

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
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August 3, 1995

The issue before the House Judiciary Committee is, as I understand it, the so-called King's Bench Power exercised by the Pennsylvania Supreme Court. The Committee is asking for input as to what if anything should be done about this power and how any reform of it should be accomplished. In my view, the King's Bench Power should be eliminated by simple legislative repeal of 42 Pa. C.S. § 726¹ and by some sort of statutory prohibition against trial court jurisdiction by the Supreme Court. No constitutional amendment should be needed to effect this change.

The future of the King's Bench Power would attract little attention were it not for the smell of scandal that continues to cling to the Pennsylvania Supreme Court. The King's Bench Power figured prominently in the charges and counter-charges of special interest that swirled around the impeachment proceedings against Justice Rolf Larsen. The erratic application of the King's Bench Power, under which the State Supreme Court may take jurisdiction over any case at any stage in the State Court system, has fed the

¹42 PA. CONS. STAT. ANN § 726 (1981). Section 726 reads as follows:

Extraordinary Jurisdiction

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

prevalent belief in Pennsylvania that it is who you are and who you know, rather than the merits of your case that determine the treatment of your case by the State's highest court.

The specific exercise of the King's Bench Power that sparked this hearing--the case of Thermal Pure Systems^{which I will not go into}--is a perfect example of the appearance of impropriety that infects this extraordinary remedy. Whether this infectious waste plant should be permitted to operate and under what conditions is no doubt an important issue, but no more significant than that contained in hundreds of other cases in the State system. What the public sees is that if you hire a former Justice of the Supreme Court, and if the Zappala banking firm is involved, the normal processes of justice cease to operate. In this case and this case only, legal proceedings,--even fact-finding,--are transferred from Commonwealth Court operating as the trial court, to the State Supreme Court.

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

Ironically, the King's Bench Power is not really significant in and of itself. Judge Bernard Scherer, in an article in the

Duquesne Law Review² has shown that the King's Bench in England never functioned as both trial court and court of last resort. In other words, historically, the King's Bench Power was not intended to allow the highest appellate court to function as a trial court as well. A more historically justified approach to the King's Bench Power would narrow its scope.

Nor is the King's Bench Power ever really needed to allow an immediate decision upon an important legal issue by the State Supreme Court. Emergency appeals and emergency interlocutory appeals can be heard. Judgments can be stayed pending appeal. In two dramatic examples of this sort of appellate jurisdiction, the United States Supreme Court was able, though exercising purely appellate jurisdiction, to rule quickly in the Steel Seizure Case in 1952³ and the Pentagon Papers case in 1971⁴. Even with the elimination of the King's Bench Power, the Pennsylvania Supreme Court can retain ample appellate authority to superintend legal decisions by the Pennsylvania courts.

Technically, all the elimination of the King's Bench Power will accomplish is to keep a formal separation between original and appellate jurisdiction--between fact-finding and review. That is an important change, but not earth shattering in of itself.

²Scherer, The Supreme Court of Pennsylvania and the Origin of the King's Bench Power, 32 Duq. L. Rev. 525 (1994).

³Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584 (1952).

⁴New York Times Co. v. United States, 403 U.S. 713, 753 (1971) (Harlan, J., dissenting).

What is important about the King's Bench Power today in Pennsylvania is that it is an aspect of the judiciary asserting unreviewable authority and acting in unpredictable ways. The King's Bench Power allows the Pennsylvania Supreme Court to suppress the opinions and processes in lower courts that might embarrass the Justices in writing later contrary opinions. *JK* The King's Bench Power is the mechanism by which the Justices meddle with controversies that for whatever reason attract their attention and allows them to believe that they can fix any problem. Justice Zappala practically said as much of the court's intervention under the King's Bench Power⁵ in the PAT strike in Pittsburgh.⁶

But, worst of all, the King's Bench Power has been an occasion for the Justices to assert the novel and indefensible theory of "inherent" power. It has been asserted, and the court may well believe, that the King's Bench Power cannot be removed from the Pennsylvania Supreme Court.⁷ Justice Roberts, otherwise one of the ablest Justices ever to sit on this Court, apparently believed that

⁵See Masloff v. P.A.T., 531 Pa. 416, 613 A.2d 1186 (1992).

⁶Pittsburgh Post-Gazette, September 8, 1994 (reporting on Justice Zappala's testimony during impeachment proceedings against Justice Larsen):

Zappala has steadfastly denied any wrongdoing and during his testimony in the impeachment trial said he was trying to mediate the Port Authority labor dispute.

⁷See generally, Scherer, supra n. 2 at 530-35. (Citing cases and debate at 1968 Constitutional Convention.)

even a constitutional convention and the vote of the people would be ineffective in removing the King's Bench Power from the court.⁸ N

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

Last March in testimony before this Committee, I argued that since the State Constitution is explicit that the Pennsylvania Supreme Court "shall have such jurisdiction as shall be provided by law,"⁹ no constitutional amendment should be needed to eliminate the King's Bench Power. Nevertheless because of the inflated judicial language surrounding this power, I suggested that such an amendment "may be needed." I would now like to recommend to this Committee that the attempt at rescission be made first by statute, rather than by amendment. The King's Bench Power is codified in 42 Pa. C.S. § 726. This section could be repealed and a statutory disclaimer could replace it. In this way, the General Assembly would be reasserting the constitutional authority that Art. V plainly gives it to control the court's jurisdiction. N

⁸See Stander v. Kelley, 250 A.2d 474, 486-87 (Pa. 1969 Roberts, J., concurring); see generally, Ledewitz, What's Really Wrong With the Supreme Court of Pennsylvania, 32 Duq. L. Rev. 409, 411-12 (1994).

⁹Art. V, § 2(c).

Such legislative action might spark a constitutional crisis in Pennsylvania. But that would not be because the legislative act was radical. Congress, for example, legislates and controls remedies and procedures now for the federal courts. Rather, any crisis that were to arise would come directly from the court's assertion of unshackled judicial power. That assertion and the inevitable public reaction against it would do more to reform the Court than any other action this Committee could recommend.

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