the Thermal Pure
12 Systems case itself. That case itself could be
13 decided quickly simply on the grant or denial of
14 the stay which the Court simply didn't do.

15 CHAIRMAN PICCOLA: Thank you. Mr.
16 Ledewitz is our last witness. The only remark
17 that I would make in conclusion is that, the
18 more this committee examines the King's Bench
19 power and as it is exercised by our Supreme
20 Court, the more it reminds me of the rules
21 between gang members and individual gang members
22 in some of our big cities, and that is the rule
23 is, there is no rule or there are no rules.

24 The purpose of this legislation that
25 hopefully the full House will take up this fall

1 is simply to impose some restrictions and rules
2 on the Court in the exercise of King's Bench.
3 The purpose is to save the appearance of the
4 Court. To reinforce or to reestablish, I guess,
5 is a better word, the good faith of the people
6 in our high court. I have to again agree with
7 Mr. Ledewitz, disagree respectfully with Judge
8 Craig, that I don't think we are out yet from
9 under the shadow of the Rolf Larsen affair.

10 The Rolf Larsen affair was in a large
11 part the doings of one individual, but those
12 events highlighted and brought to light and
13 brought to public scrutiny a great deal about
14 the failures and the lack of consistency, the
15 manner in which our Supreme Court operates and
16 in which it administers the Courts of the
17 Commonwealth.

18 House Bill 10 and House Bill 838 are
19 designed, not only to get at the King's Bench
20 issue, but to get at a number of other issues
21 that were brought to light during the so-called
22 Larsen affair.

23 I think that this hearing today has
24 quite clearly demonstrated that some adjustments
25 in the method in which our Supreme Court

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operates are in order. I hope the legislature will take that action this fall and as this session proceeds. This hearing is concluded.

(At or about 12:45 p.m. the hearing has concluded.)

* * * *

C E R T I F I C A T E

I, Karen J. Meister, Reporter, Notary Public, duly commissioned and qualified in and for the County of York, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

This certification does not apply to any reproduction of the same by any means unless under my direct control and/or supervision.

Dated this 9th day of September, 1995.


Karen J. Meister - Reporter
Notary Public

My commission expires
10/19/96