

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 1320

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House Judiciary Subcommittee on Courts

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Room 22, Capitol Annex
Harrisburg, Pennsylvania

Wednesday, August 30, 1995 - 9:00 a.m.

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BEFORE:

Honorable Daniel Clark, Subcommittee Chairman
Honorable Jeffrey Piccola, Majority Chairman
Honorable J. Scot Chadwick
Honorable Stephen Haitland
Honorable Jere Schuler
Honorable Thomas Caltagirone, Minority Chairman
Honorable Lisa Boscola
Honorable Gregory Fajt
Honorable Kathy Manderino

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ALSO PRESENT:

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Honorable Jeffrey Piccola

Karen Dalton, Esquire
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Brian Preski, Esquire
Counsel for Judiciary Committee

David L. Krantz
Minority Executive Director

Daniel DeLash
Minority Committee Secretary

Jennifer Beaven,
Minority Research Analyst

C O N T E N T S

WITNESSES	Page
Honorable Clark's opening remarks	4
Honorable Edmund B. Spaeth, Jr., Chairman of Pennsylvanians for Modern Courts	5
Lynn A. Marks, Executive Director Pennsylvanians for Modern Courts	19
Kathleen M. Sampson, Director of Hunter Center for Judicial Selection American Judicature Society	45
Winifred Peirce League of Women Voters	71
Clifford E. Haines, Vice Chancellor Philadelphia Bar Association	85
Lawrence J. Beaser, Esquire Philadelphia Bar Association	96
G. Robert Thompson Republican State Committeeman	106
Joanna Hamill Flum, President Pennsylvania Trial Lawyers Assoc.	116
William M. George, President Pennsylvania AFL-CIO (Submitted written testimony only)	137

1 CHAIRMAN CLARK: Good morning.
2 This is the House Judiciary Subcommittee on
3 Courts public hearing and today we are having a
4 public hearing on House Bill 1320. My name is
5 Representative Dan Clark and I represent the
6 82nd Legislative District and the 82nd
7 Legislative District is about one hour west of
8 here on Route 322.

9 REP. PICCOLA: Depending on the
10 traffic.

11 CHAIRMAN CLARK: Depending on
12 the traffic and the Dauphin Narrows.

13 My district is in central Pennsylvania
14 and very rural and I represent all or parts
15 of four counties. I am the Prime Sponsor of
16 House Bill 1320 which we are having the hearing
17 on today and this bill provides for geographic
18 representation in our appellate court system and
19 that representation is selected through a merit
20 process. That bill, in its current form, is a
21 culmination of a lot of discussions in the House
22 and in this Judiciary Committee and the
23 Subcommittee Committee over the last few years
24 and we are hoping that we will be able to get
25 some additional testimony today on the nuts and

1 bolts of that bill, with an eye towards
2 improving it and having it move on through the
3 legislature.

4 With that, what I would like the fellow
5 house members, if they are in attendance today,
6 to introduce themselves and we will begin over
7 here to my far right.

8 REP. SCHULER: Jere Schuler, Lancaster
9 County.

10 REP. MAITLAND: Steve Maitland from the
11 91st District which is most of Adams County.

12 REP. BOSCOLA: Lisa Boscola,
13 Northampton/Lycoming County.

14 REP. PICCOLA: Representative Jeff Piccola,
15 Dauphin County.

16 REP. CHADWICK: I am Scott Chadwick from
17 Bradford and Susquehanna Counties.

18 CHAIRMAN CLARK: Thank you.

19 The first individual to testify before
20 us today is the Honorable Edmund B. Spaeth, Jr.
21 He is the Chairman for the Pennsylvanians for
22 Modern Courts.

23 JUDGE SPAETH: Good morning.

24 CHAIRMAN CLARK: Good morning.

25 JUDGE SPAETH: May I ask Miss Marks,

1 who is the Executive Director of PMC, to join me,
2 and with the Committee's permission, she will speak
3 specifically to the problem of regional merit
4 selection. I thought perhaps it would be
5 appropriate if I were to speak for my own
6 experience and explain why I believe so strongly
7 that the time is long past for Pennsylvania to
8 amend its constitution. I should say for the
9 people of Pennsylvania to amend their constitution to
10 provide for the merit selection of appellate judges. That
11 is, specifically Justices of the Supreme Court and Judges
12 of the Superior and Commonwealth Courts.

13 I was a judge of the Superior Court
14 from 1973 to 1986 and I suspect that I have been
15 through as many statewide elections as anybody
16 in this room. I was nominated to a vacancy on
17 the Superior Court in 1973. I ran for election
18 to the court. That required first that I
19 campaign. Of course, as the Committee knows,
20 appellate judges are elected on the statewide
21 basis. I campaigned in the primary. Those
22 days, you could cross-file. So I campaigned
23 both as a democrat and as a republican and did
24 brilliantly because I was nominated as neither,
25 but was defeated in the primary.

1 As it happened, another vacancy
2 developed on the Superior Court and I was
3 nominated to fill that. In 1975, I again
4 campaigned in the primary. This time I was
5 nominated as a democrat. And, in November, I ran
6 in the General Election and I was elected.

7 Now, in 1985 when my term expired, I
8 was the President Judge of the Superior Court,
9 had been for three years, and I was eligible to
10 run for reelection on a retention basis.

11 I loved being a judge. It is one of
12 the greatest privileges that anybody can have.
13 I was 65. Had I been retained, I would have had
14 five more years in the court and I should have
15 liked that very much. I, nevertheless, declined
16 to run for retention, because on the basis of my
17 own experience and the basis of my observation
18 of how our judicial system works, I was deeply
19 convinced, I remained deeply convinced, that the
20 electing of appellate judges is wrong. It is
21 inconsistent with a qualified, independent
22 judiciary in which the public will have confidence.

23 And if I may? In the balance of my
24 statement, I would like to explain the reasons
25 for that conclusion.

1 First of all, it's frequently said that
2 the election of appellate judges is democratic,
3 it's part of the democratic process and not to
4 elect them deprives the people of their vote.
5 That is the usual way of putting it. It is an
6 easy slogan, but it has absolutely no
7 relationship to reality. A realistic
8 description would be that the election of
9 appellate judges is a politically bossed system
10 that masquerades as an instrument of the popular
11 will.

12 When I ran for the Superior Court, I
13 often would ask my audiences whether they knew
14 anything about the Superior Court or whether they knew
15 anything about me. It is a distressing sort of
16 exercise to go through, I assure you, because,
17 an occasional lawyer friend was there and they
18 would sheepishly hold up a hand and admit they
19 knew me, but mostly nobody knew me and nobody
20 knew about the Superior Court. At least
21 I had a chance to explain the responsibilities
22 of the Superior Court and its place in our judicial
23 system, and I think, I hope that that was of
24 some useful civic education. But I
25 didn't have a chance to say anything about

1 myself that would in any way help the audience
2 or anybody who read about the meeting to know
3 whether they should vote for me.

4 It is one thing to run as you, ladies
5 and gentlemen, have run. You not only may, but
6 it is entirely appropriate and it is right for you
7 to take positions on political issues. That's
8 what your constituents expect. They want to
9 know, if they vote for you, how you will vote,
10 what sort of bills you will propose. But the judge
11 can't do that. Somebody running for judge can't
12 possibly do that. It is very regrettable that
13 under the pressure of election campaign, some
14 judicial candidates have come awfully close to
15 doing that, but it's wrong to do it. The
16 obligation of the judge is to just basically decide,
17 according to the particular facts of the case, according
18 to the particular principles of law that apply
19 to that case and to say to an audience when you
20 are running for election how you will decide
21 something is dreadful.

22 One can imagine if you appeared before
23 that judge in a later case and knew that when
24 that individual is *campaigning for election*, he
25 or she had said, well, if I have a case that

1 involves X, this is the way I think it ought to
2 be decided and there you are on the other side
3 of X. You are not going to have any confidence
4 in the fairness of the hearing that you are
5 going to get.

6 Now, in the end, I was elected by a
7 very substantial margin and I would like to
8 think that that meant that after three statewide
9 campaigns, the voters had some idea of who I was
10 and decided that I would be a good judge, but
11 that ... I know perfectly well that
12 that's not the case, that isn't the way it
13 worked at all. If the day after my successful
14 election in November of 1975, voters had been
15 asked -- and there have been poles that do this,
16 exit poles -- who did you vote for for appellate
17 judge? You get an absolute blank. Well, why
18 did you vote for that person? And you get a
19 blank.

20 The reason I won and the reason that my
21 opponent who was a good judge from Allegheny
22 County lost, was that, by happen stance, there
23 was a wing-ding of a mayoral election going on
24 in Philadelphia and the democratic candidate
25 came out of Philadelphia with a very large

1 margin and I came out with a very large margin,
2 much too large for my Allegheny County opponent
3 to overcome. So he didn't lose because of the
4 voters thinking that I was better than he and I
5 didn't win because the voters thought I was
6 better than he. We were both either victims or
7 beneficiaries of political chance. So that to
8 say that the election of judges on the appellate
9 and the statewide basis is an exercise of
10 the popular will, not to put too fine a point on
11 it, is nonsense.

12 The second point I would like to make
13 is that the election of appellate judges inevitably
14 involves the judicial candidates in a process that
15 either, in fact, compromises their independence or at least
16 has the appearance of doing so.

17 When I ran for election to the Superior Court,
18 Superior Court, I necessarily appeared before partisan
19 audiences. I was in Adams County, I remember. A very
20 pleasant outdoor picnic. I was in Juniata County and
21 spoke to some college students. And, you know,
22 I was in almost every county in the state and
23 almost every occasion that I attended was a
24 politically partisan occasion. Not quite. There
25 were some that were civic meetings of one kind or

1 another, but mostly they were occasions
2 sponsored by the democratic leadership of that
3 county.

4 And I assure you, ladies and gentlemen,
5 if you are running for judge, that leaves you in
6 a very uncomfortable position because,
7 inevitably, there is the appearance that you are
8 running, in my case, as a democrat. In my
9 opponent's case, as a republican.

10 And there is no such thing, or there
11 should be no such thing, as republican law or
12 democratic law. It is an unhappy fact that our
13 courts are sometimes referred to as a democratic
14 court or as a republican court and what the
15 speaker means is that they have counted noses
16 and there are more republican justices than
17 democratic, there are more democratic than republican and
18 that's not the way a court should be perceived.
19 And the perception is every bit as important as
20 the fact.

21 But in addition to that, there is
22 another reason why electing appellate judges is
23 inconsistent with the public getting appellate
24 courts that they'll have confidence in. It takes a
25 great deal of money to be elected an appellate

1 judge. It didn't take nearly as much when I was
2 running, but it still took an awful lot more
3 than I had. And now, it takes well over a
4 million dollars.

5 That money comes from lawyers,
6 most of it, or lawyers' associations. Now, I
7 don't, I don't want to sound harsh. Most lawyers are
8 perfectly honorable in their approach to making
9 financial contributions and most judicial
10 candidates are, too.

11 I was on the bench, Common
12 Pleas in Philadelphia, and then the Superior Court
13 for over 21 years, and I know a great many
14 judges and some of them are among my closest
15 friends. There are many fine judges, despite
16 the fact that they had to go through an
17 electoral process which required dependence on
18 partisan political support and required seeking
19 contributions. Of course, they don't seek
20 them themselves. You have a committee that does it
21 for you. But just the same, seeking
22 contributions from lawyers, some of whom will
23 appear before them.

24 And again, it is not whether the judge will,
25 in fact, favor a lawyer who made a substantial

1 contribution. It is what will the public think? What will
2 individual litigants think? How would you feel if you
3 were appearing before a judge and you knew that the
4 lawyer on the other side, the lawyer opposing
5 your lawyer, was a substantial contributor to
6 the court? To the judge hearing the case? You
7 are not, you are not going to be comfortable. And
8 if the experience of the last several years has
9 shown us anything, it shows the great danger of
10 judges either, in fact, being or seeming to be
11 beholdling to those who have supported them with
12 money and with allotment.

13 Now, sometimes it is said, well, yes,
14 there is a lot, of course, to those criticisms, but
15 merit selection wouldn't be an improvement. You
16 can't get politics out of the process. Merit
17 selection, in fact, would be more political.

18 I don't propose today to go into any detail in
19 talking about the way the merit selection system
20 should be structured. We have testified before
21 on that. And, in fact, I was rather mortified
22 when I looked at the printed statement to see
23 that, although it is entitled with this
24 Committee's title, it starts out by thanking you
25 for letting me appear before the Senate Judiciary

1 Committee. Forgive the English, Mr. Chairman, but we have
2 said before how we believe a merit selection bill should be
3 structured.

4 You will have other testimony on that,
5 and you have heard a lot of it before. The point that
6 I would like to make is a more general one. The
7 fact of the matter is that merit selection is a
8 more democratic process, by far, than the
9 current process. The current process is very
10 undemocratic. The current process is chance and
11 money and political partisanship all rolled up
12 into a wad that comes out with a result that leaves
13 the public right-lacking confidence in the way the
14 courts work.

15 And to say that we can't do better
16 than that is defeatism. We most certainly can do
17 better than that. Most states have done much better than
18 that. And when I say that merit selection is a
19 better process from every aspect, I am very
20 comfortable by referring the Committee to the
21 experience of many, many other states. To argue
22 that Pennsylvania mustn't change is like the
23 mother watching her boy in the parade: everybody
24 is out of step but my Johnny.

25 For one thing, merit selection produces

1 a much more diverse bench, in terms of gender,
2 professional background, race, and geography.
3 Stating it the other way, nobody should be
4 surprised that a process we have now that is so
5 heavily dependent, exclusively dependent upon
6 partisan political muscle and the ability to
7 raise money, produces a Supreme Court that's
8 from the East or the West. All of them without
9 a single woman. That's what you would expect.
10 That's what you get.

11 If you look at merit
12 selection states, you get a much more diverse
13 bench in every respect: geographically and
14 otherwise. And that's not surprising because the
15 pool of qualified candidates is so much larger.
16 The nominating commission chooses from lawyers,
17 from small offices, large offices, medium
18 offices, every county, single practitioners, a
19 variety of backgrounds, and to say that you
20 can't tell whether somebody is qualified is
21 nonsense.

22 I have been through the merit
23 selection. A merit selection committee learns a
24 great deal about whether a person would be a
25 qualified candidate. How long has a person been

1 a lawyer? What sort of practice? What is the
2 person's reputation? What civic and
3 political, charitable activities has the person
4 engaged in? What professional activities? What
5 is the reputation? Now anybody who has
6 enough political muscle and can raise enough money
7 can run. So the experience shows that you get a
8 much more diverse, much more highly qualified
9 bench under a merit selection process.

10 Furthermore, it is very definitely a
11 democratic exercise. The members of the
12 nominating committee, there are differences of
13 just what the procedure should be. I am not
14 going to go into that, but they are all chosen
15 by elected officials, whether by the Governor,
16 by the Representatives of the House and Senate,
17 some combination thereof, nevertheless, and then
18 the nominees go to the Governor who selects one
19 and the Senate confirms or doesn't confirm. So
20 that the people's electorate representatives have
21 a decisive and the decisive final say.

22 In concluding, I respectfully express
23 the hope that the Committee, the General
24 Assembly that retire will, will recognize that
25 reasonable people are going to differ as to the

1 details of what a final constitutional amendment
2 should say, but those can be worked out.

3 And the time has come, ladies and gentlemen, for
4 something to be done. Experience in this state
5 has shown that it has to be done, the experience
6 of other states has shown that it can be done
7 and you have, the General Assembly has, many
8 important tasks before you. But I do suggest
9 that there isn't any that's more important than
10 restructuring the way our appellate judges are
11 selected so that we will achieve a judicial
12 system that commands the people's confidence.

13 I do appreciate, very much, Mr.
14 Chairman, the opportunity to appear before you
15 and express the gratification that the Committee has
16 put this very important subject on its agenda.
17 If I may ask Miss Marks to supplement what I
18 said? Thank you.

19 CHAIRMAN CLARK: Yes, thank you
20 very much. Yeah, I think what we will do --

21 JUDGE SPAETH: Or respond to any
22 questions? Or however you wish to proceed?

23 CHAIRMAN CLARK: I thought what
24 we would do, now since we have Miss Marks, who is the
25 Executive Director to the Pennsylvanians for

1 Modern Courts, go ahead and give her testimony
2 and then we should ask questions of both of you,
3 if that's acceptable?

4 JUDGE SPAETH: That's fine, Mr.
5 Speaker.

6 MS. MARKS: Thank you for inviting us
7 to testify. Judge Spaeth spoke about his
8 personal experiences through the partisan
9 election process and I will confine my comments
10 to our organization's perspectives.

11 Campaign fund raising will continue as
12 long as judicial elections do. The potential
13 for abuse will never subside unless and until
14 partisan election of appellate judges are
15 eliminated altogether. And this is true
16 regardless of whether judicial elections are
17 held on a statewide or on a regional basis. And
18 I know we are not here to talk about proposals
19 which would divide the state into districts and
20 elect appellate judges from regions, but I would
21 like to take the opportunity now to voice our
22 strong opposition to that approach.

23 Substituting regional elections in
24 place of statewide elections, we believe would
25 be a major step in the wrong direction. The

1 fund raising pressure, which Judge Spaeth alluded
2 to and which I am sure you will hear more about
3 it today, rather than receding would escalate.
4 The pressure on lawyers and on special interest
5 groups to contribute and the potential conflict
6 of interest on judges would be that much greater
7 for elections to occur within smaller districts
8 where contributors have personal ties to the
9 candidates.

10 Moreover, it is really contrary
11 to the whole concept of a statewide judiciary to
12 have appellate judges, quote, represent regions.
13 Judges who sit on statewide courts protect the
14 rights of each and every county in Pennsylvania
15 and they cannot and they should not be compelled
16 to woo votes by promising either explicitly or
17 implicitly to be mindful of the interests of any
18 one region over another.

19 And I would like to, I don't think it
20 can be overstressed, that the role of a judge is
21 different from your role as legislators or from
22 the role of an executive. Your role, obviously
23 when you campaign, is to tell the voters where,
24 where you stand: we vote for you, we vote
25 against you, because of those stands. But the

1 role of the judge is to decide cases purely
2 based on the facts and the law, not according to
3 anything that that judicial candidate said on
4 the campaign trail.

5 And although we reject regional
6 elections as a solution to the problems in the
7 statewide judicial elections, we are nonetheless
8 sympathetic to the sentiment that drives those
9 who bring those proposals and that is the lack of
10 geographical balance on our appellate court.
11 And I would like to, when I purposely say
12 balance rather than representation, because
13 judges should not be representing a particular
14 constituency. The strength of any institution
15 is, in part, dependent on the different
16 experiences of its members and those experiences
17 often result in a unique perspective that are
18 both healthy in and enriching to the deliberative
19 process. And the judicial decision making
20 process, particularly one engaged in by
21 statewide judges, the decision affects every
22 Pennsylvanian, regardless of residence is no exception.

23 I don't have to tell you that currently
24 every Supreme Court Justice that comes from
25 either Philadelphia or Pittsburgh and that no

1 candidate from another county has won a
2 statewide election since 1981. Most members of
3 the Superior and Commonwealth Courts also live
4 in or near the state's two largest cities and
5 that's not surprising, considering where the
6 money and votes come from in the statewide
7 election. It is understandable that this
8 lopsidedness troubles a great many citizens and
9 certainly the representatives in the General
10 Assembly.

11 The critical issue for a discussion in
12 devising any judicial selection reform plan for
13 the appellate court must be how to best provide
14 for a greater balance.

15 We are not prepared,
16 today, to support House Bill 1320. This is not
17 because we oppose regional merit selection as a
18 means of getting better geographical balance,
19 but simply because we don't think a regional
20 plan is necessary to achieve such balance. The PMC
21 strongly believes that a balance sought by
22 proponents of regional merit selection can be
23 accomplished by a statewide merit selection
24 plan.

25 National figures show that the experience

1 of the other states that have statewide merit
2 selection confirms this belief. For example, of
3 the seven judges that sit on New York's
4 highest court -- and that is one of the more
5 respective ones in the country -- in that state,
6 four of the seven come from New York City or the
7 immediate area and the other three come from up
8 state. And, incidentally, two judges on that court,
9 including the Chief Judge, are women; one
10 member is a Hispanic person and one is an
11 African American.

12 And it is not surprising that
13 statewide merit selection would result in
14 more geographical diversity. After all, the
15 cornerstone of a merit selection plan is the
16 broad-based and diverse nominating commission.
17 The 1988 Governor's Judicial Reform
18 Commission recommended that judicial applicants
19 be recruited and selected by a nominating
20 commission composed of nonlawyers and lawyers,
21 women and men, balanced by political party
22 background, who reflect the geographical racial
23 and ethnic diversity of the Commonwealth.

24 And similar language pertaining to that
25 kind of diversity on the nominating commission has

1 been a standard feature of all proposed judicial
2 reform plans since 1988, including the one which
3 you have before you: Representative Clark's
4 bill.

5 But traditionally that kind of diversity
6 applies to language of who sits on the nominating
7 commission, with the expectation that
8 if you have diversity of backgrounds of people
9 who sit on the nominating commission, they would
10 be sensitive to the needs of their area.

11 But in statewide merit selection plans, not
12 only do they also have a requirement that there be
13 geographic diversity on the nominating
14 commission, but I would like to call to your
15 attention a bill that was introduced in the last
16 Session by Representative Piccola and
17 Representative Evans, which was reported out of
18 the Judiciary Committee, but never came to a
19 vote on the Floor. And that bill would have
20 made Pennsylvania a trailblazer in ensuring to
21 the maximum extent possible geographic diversity
22 among prospective members of the judiciary
23 itself, and that I have listed that language in
24 the foot notes on page six.

25 And to our knowledge, no other state that

1 has adopted merit selection has gone to such extraordinary
2 length and, therefore, there is a possibility for a
3 bill with a statewide merit selection plan,
4 leading to greater geographic balance, because
5 of two provisions: that there be geographic
6 diversity on the nominating commission itself
7 and that there be diversity on the Appellate
8 Courts.

9 But even without that unique provision,
10 we have great confidence that a diverse and
11 broad-based nominating statewide commission
12 would be keenly sensitive to the needs, to the
13 needs to consider a nominated appellate judge
14 from the less populace areas of the state. And
15 certainly that popularly-elected Governor
16 and state Senate whose respective roles are to appoint
17 and confirm judicial nominees can be expected to insure
18 that no county or region dominates the appellate bench.

19 Moreover, once elections are eliminated, qualified
20 lawyers who live elsewhere will have an equal opportunity
21 to obtain a judicial and appellate judgeship. As the
22 result, the pool of applicants will widen
23 significantly, as Judge Spaeth had talked about.

24 Now, we recognize that reasonable people may
25 differ on exactly what a merit selection plan

1 should contain. Our plea is that you, as
2 members of the General Assembly, will now meet
3 and hammer out an agreement. And we expect in
4 that process that compromises will have to be
5 made.

6 For example, there might be differences
7 of opinion as to how many people sit on a
8 nominating commission and who should appoint
9 those persons. For example, in House Bill 1320
10 before you, there are 12 members of the
11 nominating commission and the Governor would
12 make all those appointments, though two-thirds
13 would come from lists provided by legislative
14 leaders of both parties. In other plans, such
15 as Senator Jubelirer's Senate Bill 3, which is
16 pending now in the Senate Judiciary Committee,
17 and like the plan which was recommended by the
18 Beck Commission in 1988 that calls for a
19 sixteen-person commission with shared
20 appointments, half by the Governor and half by
21 the legislative leaders of both parties.

22 If some kind of regional proponent is preferred,
23 there might be discussion as to whether there
24 ought to be separate judicial nominating
25 commissions, as in Representative Clark's plan,

1 or whether one statewide commission would be
2 less cumbersome with language regarding the
3 importance of regional balance on the nominating
4 commission, and perhaps on the court. Maybe
5 there should be some kind of a requirement that
6 names sent to the Governor should include people
7 from each region or maybe more than five people,
8 like in the plan before you, more than five names
9 should be sent to the Governor. Maybe the
10 Supreme Court should continue to be selected on
11 a statewide basis and the other two appellate
12 courts should be selected on a regional basis.
13 There is precedence in other states for that
14 kind of selection.

15 This whole debate over election versus
16 appointments of appellate judges has gone on for far too
17 long and we believe it is time to let the people decide how
18 they want appellate judges to be chosen. A vote
19 by you in the General Assembly during this
20 Session and again in the 1997 to 1998 Session
21 could bring this issue to the voters in a
22 referendum by 1997.

23 If opponents are so convinced that the voters want
24 to retain the current system of partisan elections, they
25 should have nothing to fear. Pennsylvanians for Modern

1 Courts, for our part, welcome the referendum and
2 we urge this Committee to take the necessary
3 actions that will allow this to happen.

4 In closing, we commend Representative
5 Clark for wanting to do away with judicial
6 elections and for convening this hearing. Thank
7 you.

8 CHAIRMAN CLARK: Thank you.
9 One observation. The purpose of providing for
10 regions in the bill was to guarantee geographic
11 diversity on the court. The members of the
12 General Assembly know all too well what ends of
13 the state even control the General Assembly, down to
14 the Appropriations Committee. And how, although there may
15 be Central Pennsylvanians in our leadership, they are a
16 token representation in the overall scheme of how the
17 legislature is run, how people are appointed to
18 commissions, etc. And I think that anything less than a
19 guarantee is a place at the table with no knife,
20 fork or spoon. And that's why, in my endeavors
21 to craft this bill and to convince fellow
22 Central Pennsylvanians and rural Pennsylvanians
23 to support a system like this, is to guarantee
24 them that the courts will be diverse on a geographic
25 basis.

1 JUDGE SPAETH: We are sympathetic with
2 that.

3 CHAIRMAN CLARK: But we live
4 with it.

5 JUDGE SPAETH: But it is a question of
6 degrees of certainty, I think, Mr. Chairman. As
7 Lynn has said, we think experience shows that
8 with a properly structured statewide system
9 you get diversity.

10 CHAIRMAN CLARK: Experience in
11 Pennsylvania shows that if it isn't carved in
12 granite, you don't get it.

13 JUDGE SPAETH: Well, its -- we are not here to
14 oppose your bill. We have consistently been of
15 the view that it should be statewide and merit
16 selection, but as both Miss Marks and I have said, we
17 would expect that if the representatives put their minds to
18 it, they can come up with a bill that will accommodate
19 their respective points of view and still have merit
20 selection and have something far, far, far
21 better than you have now.

22 MS. MARKS: Yeah, I agree. And I would
23 just like to say that whether you come up with a
24 statewide merit selection bill or a regional
25 merit selection bill, the important thing is

1 that judges would then be chosen on
2 qualifications, not because of irrelevant
3 factors, such as how much money they can raise,
4 but their name recognition is loyalty to a home-town
5 candidate, political ties and, of course, the bottom line,
6 luck.

7 CHAIRMAN CLARK: Thank you very much.

8 Any additional questions? Representative
9 Chadwick.

10 REP. CHADWICK: Thank you, Chairman
11 Clark.

12 Just a quick comment. I really have to
13 agree with Mr. Clark. I think that those of us
14 who have served in the legislation for sometime
15 perhaps appreciate more than those who haven't
16 the degree to which regional politics, partisan
17 politics, money, all those other things,
18 enter into almost everything that comes out of
19 this body. If you have the Governor and the
20 leaders of the General Assembly, House and Senate
21 picking the members of a statewide commission, I
22 assure you that that will be a highly political
23 exercise and that when you get done, you still will
24 not have what you sought, which is a commission
25 which would provide for a statewide diversity

1 and balance. Of all the political pressures
2 that enter into everything else we do will enter
3 into who goes on to that commission and we will
4 not have what we need.

5 I fully agree with Mr. Clark, if you
6 don't carve this in granite, we are not going to
7 get what we ought to have. I am from Bradford
8 County. If the two Common Pleas judges of
9 Bradford County were Oliver Wendell Holmes and
10 Thurgood Marshall, their chances of a statewide
11 merit selection of being on the Supreme Court
12 wouldn't be much better than statewide election.
13 We simply have to have some sort of regional
14 system. Thank you.

15 CHAIRMAN CLARK: Thank you,
16 Representative Chadwick.

17 Representative Piccola.

18 REP. PICCOLA: Thank you, Mr.
19 Chairman. I am glad my brother from Central
20 Pennsylvania made the remarks because I think
21 part of the effect of this, of this hearing, is
22 not only what we receive from witnesses but
23 some of the frustrations that I think you are
24 hearing from this table going out to those who
25 support merit selection, and I, as a firm

1 supporter of merit selection, wanted to make
2 sure that we can broaden the base and get the
3 support of the folks who really should be
4 supporting merit selection: namely, those of us
5 from Central Pennsylvania.

6 I would like to ask Judge Spaeth a
7 specific question. In your experience, and it
8 has been quite extensive, both at the Common
9 Pleas Court level as well as the Appellate Court level,
10 have you ever encountered -- and if you
11 have, would you care to share in the details of
12 that encounter -- either a judge or an attorney
13 who, in your view, would have otherwise been
14 very capable and qualified to serve on one of
15 our appellate courts (considered doing that) and
16 because of the system (the election process) that
17 they would have had to go through, which you so
18 eloquently and agonizingly described that you
19 went through: the prospect of running statewide
20 in a primary, the prospect of possibly losing,
21 the prospect of then running statewide in
22 General Election, the fact of having to go
23 around and raise money and potentially either
24 explicitly or implicitly make the promises that
25 perhaps should not even be made, but for that

1 process did they decline to seek that appellate
2 court position?

3 JUDGE SPAETH: I have not had anybody
4 say in so many words to me, Ned, I would like to
5 run, but I am not going to go through the
6 hassle. Not quite that way because I wouldn't
7 be the sort of person they would say that to. I
8 couldn't give them any political counsel or
9 comfort one way or the other. However, I have
10 no question in my mind, from speaking to
11 lawyers throughout states from -- that I
12 have specifically two very, both retired now,
13 distinguished Common Pleas judges that they
14 were put off and would not have done it and
15 didn't do it. Because they had good
16 practices, they were heads or important
17 partners, at least in a modest sized law firm
18 or they were respected and effective members
19 of the Common Pleas bench and to leave that
20 for so distasteful a process, and so
21 uncertain one, is something they weren't
22 about to do.

23 Now, if you ask me to say, well,
24 did anybody specifically say to you what
25 I have just said? No. But you know how

1 people feel from having a drink with them
2 and working with them, there is no question
3 in my mind that there is a very large pool
4 of highly qualified lawyers and some very
5 able Common Pleas judges who would be delighted
6 to have their credentials considered by a
7 nominating commission and would welcome the
8 opportunity to give higher service, because
9 that's what a lawyer or a judge wants, to serve
10 his or her profession, and appellate judgeship is
11 one of the best ways to do it. They would love
12 to do it, but they won't go around the committee
13 meetings, they won't go to ward leaders and they
14 won't go to friends and say, Bill, I need a
15 million dollars, how about if you would join a
16 \$2 million luncheon club? They won't do that.
17 And you know it from knowing people. And I know
18 many people that well enough, so that just on
19 the basis of my knowledge of them, I know they
20 wouldn't do that and they don't do it.

21 REP. PICCOLA: Thank you, Mr.
22 Chairman.

23 CHAIRMAN CLARK: Any additional
24 questions, Representative?

25 REP. BOSCOLA: One of my friends isn't

1 really interested or not that merit selection is
2 not the best way to go. What I am afraid of is
3 that the people now have the right to elect
4 their judges. And the one thing about in the
5 election process is the judges that are
6 running for the appellate court get to go around
7 the state and people get to meet them. I had
8 the opportunity to meet several people that
9 stopped from running. I probably would never ever
10 get to meet them, as a citizen, if there was some
11 kind of merit selection involved. People
12 already feel that they are kind of removed from
13 who their judges are and I think this even
14 removes them even farther from the public. And
15 when you say that a court shouldn't be a
16 democratic or a republican court, I agree with
17 you, but all courts tend to have either liberal
18 or conservative tendencies. And when I vote for a
19 judge and other people in my district or
20 throughout the state, we look to a candidate who
21 represents our interests, whether it be liberal
22 or conservative.

23 Now, I happen to look for somebody
24 that is more moderate because I think that an
25 ultraconservative and ultraliberal are so

1 narrowly focused that they probably aren't best
2 to sit on our court. That's a personal belief.
3 What I am really seriously afraid about is removing
4 the people from their right to decide. And I am
5 hoping that inevitably that this comes out of
6 committee and then a vote upon, but we will be
7 really going to the people in a referendum
8 and showing them exactly what we are doing here,
9 that they are giving up their right to decide their
10 judges. And I hope we handle this in a responsible
11 way. How do you feel about what I just said?

12 JUDGE SPAETH: Well, my first reaction
13 is that I think a lot of people, voters,
14 feel the way you do, but I think that they are
15 frustrated because they can't really exercise
16 those feelings effectively. Since I have been a
17 judge, many of my friends before election will
18 come to me and say, Ned, who shall I vote for?
19 I don't know anything about any of the
20 candidates.

21 You are, by virtue, you have
22 demonstrated that you are by virtue of the
23 office that you hold, somebody who probably would
24 make more inquiries than most people, but
25 without being rude, I don't intend it to be that at

1 all. I would love to question you about how much
2 you really did know about the last judicial
3 candidates you voted for and I would bet a good
4 deal that I wouldn't have to ask you very many
5 questions before I would have you on the ropes.

6 Now --

7 REP. BOSCOLA: I have a tendency not to
8 vote for Philadelphia and Pittsburgh in your
9 district.

10 JUDGE SPAETH: I will tell you, I did very
11 well in Central Pennsylvania because I have a
12 German name. I am not proud of that. And, in
13 fact, I am quite ashamed of it, because the
14 other side of that story is my opponent did not
15 do well because he had a different sort of name,
16 and that's, that's bad.

17 I applaud any system of
18 government that involves the people but not one
19 that fools the people, not one where they are
20 being manipulated. And they are being manipulated
21 now. They are not getting candidates chosen by
22 merit.

23 You may have seen that the news accounts of
24 the last meetings of the democratic party where
25 the candidates were selected and it was a

1 perfectly open: you vote for my guy, we will
2 vote for you guys. Nothing to do with merits.
3 Everything to do with brute political power.
4 And when it goes to the people, that's their
5 choice? Take an exit pole and say, madam, who
6 did you just vote for for appellate judge? Try
7 it in your own district and you will find that
8 the responses are very disappointing.

9 Now, the people are not taken out of
10 the loop in merit selection. After all, it is
11 the Senate that decides whether to confirm. And the
12 Governor isn't exactly an unelected official and the
13 Governor is the one who decides to nominate.
14 Will there be politics in the selection of the
15 nominating commission? Of course there will be.

16 But politics isn't a dirty word. Politics is
17 one of the most honorable careers that any
18 citizen can engage in. Politics is the way the
19 laws get made. And most, many of the very
20 finest judges have had political experience. It
21 is one of the most effective ways to get to know
22 one's community and to understand what matters
23 to people. The problem isn't taking politics
24 out of the judicial selection process, the
25 problem is putting it in in an appropriate

1 degree.

2 Now it dominates it and has nothing to do
3 with the merit and the people know this. People
4 don't have confidence in their courts now
5 because they don't think that the court is as
6 independent or as qualified. It's a long
7 answer.

8 REP. BOSCOLA: Right.

9 CHAIRMAN CLARK: Additional questions?

10 Representative Schuler.

11 REP. SCHULER: Thank you, Mr. Chairman.

12 And I do want to thank both of you for your
13 enlightening testimony. I am a novice to
14 this, but I have been here fourteen years. And
15 I guess looking at this panel, Representative
16 Piccola and I are the longest serving members
17 up here. He longer than I. But I have a
18 concern, as the other members have already mentioned,
19 about the selection. When I first came to the
20 legislature fourteen years ago, I felt that
21 election was the way to go. I am changing my mind.
22 I see too many problems under the existing
23 framework that we have developed to elect our judges.

24 In my area of the Pennsylvania Dutch
25 country, we are very conservative down there.

1 In my experiences with the people who I speak
2 with regarding judges, the two things that
3 come out most often: I don't know who these
4 people are. And I think, Your Honor, you just
5 mentioned something that lack of knowledge
6 developed some other things that we should not
7 have in our election process, when you mentioned
8 the fact about your name. When people don't
9 know who they are voting for, they look for
10 other things to make their decision and I am
11 afraid that's one of them that they use and
12 that's not the way you should be elected,
13 especially judges.

14 The second thing that they are
15 concerned about is this geographical alignment.
16 All I hear is Pittsburgh/Philadelphia,
17 Philadelphia/Pittsburgh and that creates a lot
18 of problems with my people back home.

19 Finance is our problem. However, in my
20 constituency, I don't hear that as much. These two things:
21 knowledge and the aspect of region, are the two big things.

22 I believe that under the
23 present bill, the 1320, I don't know if that's
24 the solid or the best solution to this problem,
25 but it's a step forward. But I do want to

1 make certain that when we do, if we go to a
2 merit selection system, that we do bring
3 in this regional aspect and address the
4 issue of our constituents back home.
5 I know that you disagree with that . . .

6 JUDGE SPAETH: No.

7 REP. SCHULER: . . . to some degree. Go
8 ahead. Would you respond, sir.

9 JUDGE SPAETH: Only to a degree. And as I
10 said to the Chairman, we are not here today to
11 oppose regional selection. We are really,
12 we think of ourselves as engaged in a dialogue with
13 you as to the importance of the issues and of
14 the need for structural change.

15 Your bench, from Lancaster County, is a
16 distinguished bench. I mean, I, as an appellate
17 judge, I've reviewed decisions from the Lancaster
18 County bench. And the point you make is exactly
19 so because there are, you take a given sort of
20 case, a drunk driving case, a drug possession
21 case, a minor assault case, a Common Pleas judge
22 from Lancaster County will more likely than
23 not handle that case differently than a Common
24 Pleas judge from a large urban county. Not
25 necessarily, but on the average.

1 Now, the important thing about regionalism on
2 appellate courts is when that decision is reviewed, when
3 the Common Pleas judge's decision is reviewed, it's
4 reviewed by at least three appellate judges, and if in
5 bank, by nine.

6 What the judges do, of course, is they sit
7 down and they talk about it. It is very important -- and
8 Lynn made this point -- it is very important that in those
9 deliberations on an appellate court that judges of
10 different backgrounds, of different experiences,
11 participate because that's where the strength of any
12 deliberative process comes from. So you
13 should have a diverse court, an appellate court.
14 The question is, what is the best way to get
15 there? And you know that's what you're struggling
16 with. That's the legislature's job. And if
17 there is any way in which we can say, have anything,
18 help to you, we welcome the chance.

19 I believe on your list of people that are going to
20 testify, you have a representative of the American
21 Judicature Society. She will, I know, give you chapter and
22 verse as to how other merit selection states
23 have handled it, and some do have regional merit
24 selection. This is something that can and should
25 be worked out.

1 REP. SCHULER: I agree with you, Your Honor,
2 in the sense that a Common Pleas Court judge from
3 Lancaster County will have one different frame of reference
4 with respect to a situation, but that's our problem
5 right now, and that's why we're looking at this,
6 because when that case comes from Lancaster
7 County to the appellate courts here in Pennsylvania,
8 we have, as you mentioned, in your remarks . . .

9 JUDGE SPAETH: That is --

10 REP. SCHULER: . . . that most of the
11 people who are out of Allegheny or Philadelphia who
12 have a different frame of reference.

13 JUDGE SPAETH: That is the problem.

14 REP. SCHULER: And what we are concerned
15 about and even what I have heard from the other members
16 is that we are guaranteed that this type of situation
17 did not continue. And I think your testimony,
18 Miss Marks' testimony, and our view, my view,
19 is that we both agree that there should
20 be some type of merit as to how we get there.

21 JUDGE SPAETH: That's right.

22 REP. SCHULER: Thank you. Thank you,
23 Mr. Chairman.

24 CHAIRMAN CLARK: Thank you.

25 Yes, go ahead.

1 MS. MARKS: I just wanted to supplement
2 Judge Spaeth's response to Representative
3 Boscola. And I think we share your concern, that
4 the appellate judiciary is not too removed from
5 people, from people in your districts. And I
6 think there is value to judicial hopefuls going
7 around seeing different people in the state.
8 From people we have talked to, who although
9 engaged in that process, they have not thought that
10 voters could really get a clear sense of who
11 to vote for, whether they would be a good judge,
12 from those kinds of discussions.

13 I think there is value of people going out there
14 that I am not sure that it helps to get an improved
15 judiciary. And don't forget, you are only
16 seeing those candidates who have felt that they
17 have enough either political connections or
18 money, or access to money, to put themselves in
19 that process anyway, so you have a very limited
20 pool.

21 I think one way, which doesn't have
22 to do with judicial selection, but if you wanted
23 to encourage your constituents to learn more
24 about the judiciary: to participate in the
25 Meet the Judges Program which is sponsored by

1 the State Conference of Trial Lawyers and League
2 of Women Voters and so forth where judges come
3 out to communities and talk in the communities.
4 And I know at least when Judge Spaeth sat on the
5 Superior Court that they used to go and meet in
6 different places outside of Philadelphia and
7 Pittsburgh and Dauphin County and that's another
8 way that people can learn about their courts.

9 CHAIRMAN CLARK: Thank you very
10 much for coming today and providing us with your
11 insight into these issues.

12 MS. MARKS: Thank you.

13 JUDGE SPAETH: Thank you very much.

14 CHAIRMAN CLARK: The next
15 individual to testify will be Kathleen M.
16 Sampson. She is the Director of Hunter Center
17 for Judicial Selection for the American
18 Judicature Society. Good morning.

19 MS. SAMPSON: Good morning. And it is a
20 condition of employment that I couldn't be hired
21 until I could pronounce it correctly and spell
22 it, besides. I am very grateful for the
23 opportunity to appear before the Committee and I
24 thank you for the invitation, you and the
25 Members of the Committee.

1 talking about two things: how other states
2 with merit plans select their appellate judges,
3 because I want you to compare apples and apples;
4 and the other is to give you some comments and
5 thoughts on specific provisions of House Bill
6 1320 as they compare and contrast with our model
7 merit selection provisions and with what really
8 is going on in the other states.

9 So on the back page of my testimony is
10 a table that sets out states with plans like
11 those envisioned in HB 1320.

12 A little bit about terminology. Not
13 every state calls its Supreme Court a Supreme
14 Court so I have gone through the generic term,
15 court of last resort, and they have different
16 names for their intermediate appellate courts so
17 I have just used IAC.

18 And the quick summary of what you see in this
19 table is that fourteen of these states select their, both
20 levels of their appellate judges statewide. Five of them
21 select both levels of appellate judges regionally. And
22 those five states are Maryland, Nebraska, Oklahoma, South
23 Dakota, and Tennessee.

24 And four more states have a mix of systems where
25 they elect their Supreme Court justices -- not

1 elect, select their Supreme Court justices
2 statewide, but they choose their intermediate
3 appellate court judges from districts and
4 divisions. So this is the quick snapshot
5 overview of what other states are doing in this
6 area and you can just plug in what would be
7 going on in Pennsylvania if 1320 were to pass.
8 It would be in the, with the five states that have
9 regional selection.

10 What I think is interesting, also, is the number
11 of commissions so that you will see that in some
12 of the states where they do have regional
13 selection for both levels of court, they'll only
14 be one nominating commission. As 1320 is
15 structured, you would have three such nominating
16 commissions.

17 And I should say that American
18 Judicature doesn't have a policy, we don't have a
19 position on regional selection. As far as we
20 are concerned, 1320 has the basics, which is a
21 limited number of names that go to the Governor,
22 a nominating commission with equal or nearly
23 equal numbers of lawyers and public members and
24 the Governor must appoint from the commission's
25 list. So the basics are there.

1 These merit plans, as they are
2 implemented in the states, are like snowflakes:
3 they can start with the basics, but as you can
4 see here, just from an analysis on appellate
5 court selection, that there is a great deal
6 of variety out there.

7 I also thought, even though I didn't
8 know if you would be interested in it, it would
9 be interesting just to dig around and see what
10 the geographic basis for retention would be
11 then. And I know that now you have statewide
12 basis for retention for your appellate courts.
13 So it is interesting to see how that plays out
14 from state to state, where sometimes the Supreme
15 Court is statewide but the intermediate
16 appellate judges are retained from districts.
17 Sometimes both levels of the court are
18 statewide. And in two states, both levels of
19 court are from districts. So there is a lot of
20 comparison and contrast there that you can see
21 where the provisions of 1320 would fit in.

22 If you don't have any questions about
23 the table, I will go on to other aspects of
24 1320.

25 On page six of my testimony, I

1 compare and contrast the method or who
2 picks the pickers? Which is the big question
3 whenever merit selection is on the agenda. Our
4 model provisions say that usually the attorney
5 members are elected or appointed by the Bar and
6 that the Governor appoints the nonlawyer
7 members. However, there are a handful of states
8 where legislative leaders, sometimes the
9 Attorney General or even the Chief Justice gets
10 involved. This is just another example of
11 that snowflake metaphor that I brought up that
12 the basics are there, but it varies from state
13 to state. There are probably up sides and
14 down sides to any way you choose to deal with
15 that.

16 I wanted to talk with you about the
17 number of names that would be submitted to the
18 Governor and tell you that, in our model
19 provisions, we recommend a range of two to five
20 names be given to the Governor. And I want to
21 give you an anecdote about Hawaii, where they
22 are required to submit six names for every
23 vacancy. And the nominating commissioners have
24 found that sometimes after the first two or
25 three names, they come fairly easily and then

1 they wind up having to put people with lower
2 levels of qualifications on the list to make up
3 the six names and so they have gone to their
4 state legislature and gotten a constitutional
5 amendment to allow the nominating commission to
6 submit up to six names. And I just
7 wanted to raise that for you to think about.

8 I understand that in the interest of diversity,
9 the larger the list that goes up, the better. But
10 you are also balancing that with quality. And that's
11 supposed to be one of the primary concerns about
12 a merit plan, is that only the people with the
13 best qualifications get nominated. And I think
14 offering a range would allow the commission the
15 discretion to deal with that.

16 Your Bill 1320 also says that the nominating
17 commissions will have the authority to develop their own
18 rules of procedure and that is also in our model
19 provisions. And I just wanted to point out to
20 you that the two states most like what is proposed
21 in 1320, which are Florida and Nebraska on the
22 table, they have uniform rules for all of those
23 commissions. And the purpose of that is so that
24 all the commissions across the state are operating
25 with the same procedures, these rules are made

1 public, they are given to applicants for judgeships
2 and it is to give the public a sense that what's
3 going on in the western district is the same thing
4 that is happening in the central and the eastern
5 district of the state so that the rules are uniform and
6 that they're open to the public and they can be discussed.

7 Another point where our model provisions are
8 silent but where this bill diverts a little bit from common
9 practice is in the length of the initial term for judges.
10 Under 1320, judges appointed would serve a full
11 term of 10 years. And as you will see in my
12 testimony, there are a number of states that
13 also do that. In most of the states, judges
14 serve a two- or a three-year term before they go
15 before the public in a retention election.

16 There is another point I offered for
17 your consideration that is not in House Bill
18 1320 that you might want to consider if it goes
19 forward and that is that every state that has a
20 merit plan, has somewhere in their constitution
21 or statute, a requirement that the nominating
22 commissioners themselves may not apply for
23 judgeships during their term of service. And
24 also, usually there is a cooling off period of
25 one to three years after the commissioner leaves

1 the service.

2 And I was thinking that with regional
3 commissions and with a possible total of eight years
4 as a commissioner and then if you put in a cooling off
5 period, that's a very long time and you may want to
6 think of one six-year term. You know, you have
7 to think about what's going to work in your
8 state, but you want to always be sure that you
9 have a good pool of lawyers who will be
10 available to apply for appointment and so if
11 someone was thinking of possible eight years on
12 the commission with two years cooling off period
13 before they could apply for a judgeship, that's
14 10 years. And you might find that attorneys may
15 not be willing to commit for 10 years like that.
16 They'll resign from the commission, you will
17 have turnover issues to deal with and so on.

18 So I guess I am raising two things for you.
19 You might want to think of one six-year term and
20 then put in a provision that the commissioners
21 cannot apply for judgeships. I think it would
22 really undermine the credibility of the system
23 if the public saw this, saw service on a
24 commission as an inside track to getting a
25 judgeship.

1 Another rule that often shows up in
2 constitution and statutes and if it is not
3 there, it is in the commission's procedural rules,
4 is that the names that go to the Governor are
5 submitted in alphabetical order. Once the
6 commission has determined that the people that
7 they are recommending are the best qualified
8 people for the position, their role is finished.
9 And I think to send the list in preferential
10 order goes outside the bounds of what the true
11 role of the commission is. Then it is the
12 Governor's responsibility and the Senate's
13 responsibility to confirm. So I would suggest
14 that to you for your consideration.

15 I think those are the main points. I
16 didn't want to sit here and read my testimony at
17 you.

18 As I said, the bill very much conforms
19 to our model provisions. I am going to leave a
20 copy of those model provisions with Karen Dalton,
21 in case you are interested in them. I also am
22 going to leave a more complete table that sets
23 out the procedures in all the states that have
24 merit plans, what levels of court are covered,
25 who picks the commissioners, how many days they

1 have to do their work. And I think your 60-day
2 period, in 1320, is adequate. I have done
3 training for nominating commissioners in some
4 states where they have only 30 days and they
5 feel that isn't enough time to check all the
6 references, do all the background checks,
7 conduct thorough interviews with applicants.
8 So 60 days is a good time for them to do that.

9 So I thank you for giving me this
10 opportunity and I am hoping you will have lots
11 of questions and that I can also answer them.

12 CHAIRMAN CLARK: Thank you very
13 much. Are there any questions from the
14 Committee Members? Representative Piccola.

15 CHAIRMAN PICCOLA: Perhaps you
16 mentioned it, but I didn't catch it, on the
17 issue of merit retention or retention election,
18 the states that have regional merit selection,
19 how do they handle -- if they handle at all --
20 the retention issue? Are they retained with
21 only by a vote within that district, or do they
22 retain statewide?

23 MS. SAMPSON: It varies.

24 CHAIRMAN PICCOLA: Or both?

25 MS. SAMPSON: It varies. All of the

1 above. It is in the last column. I am sorry,
2 it says geographic basis for retention.

3 Appellate Courts are statewide courts and I have
4 heard a lot of -- or I heard Judge Spaeth and Miss
5 Marks making those points this morning. And many
6 of the states do require, even if they initially
7 select from districts, they stay with
8 statewide retention. And I am thinking back to
9 the importance of judicial independence and that
10 judges shouldn't be responsive to a constituency
11 and I would see statewide retention as a
12 safeguard of judicial independence.

13 Just checking over my homework here
14 myself, yeah, they select from districts and then
15 they retain statewide. So I would -- You are
16 trying to balance independence and accountability
17 here, but I think coming down, statewide retention
18 comes down more on the retention side.

19 CHAIRMAN PICCOLA: I believe the Prime
20 Sponsor's wisdom in drafting this bill provided for
21 statewide retention.

22 MS. SAMPSON: I couldn't find any in
23 1320. Maybe it is --

24 CHAIRMAN PICCOLA: It is my understanding
25 in talking to staff that there are statewide retention

1 elections.

2 MS. SAMPSON: Okay, okay. You know,
3 another mechanism that is being developed in the
4 merit planned states now, is four of them, five
5 of them now have plans where they have another
6 commission of lawyers and nonlawyers that
7 evaluate judges who are standing for retention
8 and makes information available to the voters.
9 And the standards for retention are linked with
10 the standards for selection: legal ability;
11 integrity; temperament, which often won't show
12 up until the judge is on the bench, is this
13 judge courteous to the litigants and witnesses in
14 the courtroom and so on. And then these groups
15 are making either a recommendation to the voter:
16 retain or do not retain. Or Arizona, for example,
17 says, this judge meets, exceeds or fails to meet
18 performance standards. So this is another way of
19 addressing some of the representatives' concerns
20 about how do voters know what is going on in
21 retention elections.

22 Alaska has had up to 20 years' experience
23 with this. Arizona just did their first program
24 last fall. But we see it, along with requiring
25 diversity on a nominating commission, as two major

1 trends in merit planned states now.

2 CHAIRMAN PICCOLA: Thank you.

3 Thank you, Mr. Chairman.

4 MS. SAMPSON: I told you more than you
5 asked, but it is an important point, I think.

6 CHAIRMAN CLARK: When, on your
7 graph in the back for like the State of Indiana in
8 the last column, you have same as initial selection?

9 MS. SAMPSON: Right. So the court of
10 last resort, the Supreme Court, runs for
11 retention statewide, the intermediate appellate
12 court is sort of like the way your Supreme Court
13 selection is structured in 1320, that some
14 intermediate appellate court judges in Indiana
15 are initially selected from districts but two
16 are selected statewide. And I believe 1320 says
17 three justices will be selected from the districts
18 and four statewide? I am pretty sure that's
19 what the bill says.

20 CHAIRMAN CLARK: That wasn't my
21 understanding.

22 MS. SAMPSON: Okay, I may have misread
23 it.

24 CHAIRMAN CLARK: But when you
25 say same as initial, do you mean they are

1 retained by election or they are retained by --

2 MS. SAMPSON: If they are retained by
3 and -- Oh, I am sorry, I didn't realize that
4 would be ambiguous. It means that they run in
5 uncontested retention elections where the voter
6 votes yes or no on whether the judge should be retained.

7 CHAIRMAN CLARK: So in three of those, they would
8 run just in their geographic districts?

9 MS. SAMPSON: Correct.

10 CHAIRMAN CLARK: The other ones would run for
11 the retention seat?

12 MS. SAMPSON: Correct.

13 CHAIRMAN CLARK: Are there any
14 additional questions?

15 Representative Schuler.

16 REP. SCHULER: Thank you. The only
17 question I have, in our proposal, or I should
18 say Clark's proposal, twelve individuals would be
19 appointed to these commissions. In your
20 experience of states that have this type
21 of arrangement, what's the relationship
22 between these individuals and the constituency
23 of the region? Is there any communication between
24 them or are they isolated or . . . ?

25 MS. SAMPSON: Well, most of the

1 commissions for appellate courts are statewide.
2 Florida and Nebraska are the states that have
3 the regional nominating commissions for their
4 appellate judges. I would hope that they would
5 at least make public, as 1320 does, make public
6 the names of those who have applied so if
7 constituents in that district want to comment on
8 the applicants or provide information to the
9 commission, that they would be able to do that.

10 I would also hope that when the
11 commission writes its procedural rules, it would
12 put in an ethics requirement that if a
13 commissioner receives such a communication from
14 a member in the district, that he or she would
15 share that information with the full commission.
16 You know, so that there aren't any side
17 conversations going on.

18 REP. SCHULER: So you don't advocate
19 the communication between the residents of a
20 district with the commission?

21 MS. SAMPSON: I think the commission
22 should be seeking all the information that it
23 can get on the applicants.

24 REP. SCHULER: Okay.

25 MS. SAMPSON: I think it would address

1 the concern, if people are going to lose their
2 right to vote for judges, to feel that they are
3 part of this process and could have a voice in
4 it. I would be real concerned about organized
5 lobbying, you know, for or against, like I don't
6 like this person.

7 REP. SCHULER: That is a very, it could
8 be a very good possibility, that that could
9 happen, is that correct?

10 MS. SAMPSON: Yes.

11 REP. SCHULER: In those states that
12 have the regional, I think you mentioned
13 Florida?

14 MS. SAMPSON: Florida and Nebraska.

15 REP. SCHULER: How do they handle that,
16 do you know offhand?

17 MS. SAMPSON: In their procedural rules, they
18 have a requirement that the commissioners have
19 to disclose communications from people outside
20 the nominating commission and they have to share
21 the substance of those communications with the
22 other commissioners. I don't know of any
23 particular rules about lobbying activities.
24 People are going to do what they want to do. But
25 the commission is the one that eventually

1 develops the most coherent and complete body of
2 information about the applicant. And here, I do
3 training for these commissioners and they do
4 Department of Law Enforcement checks and so on.

5 REP. SCHULER: Then the issue I think
6 was raised by the other folks who gave
7 testimony, do we want uniform rules or regional
8 rules for these groups? I think that is an
9 issue here.

10 MS. SAMPSON: Um-hum, yeah.

11 REP. SCHULER: If you are going to
12 allow one nominating committee to run by this
13 set of rules and another that would allow
14 lobbies and another group that didn't allow,
15 you could have some problems.

16 MS. SAMPSON: I don't think you are
17 going to control lobbying. I think people are
18 going to want to influence the process.

19 REP. SCHULER: Sure.

20 MS. SAMPSON: So I think that would be
21 an argument for uniform rules.

22 REP. SCHULER: That's what I am looking
23 at here.

24 MS. SAMPSON: Yeah, that it includes

25 ...

1 REP. SCHULER: All right.

2 MS. SAMPSON: ... that includes
3 saying that if -- but sometimes lobbying isn't a
4 big organized effort, it could be one person . . .

5 REP. SCHULER: That's true.

6 MS. SAMPSON: . . . calling a commissioner
7 whom he or she knows. And I think the
8 commissioners, through the integrity of the
9 process, the commissioner has to disclose the
10 substance of that conversation.

11 REP. SCHULER: That's true. All right.
12 Thank you, Mr. Chairman.

13 CHAIRMAN CLARK: Thank you.
14 Representative Manderino.

15 REP. MANDERINO: Thank you, Mr.
16 Chairman.

17 Finishing off where Representative
18 Schuler just asked about the rules, if I heard
19 your testimony correctly, at least I was coming
20 away with the message of, if you have regional
21 selection panels, I would recommend uniform
22 rules. If you have one statewide selection
23 panel, then it makes more sense because the
24 rules will still be uniform.

25 MS. SAMPSON: Right, exactly.

1 REP. MANDERINO: I mean, to leave kind of rule
2 making up to the discretion of the pact.

3 MS. SAMPSON: Yes.

4 REP. MANDERINO: But in either case, it
5 should be public.

6 MS. SAMPSON: Yes.

7 REP. MANDERINO: Okay. The other thing
8 that I found interesting that you said is that
9 most of the states, and maybe you even said all
10 of the states, I don't know, but no one on a
11 first retention election has as long a period as
12 we were proposing which was 10 years?

13 MS. SAMPSON: No, not normally.

14 REP. MANDERINO: Okay.

15 MS. SAMPSON: I forget where this is in
16 my testimony. Page eight, initial term of office
17 for appointed judges, our model provisions are
18 silent on this. We don't say it should be a
19 certain number of years. I am describing for you
20 that in most states the initial term is two or
21 three years and then I list five states or six
22 states where they get full terms on their initial
23 term of office. It is part of that snowflake
24 analysis.

25 REP. MANDERINO: But those that have maybe

1 a shorter term for the initial, for when you are first
2 appointed, then once retention, if a judge is young enough
3 and interested enough that they make it to a second
4 retention. After the first retention they are
5 usually, whatever the typical span is, if it is 10
6 years; or, if the state, is typically eight years?

7 MS. SAMPSON: Exactly. It is whatever
8 the state requires.

9 REP. MANDERINO: Maybe the information
10 that you provided to Miss Dalton will be
11 helpful to them and we will look at it. But the
12 one thing that I am kind of trying to get more
13 information about, I don't necessarily have a
14 problem with, even though my preference on the
15 statewide merit selection component is kind of in
16 activity optimistically, but I am having a
17 problem with the notion of regionalism as
18 proposed somewhat in 1320. My concern is with a
19 feeling of allegiance only to a particular
20 region once on a statewide court.

21 MS. SAMPSON: Um-hum, um-hum.

22 REP. MANDERINO: Okay? So I guess that
23 you have two, a couple of different states,
24 examples for us to look at, one where they came
25 on regionally but they are not necessarily, they

1 don't view themselves as just representing that
2 region and they get retained statewide, but you
3 did mention a few where their retention and
4 everything seems to be much smaller.

5 MS. SAMPSON: From a smaller
6 jurisdiction.

7 REP. MANDERINO: . . . confined to their
8 district. Has your Society done any review
9 of how that has worked or has anybody done any
10 review of how that has worked in terms of either
11 the integrity of the bench or the feelings of the
12 constituency of that state in terms of how that
13 works?

14 MS. SAMPSON: No, we have no data on
15 that. No. Are you thinking, too, of, you know,
16 the independence of the judges and so on?

17 REP. MANDERINO: (Nods head
18 affirmatively.)

19 MS. SAMPSON: Yeah. As I said to
20 Representative Piccola, I would think that
21 statewide retention would be a greater safeguard
22 of judicial independence.

23 But can I go back to what you had said
24 about being concerned that if judges are selected
25 regionally, they might have more of an

1 allegiance to the region?

2 REP. MANDERINO: Yes.

3 MS. SAMPSON: If I said that correctly?

4 I don't want to mistate what you have said.

5 REP. MANDERINO: Well, one of the provisions
6 in 1320 -- And let me clarify my understanding
7 of 1320 just so that you know what was being
8 proposed with regard to it. My understanding
9 of what's being proposed in 1320 with regard
10 to our court of last resort or our Supreme
11 Court was: we will have a statewide court and
12 we won't necessarily appoint judges based on
13 region, but we will guarantee that there is at
14 least one judge from each of the three regions.

15 MS. SAMPSON: On the Supreme Court.

16 REP. MANDERINO: Yeah. So that if the
17 vacancy occurs and the vacancy occurred in the
18 middle region and the only judge that had been
19 from the middle region is the one who vacated,
20 left the bench ...

21 MS. SAMPSON: Right.

22 REP. MANDERINO: ... then kind of that
23 spot would be guaranteed to the middle region.

24 MS. SAMPSON: Right. That's what --

25 REP. MANDERINO: But the vacancy occurred

1 and there is already at least one member on the bench
2 from each region ...

3 MS. SAMPSON: Um-hum.

4 REP. MANDERINO: ... then it didn't
5 matter which region the appointment came from.

6 MS. SAMPSON: Right.

7 REP. MANDERINO: It was kind of a
8 notion, so there was a guarantee of at least the
9 the diversity of one judge on that.

10 MS. SAMPSON: Right, from each of the
11 three regions.

12 REP. MANDERINO: From each of the three
13 regions, but not a guaranteed provision.
14 However, 1320, this is the part, 1320, when it
15 gets to our appellate intermediate level court
16 was kind of more of a quid pro quo: three from here,
17 three from here, three from here.

18 MS. SAMPSON: Right. Or five, five,
19 and five, whatever.

20 REP. MANDERINO: Right. And I guess that's
21 where I have the concern that these five judges
22 are going to stay ...

23 MS. SAMPSON: On the intermediate
24 level.

25 REP. MANDERINO: . . . on this way, and these

1 five judges are going to say this is my
2 constituency and these five judges are going to
3 say that this is my constituency and that was
4 what I was trying to see what are other states
5 doing and how does that effect?

6 MS. SAMPSON: I have a question before
7 I get into that. Do those intermediate
8 appellate -- and this is what I don't know about
9 Pennsylvania -- do those intermediate appellate
10 court judges decide cases that come from the
11 trial courts only in those regions or it's a
12 statewide court?

13 REP. MANDERINO: It is a statewide
14 court.

15 MS. SAMPSON: And so they would be
16 hearing -- I was listening to Judge Spaeth
17 earlier, saying judges hear these appeals in
18 panels or en banc?

19 JUDGE SPAETH: Panels, usually.

20 MS. SAMPSON: Panels usually. If those
21 panels were diverse ...

22 REP. MANDERINO: Were diverse.

23 MS. SAMPSON: ... I would see that it
24 would bring multiple perspectives to that group
25 decision making process.

1 REP. MANDERINO: But the thing you
2 would want to guard against --

3 MS. SAMPSON: I don't know if the law
4 requires that the panels be diverse? I don't
5 know that or if it is just not.

6 REP. MANDERINO: Now they are not, but
7 now we don't do it that way either. But I guess
8 what you are saying is, if you did it that way,
9 then you would want to consider building in a
10 safeguard that you had diversity on the panel
11 as compared to a uniform panel?

12 MS. SAMPSON: I think I don't know
13 enough to tell you that.

14 REP. MANDERINO: Okay. Maybe -- I think you
15 told me this --

16 MS. SAMPSON: I think that needs to be
17 something locally determined, because I don't
18 know enough and I don't want to get outside of
19 my area of what I do know.

20 REP. MANDERINO: Is that the kind of
21 information that you have given to Mrs. Dalton that in
22 looking at other states that might have these regional
23 aspects if it is detailed enough to show that?

24 MS. SAMPSON: No, it doesn't show that.
25 I have some reference books back at the office,

1 though, and I can go and check some of those and
2 if it is not there, maybe I can find some people
3 who do know and let Karen Dalton know that. But I
4 better write it down so I don't forget.

5 REP. MANDERINO: She is rolling her
6 eyes about that . . . Yes, you can send them directly to
7 me, too. Karen said, she had referred to having sent you
8 the information. That's all. Thank you.

9 MS. SAMPSON: So the question is, do
10 states require regional diversity appellate
11 panels?

12 REP. MANDERINO: So those that have
13 regional selection to their selection process.

14 MS. SAMPSON: Okay. I will see what I
15 can find out for you.

16 REP. MANDERINO: Thank you.

17 CHAIRMAN CLARK: And we thank
18 you.

19 MS. SAMPSON: Okay. Thank you. And I
20 am available as a resource to all of you as this
21 issue develops and if specific questions or
22 concerns come up, I hope you will call on us.
23 Thank you.

24 CHAIRMAN CLARK: The next
25 individual to testify before the Committee is

1 Miss Peirce with the League of Women Voters.

2 MS. PEIRCE: Good morning. I am here
3 today on behalf of the League of Women Voters
4 and our 51 Chapters throughout the state. We
5 are happy to present, once again, our position
6 on how best to select justices and judges for
7 our Appellate Courts.

8 The League of Women Voters
9 is 75 years old this year. In fact, it came
10 into being in August of 1920. The actual date
11 was the 26th, last Saturday, when the 19th
12 Amendment became law and the Suffragist
13 League changed its name to reflect its new
14 mission. One of the first items on the
15 agenda of the Pennsylvania League was to call
16 for a constitutional convention. It was a long
17 time coming (48 years), but when it was finally
18 held -- and when it resulted in an amendment
19 calling for merit selection of judges being
20 placed on the ballot -- League members were out in
21 force around the state urging a yes vote.

22 As you know, that amendment failed by a
23 narrow margin. But the League is very
24 persistent. It is our hope that a merit
25 selection amendment will be on the ballot again

1 in 1997, almost 30 years after that first time.

2 Since those early days, we've presented testimony
3 many, many times and our message has not varied
4 much. We endorsed the findings of the Beck
5 Commission and the Pomeroy Commission before it, and
6 we continue to believe that gubernatorial
7 appointment from a list of nominees submitted by
8 a representative commission and followed by
9 Senate confirmation is the best way to elect
10 appellate court justices and judges.

11 Rather than repeat all our earlier
12 statements, I have enclosed with this testimony
13 a League position paper entitled, Where We Stand On
14 Judicial Selection. This summarizes our reasons
15 for believing that merit appointment would be
16 much better for Pennsylvania than the present
17 system of partisan election, with all its inherent
18 problems.

19 The recent examples of the corrupting
20 effects of massive fund raising for state and national
21 election campaigns only serve to highlight the need
22 for judges -- whose only obligation must be to the law
23 and the Constitution -- to be freed from the necessity
24 of raising large amounts of money, often from parties
25 who may have a stake in the outcome of court decisions.

1 It is very important to know that merit
2 selection is under serious consideration, and we
3 are happy to contribute our comments on House Bill
4 1320, which seeks to ensure diversity on the appellate
5 courts by dividing the state into three regions, with a
6 Judicial Nominating Commission for each region.

7 Certainly diversity is desirable and important
8 in the makeup of our statewide courts, and
9 geographical diversity -- or the lack of it -- is
10 one aspect that is most recognizable to voters.
11 Judicial candidates are the only statewide
12 candidates whose county of origin is listed on
13 the ballot, and almost everyone knows that all
14 the sitting Supreme Court justices come from
15 Philadelphia or Allegheny County.

16 They are all men, also, and only one
17 is African American. Obviously, diversity means
18 much more than what part of the state a justice
19 or judge comes from. House Bill 1320 addresses
20 diversity in all its particulars, both in the
21 makeup of the nominating commissions and in
22 the standards for judicial selection. But in
23 calling for three districts and three commissions,
24 it seems to stress geographical diversity above
25 all else.

1 Evidently the lines have been drawn so
2 that all three districts are approximately equal in
3 population, but what about the distribution of
4 the lawyer population? Surely there are highly
5 qualified people all over the state that a
6 diligent nominating commission would seek out,
7 but it may be that stressing geographical
8 diversity could make it more difficult, at the
9 time a vacancy occurs, to ensure that nominees are
10 the best available among both men and women and
11 those who come from racially and ethnically
12 diverse backgrounds.

13 A hypothetical case might be that of a
14 lawyer with outstanding credentials,
15 experience and reputation who comes from a rural
16 county and could bring a new perspective to the
17 court, but whose name cannot even come up at the
18 time of the vacancy because she or he lives just
19 outside the district line. Trying to match exactly the
20 racial and gender makeup of the courts to that of the
21 general population would be described -- and decried --
22 as a quota system. Are geographical quotas that
23 different?

24 The League also questions the need for
25 separate commissions, as called for in the bill.

1 It takes time for any commission or board to meld
2 into an effective working group, and
3 we would suggest that setting up three -- and
4 having one or more remain idle for long periods --
5 is somewhat inefficient. It seems
6 possible that staggered terms might result
7 in having someone go off a commission before
8 ever participating in a search for proposed
9 nominees. A single commission, meeting
10 periodically, could be aware of upcoming
11 vacancies on the courts and cover the whole
12 state in its search for the best candidates.
13 The bill's requirements for diversity of the
14 members could apply to one commission as well
15 as to three.

16 The details of merit appointment
17 systems vary among the many states that choose
18 their judges, and few of them do select by
19 districts.

20 I called Kathy Sampson the other day,
21 as do I quite often when I have a question about
22 the courts. I'm a member of the Judicature Society,
23 anybody can join, it's a great organization, and
24 I was delighted that you had invited her to testify
25 and give information on those other states.

1 We are very encouraged by your interest in
2 improving the way judges are chosen. We congratulate the
3 Committee for seeking input from so many sources.
4 It is our hope that all our comments and suggestions
5 will aid you in your search for a judicial selection system
6 that will make Pennsylvania's appellate courts the
7 best in the country.

8 I would say along with Judge Spaeth and
9 Lynn Marks that the League does not oppose House
10 Bill 1320. We prefer the regular system that
11 we have described so often with one nominating
12 commission and statewide search for candidates,
13 but it is more the particulars that we would
14 disagree with.

15 I'd like to add just a few words
16 about the fall elections. Because Pennsylvania
17 still does have partisan election for all its
18 judges, because we believe that one of the
19 principal flaws in that system is that it's
20 extremely difficult for voters to learn anything
21 about the candidates, because the League's mission
22 is to promote the informed participation of citizens
23 in government, we're pleased to announce that the
24 League is sponsoring three forums for Supreme Court
25 candidates to be held on October 8th, in Philadelphia,

1 October 21st in Pittsburgh, and October 27th in the
2 Lancaster/Harrisburg area. All three will be televised
3 statewide. See your local listings for the exact broadcast
4 times. Thank you very much.

5 CHAIRMAN CLARK: Thank you.

6 MS. PEIRCE: As I said, I have attached a
7 position paper relating to this.

8 CHAIRMAN CLARK: Yes, that is attached.
9 Thank you very much.

10 Any questions of Ms. Peirce?

11 Representative Boscola.

12 REP. BOSCOLA: I am a member of the
13 Bethlehem League of Women Voters, have been for
14 several, many years, even served on the Board of
15 League of Women Voters, and my part there had a lot to
16 do with the voters guide, which I know that you are
17 well aware of, that helps inform the electorate of
18 candidates in a way that is not partisan.

19 MS. PEIRCE: Right.

20 REP. BOSCOLA: Which is really appreciated by the
21 people in my district. You know it. See, as a
22 member of this, I am not too thrilled about merit
23 selection. Even though I'm a proud member of the
24 League disciplinary, that I might differ with them
25 a little bit. And let me ask you a couple of questions

1 based on some of your testimony.

2 I note here you said that these judges
3 need to be freed from the necessity
4 of raising large amounts of money, often from
5 parties who have a high stake in the outcome of
6 court decisions. And, yes, people will contribute
7 to campaign organizations. But now you take, you
8 turn around, thinking now, how do you gain access
9 to the commission or to the Governor or to the
10 Senate who confirms? Because somewhere along the
11 line, politics is still going to play a part and
12 instead of going to the people directly for money
13 or individual contributions or organizations, the
14 judicial candidates will now be seeking access through
15 going to the commission or the Governor, who makes the
16 appointment, or the Senate. And I'm sure you are
17 going to see monetary contributions from attorneys
18 who are seeking that in that form so we are still
19 going to deal with the monetary issue.

20 MS. PEIRCE: I don't understand. What are
21 they raising money for?

22 REP. BOSCOLA: Because they are buying access,
23 they are buying access into the system because the
24 want to be part of that nominating candidate slate.
25 You know what I'm saying? It happens, I mean,

1 I'm only being realistic here.

2 MS. PEIRCE: Okay.

3 REP. BOSCOLA: And what I'm concerned
4 about is now we have candidates that don't
5 necessarily -- and there are some that are running
6 this fall -- that might not have a lot of money,
7 but they have the ability to raise money because
8 people believe in them. Because they went into
9 organizations and talked about who they are,
10 their qualifications, and other organizations
11 in which the individuals particularly believed in
12 them, and they contribute to them.

13 I met some of our candidates that are running for
14 the appellate court through business organizations, labor
15 organizations and some political organizations.
16 Do you know I had to play volleyball with a couple
17 of members of the appellate, that are running. And
18 when would a normal person be able to play volleyball
19 with their judges based on merit? This is what
20 happens when you are forced to go out and meet the people.

21 And that's not just me. There were other
22 members that were just, you know, working nine to five
23 jobs and they were able to talk to these judicial
24 candidates and find out who they are as a person.
25 Because I believe when people vote for somebody, they

1 want to know that they're honest, they want to know
2 that they care about you and what their background is
3 and can they relate to that, that background that, hey,
4 I am working for a living like you did and see how --

5 And what I am afraid of, you might say, well, you
6 shouldn't be voting for a judge because you played
7 volleyball with him. I'm not saying that.

8 I'm saying that I guess we get to meet these
9 judges and you get to talk to them, you get to understand
10 who they are.

11 I would rather see a judge in different
12 parts in the state going to a dinner to play volleyball
13 with people rather than going on the golf course
14 with the Governor or several members of the
15 Senate.

16 And you can address this, but I want to
17 talk about another point. You said that diversity
18 on the court is what is really important, and I
19 agree with you, but if the people in this state
20 really want diversity, then it's up to them to vote
21 for it. And in my opinion we have had -- Even in the
22 legislature, you know, we don't have much diversity
23 in the legislature but the people elect us and
24 they're the ones that they really believe that we
25 should have diversity in the legislature to vote for

1 that. And the same with the court, we have had
2 female candidates running for election and have been
3 defeated.

4 I don't want any commission saying, well,
5 now we should have an African American on the court
6 and I believe we should have a woman on the court,
7 because then we get away from the best qualified
8 candidate again.

9 Lastly, I would like to say that I really
10 appreciate all your efforts to make up the voters
11 guide, because there is a newspaper -- well, it's a
12 piece of literature that is sent out to the public
13 to let them know what the qualifications are of
14 judicial candidates. And I applaud you for that.

15 I still think and I would like to address
16 this issue, as to whether it is merit selection or public
17 election. The fact of the matter is you have
18 inappropriate behavior by judges and we have not
19 figured out how to handle that. And until we
20 investigate and discipline our judges, to me, that
21 is the key to judicial reform.

22 MS. PEIRCE: Well, we did change the
23 judicial system, discipline system a couple years
24 ago. I would assume it's working better now. It
25 hasn't be in effect for very long. I think that was

1 a significant reform.

2 I don't know exactly how better people can find
3 out about judges, proposed judges. It seems to me that I
4 believe that with most plans for merit selection, when the
5 commission has decided on its nominees, those names become
6 public and people can find out about them and they can have
7 input to their Senators or to the Governor or
8 whatever they want to do.

9 It is very difficult, as you said, for
10 any ordinary people to get to know people who are
11 proposed judges, whether they're nominated or you know
12 in the electoral process or by a commission. And I
13 don't think, I certainly don't think that the
14 people have a real choice in candidates in the
15 partisan system now. Judge Spaeth addressed
16 that. And we have seen the process that the
17 parties go through when they decide who their
18 candidates for the primaries are going to be, and
19 there is not a lot of input from the voting
20 public in that process.

21 REP. BOSCOLA: Well, I asked two of the
22 individuals running for appellate court now, what
23 did they think about merit selection and did they
24 think they would have the opportunity under
25 merit selection that they have now

1 going through public elections? And they said,
2 no, they feel that money would be the
3 influential factor in merit selection, they
4 probably wouldn't have the opportunity because
5 they personally don't have a lot of
6 money and that through a merit selection, it's easier
7 to buy access.

8 MS. PEIRCE: I am not sure I know how
9 they would do that. Assuming that the people
10 that are on the nominating commissions are
11 honest people, they are to be chosen in a model
12 system by both minority and majority leaders of
13 the General Assembly and the Governor appoints.

14 REP. BOSCOLA: All the people the Governor
15 appoints, the Senate confirms.

16 MS. PEIRCE: Now I'm talking about the commission,
17 the people that search for them.

18 REP. BOSCOLA: But in the political appointment,
19 if the Governor wants a certain candidate, you know that
20 he's going to be in that pool of names that are submitted
21 to him and that's political reality.

22 MS. PEIRCE: It's probably true, you cannot take
23 the politics out of the system. Even if all you took out
24 was the large amounts of money, though, I think that would
25 be a significant improvement.

1 REP. BOSCOLA: Thank you.

2 MS. PEIRCE: Okay.

3 CHAIRMAN CLARK: Any additional questions?

4 Thank you very much for your testimony.

5 MS. PEIRCE: Okay.

6 CHAIRMAN CLARK: The next individual to
7 testify and the last individual of the morning is
8 Clifford E. Haines, Vice Chancellor of the
9 Philadelphia Bar Association, and he's along with
10 Lawrence J. Beaser, Esq., also with the Philadelphia
11 Bar Association.

12 Good morning, Mr. Haines.

13 MR. HAINES: Good morning. You've already
14 introduced me by name so I won't repeat that. I
15 am a partner with the Philadelphia law firm of
16 Litvin, Blumberg, Matusow & Young. With me today
17 is the past-Chancellor of the Philadelphia Bar
18 Association, Lawrence J. Beaser, who is with Blank,
19 Rome, Comisky & McCauley.

20 As has been suggested, I am the Vice Chancellor
21 of the Philadelphia Bar Association, which means I
22 have got three more years to come up here and
23 talk to you. And I hope that when I am Chancellor in
24 1997, I will be here and welcomed by all of you who
25 will be returning, I am sure, at that time.

1 I am pleased to be here today and I am bringing
2 greetings not only from the 13,500 members of the
3 Philadelphia Bar Association but my family on Long Beach
4 Island, who tell me that the weather continues to be as
5 beautiful as it has been, and hopefully it will be about
6 four o'clock this afternoon if I am lucky enough to get
7 back that fast.

8 This hearing is specifically intended
9 to focus on House Bill 1320, which provides for the
10 merit selection of appellate judges on a regional basis.
11 Because the Bar Association's Board of Governors has not
12 yet considered the regional component of Representative
13 Clark's proposal, I must necessarily confine my remarks
14 to the merit selection component of House Bill 1320.

15 The Philadelphia Bar Association has supported the
16 concept of choosing judges based on merit for many years.
17 We firmly believe that merit selection of appellate
18 judges will give the people of Pennsylvania a more
19 distinguished, more independent, more representative
20 appellate bench. Pennsylvanians deserve the very best the
21 legal profession has to offer, and we are confident that
22 can be accomplished only if we abolish the political
23 election of judges in favor of some form of merit
24 selection.

25 Our Association's support for merit selection

1 predates the events of recent years surrounding our Supreme
2 Court and is one issue in which the majority of our members
3 have agreed for many years. When we surveyed our
4 membership in 1984, 94% of our members wanted the
5 Association to speak out in favor of merit selection of
6 judges. When we surveyed our members again in 1990, merit
7 selection topped the list, again with more than 90% of our
8 members identifying merit selection as an issue of
9 primary importance to them. Early returns from our 1995
10 membership survey again indicate that merit selection
11 leads the list of issues of concerns to our members.

12 Most of our reasons for supporting a change from
13 the popular election of judges to a merit-based selection
14 system stem from limitations which are inherent in the
15 elective process itself.

16 To win election to the bench, a successful
17 judicial candidate need not necessarily convince
18 voters that he or she will be a good judge; instead,
19 aspiring candidates for statewide judicial office
20 must persuade political party leaders that he or she
21 should be a candidate. With all due respect to the
22 individuals involved, newspaper accounts of meetings in
23 which party endorsements of Supreme and Superior Court
24 candidates were made during the current election cycle
25 illustrate how highly politicized our present system is

1 and, more significantly, how little consideration is given
2 to the qualifications of candidates for the positions
3 they seek.

4 That is not surprising -- after all, political
5 parties are in the business of being political. It is
6 therefore both inevitable and extremely unfortunate that
7 political concerns will continue to be prioritized
8 over merit unless you, and your colleagues, begin the slow
9 process of reform by passing a merit selection
10 constitutional amendment.

11 Having received the necessary party endorsements,
12 a judicial candidate then faces an even more formidable
13 task under our present system. In 1988, the Report of the
14 Governor's Judicial Reform Commission, what we now refer to
15 as the Beck Report, reported that in 1983, the successful
16 candidate for Supreme Court raised campaign funds totaling
17 almost a hundred and ninety-three thousand dollars.
18 Six years later, in 1989, the amount raised by the
19 successful candidate had risen to more than \$1.4 million,
20 more than half of which was contributed by members
21 of the legal profession. Final figures are obviously not
22 available for the spending in this year's Supreme Court
23 races, but we can safely guess that the numbers will be
24 high and that members of the Bar will again represent a
25 significant percentage of contributors.

1 Fund raising by judicial candidates raises
2 troubling issues which are qualitatively different
3 from those raised by candidates for other elective office.
4 Candidates for nonjudicial offices are able to garner
5 financial support from those who believe in their stated
6 positions and ideology.

7 But when they engage in fund raising, judicial
8 candidates by necessity seek out their natural
9 constituency: the members of the bar. Paradoxically, the
10 Judicial Canons which establish the judicial rule of
11 governing judges appear to be at odds with the notion of
12 campaigning for judicial office and fund raising,
13 particularly among lawyers. And as the pressures to run a
14 well-funded campaign continue to escalate over the years,
15 so will the temptation to cut ethical corners.

16 Each of you as an elected member of the General
17 Assembly owes some measure of success to the elective
18 process. You or your colleagues might easily find a certain
19 superficial appeal to the notion that if partisan elections
20 for the legislature and executive branches serve the best
21 interest of the public and the Commonwealth, then there is
22 nothing wrong with similarly electing members of the
23 judicial branch. But this argument ignores the fundamental,
24 qualitative differences between the legislative and
25 judicial function. As Alexis de Tocqueville wrote in 1835,

1 quote, "The power vested in the American courts of justice
2 . . . forms one of the most powerful barriers which has ever
3 been devised against the tyranny of political assemblies.
4 Thus, it is uniquely the role of the courts to exercise a
5 counter-majoritarian force when necessary, so as to protect
6 the rights of the minority from the will of the majority.

7 John Marshall once said that the judiciary
8 comes home in its effects to every man's fireside: it
9 passes on his property, his reputation, his life, his all.
10 Is it not, to the last degree important, that he (the judge)
11 should be rendered perfectly and completely independent,
12 with nothing to influence or control him but God and his
13 conscience?

14 Today, judges continue to rule on issues
15 which come home with us, rules which affect how we live,
16 where our children go to school, the people with whom we
17 associate in our personal and professional dealings, and a
18 myriad of other issues that are central to the quality
19 of our lives and our society. The importance of
20 protecting judges and judicial candidates from outside
21 influence cannot be over stated. Again, we applaud
22 Representative Clark's effort to remove partisan election and
23 their vast potential for improper influence and misdirection
24 from our judicial selection process.

25 These are only some of the reasons why the

1 Philadelphia Bar Association initially took a stand
2 in favor of merit selection of judges, while we strongly
3 endorsed the recommendations of the Beck Commission in
4 1988 and why we have continued over the years to advocate
5 for a merit selection constitutional amendment. This year,
6 that goal -- at least with regard to appellate judgeships -
7 may finally be within our grasp.

8 As any good Philadelphia lawyer knows, it is
9 dangerous to overstate one's case, so I will not tell you
10 that merit selection is a perfect system, nor will I tell
11 you that a change to a merit-based selection system of
12 choosing appellate judges will remove politics from the
13 process. After all, as Dan Rottenberg wrote in The
14 Philadelphia Inquirer in 1993, merit selection will not
15 remove fallible humans from judicial selection and delegate
16 the task instead to computers assessing objective
17 scientific standards.

18 However, if our objective is to provide the people
19 of Pennsylvania with the best and most representative
20 appellate bench possible, merit selection is a vast
21 improvement over the elective system. As evidence of the
22 superiority of merit selection over elective systems, since
23 1950 every state that has changed the way it selects judges
24 for statewide positions has moved away from the highly
25 politicized election systems -- all but one changed to a

1 merit selection. Georgia, the exception, changed from a
2 system of partisan elections to nonpartisan elections.

3 Opponents of merit selection frequently point to
4 the federal system of judicial selection has an example of
5 a merit selection system, and argue that we here in
6 Pennsylvania do not need that kind of system. Certainly
7 the federal system can be justly criticized as highly
8 political and the federal judicial selection process often
9 may have little to do with true merit. But the proposals
10 we support provide for true merit selection, rather than
11 the political appointment of judges which often occurs
12 under the federal system.

13 Many people have expressed concern that an
14 ideological litmus test has been applied under the federal
15 selection system from time to time. Unlike the federal
16 system, the merit selection proposal before you does not
17 readily allow for a litmus test on any particular issue as
18 a prerequisite for recommendation by the nominating body.

19 There are those who fear that merit selection is a
20 scheme propounded by the old boys network to keep women and
21 minority lawyers off the bench. The experiences of other
22 jurisdictions demonstrates that the contrary is true.

23 According to statistics compiled by the American
24 Judicature Society in July 1991, 17 of the 50 African
25 American jurists serving on state appellate courts were

1 initially chosen by merit selection, as compared to 9% who
2 first reached the bench through partisan election. The
3 remaining African American judges were initially chosen by
4 either gubernatorial or legislative appointments without a
5 nominating commission, or through nonpartisan elections.

6 For women jurists, forty-five of the one-hundred
7 and thirty-one serving on state courts of last resort
8 and intermediate appellate courts were initially chosen
9 by merit selection as compared to thirty-three who first
10 reached the bench through partisan elections. The
11 remaining women judges were initially chosen through their
12 gubernatorial or legislative appointment without a
13 nominating commission or through nonpartisan elections.

14 In short, merit-based selection systems have
15 resulted in more minority and women judges serving on
16 appellate courts than have elections.

17 There are those who are concerned that, under a
18 merit selection system, the people will lose their voice in
19 the selection process. It is true that citizens will no
20 longer vote directly for candidates for our appellate
21 courts under these proposals. But until the public has
22 had a chance to decide for itself by referendum whether to
23 adopt a merit-based selection system, any argument against
24 merit selection on this basis is no more than populist
25 rhetoric.

1 In conclusion the Philadelphia Bar Association
2 wholeheartedly endorses merit selection of appellate
3 judges. We hope you will let the people of Pennsylvania
4 decide whether to continue as we have with the current
5 system, or whether we, too, like so many other states, are
6 willing to take the positive steps needed to effect real
7 change and real reform.

8 Again, thank you for the opportunity to be here
9 today and to be heard in support of merit selection in
10 Pennsylvania. If you have any questions for us now, we
11 would be happy to address them. We are grateful for your
12 attention and look forward to working together with you in
13 the future on this very important issue.

14 CHAIRMAN CLARK: Thank you very much for your
15 testimony. I understand that you have not considered the
16 regional component of this bill yet, and perhaps you
17 weren't here for the opening hour of the hearing, but maybe
18 as you leave, why, Mr. Beaser will fill you in on the
19 realities of geographic selection and the necessity that
20 that be part of a merit selection process as far as the
21 many members of the legislature are concerned.

22 MR. HAINES: Well, the remarks that I made were
23 obviously on behalf of my association. And as I suggested,
24 the association has not yet considered that component of
25 it. But it is a subject that is likely to come up this

1 fall. And if invited, I may well be back with a position
2 on that aspect of your proposal, Representative.

3 CHAIRMAN CLARK: Thank you.

4 Representative Chadwick.

5 REP. CHADWICK: Thank you, Mr. Chairman.

6 Mr. Haines, thank you for coming.

7 MR. HAINES: My pleasure.

8 REP. CHADWICK: I agree with your belief that we
9 should get away from the highly politicized system of
10 selecting appellate judges that we have here in
11 Pennsylvania. Most of the proposals that I have seen
12 provide that those who would pick the pickers,
13 many of those who come from the leadership of General
14 Assembly: Speaker of the House, the House Minority Leader,
15 President Pro-Temp, The Senate Senate Minority leader. My
16 concern is that if those individuals have tremendous amount
17 of influence in picking the pickers, that we will not have,
18 in fact, gotten away from a highly politicized system of
19 selecting appellate judges. And I wonder if you have a
20 position on whether or not those who pick the pickers
21 should come from organizations like the Bar Association as
22 opposed to leadership of the General Assembly.

23 MR. HAINES: Well, I know there have been a
24 variety of proposals that have been on the floor over the
25 years and a variety of different components of people who

1 are involved in the selection process, that is, picking the
2 pickers. I think it is inevitably impossible to eliminate
3 a political component to the selection process.

4 I got here in a car, but I got to my position by
5 political process of sorts within the Bar Association.
6 Hardly the kind of political process that you all went
7 through. But I think that people who are going to speak
8 out on issues and take positions on issues, are going to
9 get there by some form of political process.

10 We have to start somewhere, though, to
11 ensure that at least people are taking into consideration
12 the judicial qualities and the merits of the individual who
13 wants to be in the position of being a judge, to be a
14 judge, which happens to be very unique and, in my view,
15 very different. It is one thing to have a law degree, it
16 is one thing to go in a courtroom and argue on behalf your
17 constituent or on behalf your client. It is a very
18 different thing to be a judge. And I think that those of
19 us who spend our time in courtrooms trying cases come to
20 understand the very important aspect of the quality of
21 judicial temperament.

22 And with all due respect to the voters,
23 I am concerned that they don't even know who they are
24 voting for, let alone whether they have the necessary
25 qualities to be a judge.

1 MR. BEASER: If I can amplify for a moment
2 first on what Mr. Haines just said that the nature of who
3 a judge is and what a judge does? When you go into a
4 courtroom, when what the client wants is not necessarily,
5 with great respect somebody who they played volleyball with
6 but somebody who is going to decide the message on the case
7 and the law and what the facts are and be bright and have a
8 good judicial temperament and bring to bear knowledge, and
9 particularly at the appellate level where you don't have
10 the trial, bring to bear what the law should be and what
11 the law is and to look at the cases and to make a decision
12 based on neutral principles, the concern that I have had
13 about the present system is that's exactly not what we have
14 and not what the system leads to.

15 In terms of your specific question about who picks
16 the pickers, getting back to what Representative Clark
17 said, that there is some reality here in the system: I am
18 not in favor and I don't think the Philadelphia Bar has
19 ever been in favor over the last 12, 15 years that I have
20 been involved in having the Bar Association involved in
21 being the picker. I don't think that's -- private
22 associations don't do government work.

23 The issue in terms of who chooses, there are a
24 wide variety around the country. I think the proposals
25 that have come up today about having the choice would be by

1 the leaders and the Governor reflects the reality of the
2 way commissions have been set up in this state for the last
3 25, 30 years, in terms of a sharing of power. I am not, as
4 you are, convinced that is necessarily the best way, but in
5 terms of reality, that may be the only way that it has a
6 chance of getting through.

7 There is always a major concern with who picks the
8 pickers. What I urge to you focus on, as well, is the
9 present system that in our view needs to be eliminated, the
10 system where money talks, where chance rules the who gets
11 elected, where voters don't know who they are voting for
12 and where decisions at the ballot box are made on the basis
13 of people's last names and where they don't live, and where
14 the perception of undue influence runs rife through the
15 system. We believe that needs to be changed. And that the
16 system that will come out of this body and the General
17 Assembly will, by necessity, be a compromise, but one that
18 I think is needed in order to change the current
19 system that is a corrupting one and one that -- at the
20 appellate level. We are not talking common pleas. But at
21 the appellate level has left a problem in terms of the
22 perception that there isn't justice, necessarily, being
23 done around the state. We have a lot of good judges and
24 this Philadelphia Bar Association has for years supported
25 our judges. But the best ones are there, despite the

1 system, and we're here today to urge you to change that
2 system.

3 REP. CHADWICK: Thank you. I'll just leave it
4 with the comment that based on my eleven years in
5 Harrisburg, I probably have a little less confidence than
6 you do that we do a good job of picking members of the
7 commission. Thank you.

8 CHAIRMAN CLARK: Representative Maitland.

9 REP. MAITLAND: I just have a comment that, I'm
10 very impressed that as members of the Philadelphia Bar
11 Association, you are here offering testimony in support of
12 merit selection which is likely more to be enacted to
13 reduce the number of your members that make it to the
14 state's appellate courts. And while my mind is not made up
15 on this legislation, I think your testimony for what you
16 feel is the good of the state adds a lot of credibility to
17 the legislation and again I thank you.

18 MR. HAINES: Thank you.

19 CHAIRMAN CLARK: Representative Boscola.

20 REP. BOSCOLA: Mr. Haines.

21 MR. HAINES: Yes, ma'am.

22 REP. BOSCOLA: I'm concerned about people giving
23 up their right to elect their judges, is not what you call,
24 populist rhetoric. And I think that was very unfair. I am
25 genuinely concerned about the people's rights to select

1 their judges. It is not based on any contract and I just
2 want to clarify that.

3 And I want to throw something out at you. You
4 know, I worked in the courthouse as deputy court
5 administrator and I know a lot of attorneys. So when this
6 was coming up, I did get the opportunity to ask them some
7 questions about what they felt about merit selection, being
8 attorneys. And you know, you know what the biggest thing
9 they said to me was? Lisa, I don't favor -- I'm not
10 sure about merit selection, I don't think that it be a
11 politicized system. What I like about it is, I no longer
12 have to contribute to judges.

13 So, see, I can understand why members of the Bar
14 and individual lawyers would like this, because now they
15 won't have to contribute to these campaigns. That's
16 what is driving this issue with some of the Bar
17 Association.

18 Finally, Mr. Beaser, I think you missed
19 my point about the volleyball. The volleyball was just
20 showing you how, in a statewide election, that the
21 candidates now come to the people. And this is the genuine
22 concern I have about merit selection, that you will remove
23 this from the people. They will never have the chance to
24 play volleyball or have dinner or even meet their appellate
25 candidate.

1 MR. HAINES: Representative, let me respond to one
2 aspect of what you have suggested. I don't quarrel with
3 your point of view that in Lehigh County, you ought to go
4 elect your judges. And they may be people that you play
5 volleyball with in the school, through schools or churches
6 or synagogues or wherever, and I think that any proposal
7 that would take away from the public in many, many
8 counties, rural counties, where everybody knows everybody,
9 the right to the choose their judges is not the right way
10 to go. But we are not talking about that. We are talking
11 about a statewide election. I think --

12 REP. BOSCOLA: I played volleyball with a
13 statewide candidate.

14 MR. HAINES: Probably not all
15 of them. But I will tell you that --

16 REP. BOSCOLA: I am not talking
17 about myself, I am talking about other people, the average
18 joe out there . . .

19 MR. HAINES: I understand that.

20 REP. BOSCOLA: . . . who would never have the
21 opportunity to meet them except for because the election
22 process.

23 MR. HAINES: Let me just use -- I know you all
24 don't like to hear about Philadelphia, but let me use
25 Philadelphia as an example. I think I am a pretty active

1 practitioner. I am not only involved in the Bar
2 Association, but I am a trial lawyer. I am in the
3 courtroom. And when I see the judicial ballot and I don't
4 know who the people are, that is, that are running for
5 office, that frightens me. I don't know how, what more I
6 can do to know who these people are. But I cannot
7 intelligently go into the voting booth and make a
8 selection. If I can't do it, if I can't do it and these
9 are my contemporaries, how is it that every other voter is
10 going to do it? And when you are talking about a statewide
11 election, where people don't have the opportunity to do
12 much more than play volleyball, how is it that you
13 determine whether that individual has the capacity to be a
14 judge?

15 I am not talking about the capacity to be a nice
16 person. I am not talking about the capacity to be honest.
17 I am talking about the capacity to be a judge, which I
18 suggest to you requires an extraordinary level of ability
19 and a level of ability that we could use a little more of
20 in this Commonwealth, quite frankly.

21 REP. BOSCOLA: There are a lot of voters that do
22 take the time to find out who their judicial candidates
23 are. You're taking away their right to express that
24 opinion in the ballot box.

25 MR. HAINES: I don't know that I agree with that.

1 When I look at the turnout in the polls, I not so sure
2 that there are a lot of voters that are even bothering
3 to go vote for you all, let alone for the judicial
4 candidate.

5 And my best guess is that when they get in there
6 and pull the switch, if they are not voting straight party,
7 they are stopping when they get beyond you all because they
8 don't know who they're voting for, and they don't even
9 bother. So I am not sure we're taking away from people
10 anything in that respect.

11 REP. BOSCOLA: You're right, and that's part of
12 the problem that I have with it. People feel so removed
13 from government so as it is and this measurement is just
14 another way to isolate the people from the process.

15 MR. HAINES: But we're not suggesting that you
16 eliminate people from government. We are suggesting that
17 the way in which you put judges on the appellate court
18 where they are supposed to be above the partisan politics
19 altogether, be different than the way we elected.

20 You know, government doesn't elect everybody that
21 works in this building: a lot of people who work here, get
22 here because they are appointed, because we have made a
23 decision that that is an intelligent way to get, hopefully,
24 competent people.

25 MR. BEASER: The other thing, the important thing,

1 and I was trying to say Mr. Haines said it a lot better
2 than I did and I did not mean to insult you on the
3 volleyball issue, because it was really the issue of what
4 he said about the function of the judge. But the critical
5 thing that we're asking today is to let the people make the
6 decision at the polls whether they're comfortable, they
7 know who they're voting for or whether they want a new
8 system, one that is adopted in most states.

9 All we ask is that you let the people decide.

10 REP. BOSCOLA: I agree with you and I know it is
11 going to be part of the my responsibility in my community
12 to educate the people as far as exactly what this means to
13 them. And that's a concern that I have with any referendum
14 is how it's worded on a ballot, and if it seems to be
15 something that somebody is willing to vote for because it
16 sounds good, but do they understand the rights that they're
17 giving up and that will be my role in the future.

18 Thank you, Mr. Chairman.

19 CHAIRMAN CLARK: Representative Schuler.

20 REP. SCHULER: Thank you. Just a few questions
21 here, and a couple of comments. You represent the
22 Philadelphia Bar Association. Do you have any idea what
23 the other Bar Associations feel about this, the
24 Pennsylvania Bar Association, or are you aware of their
25 position? I don't want to put you on the spot. If you

1 don't know, say so.

2 MR. HAINES: I am going to defer to Larry; he may
3 know the answer to that question, but I don't. And I don't
4 feel comfortable representing their position, particularly
5 on this bill.

6 MR. BEASER: I don't believe the Pennsylvania -

7 CHAIRMAN CLARK: Yeah, the Pennsylvania Bar
8 Association, I don't believe it has taken a position on it.

9 REP. SCHULER: I think we have to keep in mind
10 here, we're not taking away the rights of the people to
11 vote. We are giving them an opportunity to make that
12 decision. And in our discussion here, it appeared, and I
13 even noticed that one of these questionnaires that comes
14 up here, is sort of misleading, but I think we have to keep
15 that in mind. We are giving the people an opportunity to
16 make a decision on how they want or wish to elect their
17 judges. We're not taking anything away. This thing with
18 volleyball, that's fine and so forth. I mean, I haven't
19 played volleyball with Bob Walker or some of these other
20 fellows who does break gavels once in a while, but
21 that is something that . . . Well, I will quit. Thank
22 you.

23 MR. BEASER: The one other thing that I think is
24 very important is not only are you giving the people the
25 right to decide on this issue, but they will have the right

1 in a retention election to the turn out of office any of
2 the judges they don't like. So you are not, this bill
3 would, in no way, touch the retention election. People
4 could still say no to a judge that the people didn't like.
5 So you've got that check, in terms of the election of the
6 people and retention election to turn out of office any
7 judge that they do not approve of.

8 CHAIRMAN CLARK: Thank you very much.

9 MR. HAINES: Thank you.

10 CHAIRMAN CLARK: Before we conclude this
11 morning, Ms. Sampson, I would like to follow up on
12 Representative Chadwick's question about picking the
13 pickers. Could you give us some insight on how pickers
14 are picked, and, we are picking our pickers properly?

15 MS. SAMPSON: Again I brought tables that I could
16 bore you to death with 33 states and how they do it. The
17 primary mechanism used to pick nominating commissioners is
18 that the Governor picks the nonlawyers and
19 the Bar Associations, either statewide or local -- it
20 depends, states vary on that -- elect or appoint the
21 attorney members. There are changes, there are varieties
22 in other states where sometimes the Attorney General or the
23 Chief Justice picks some commissioners, there are some
24 states where the legislators get involved, but the common
25 pattern is that the lawyers choose the lawyer members and

1 the Governor picks the public members.

2 CHAIRMAN CLARK: And are they generally 50/50?

3 MS. SAMPSON: In most states. Or close to it. It
4 might be a majority of one on either side.

5 CHAIRMAN CLARK: Does that satisfy your curiosity?

6 MR. HAINES: I rest my case.

7 CHAIRMAN CLARK: Thank you very much. We will
8 break for lunch now and we will be back at one o'clock.

9 MS. SAMPSON: Thank you.

10 (Lunch recess taken.)

11 CHAIRMAN CLARK: We are now in session of the
12 Judiciary Committee Subcommittee on Courts Public Hearing
13 regarding Regional Merit Selection of our appellate
14 court judges. And we have two individuals to testify for
15 us this afternoon and the first person is G. Robert
16 Thompson and he is a Republican State Committeeman and I
17 believe he's from someplace out toward western
18 Pennsylvania.

19 MR. THOMPSON: Oil City, sir.

20 CHAIRMAN CLARK: Oil City, out in western
21 Pennsylvania. Mr. Thompson, welcome to the Committee.

22 MR. THOMPSON: Thank you for the invitation to
23 appear. I think I am a voice crying in the wilderness
24 after listening to this morning's testimony. However, I'm
25 here to speak in opposition to House Bill 1320 which

1 deprives the citizens of the Commonwealth their voice and,
2 more importantly, their vote on the selection of appellate
3 court judges in Pennsylvania.

4 Special interests have been trying for years
5 through the guise of merit selection to control the system
6 of justice in our state. And you, their representatives,
7 cannot, in good conscience, deliver the prerogatives of
8 good citizens into the hands of those interests: the
9 present system.

10 CHAIRMAN CLARK: Excuse me one minute. Do we
11 have copies of Mr. Thompson's testimony, please?

12 MR. THOMPSON: If you don't, I have got
13 additional ones here.

14 MR. THOMPSON: The present system is flawed
15 primarily because the media and the major political parties
16 do not sufficiently educate the voters on the strengths and
17 weaknesses of the candidates; this problem is addressed
18 more effectively in House Bill 265.

19 The founder of our state, William Penn, warned the
20 Colonists in 1687 "not to give away anything of liberty or
21 property that at present they do enjoy." He was a wise
22 man. The right to vote is an issue we must fight to
23 protect. Surrendering our vote on a selection of those who
24 judge us is a major retreat.

25 The preponderance of judges from Allegheny

1 and Philadelphia Counties in our appellate courts deprives
2 the courts of a diversity of views. House Bill 1320
3 addresses this problem with a bureaucratic monstrosity that
4 would impress even Merton Quirk. Obviously designed by
5 attorneys and paid staff to ensure future employment, it
6 would replace our primary and general elections. The most
7 recent election clearly indicates our citizens want less
8 government, not more.

9 Unfunded mandates, restrictive laws, intrusions on
10 our liberties and attacks on our constitution need to be
11 reviewed by a system of court that reflects the diverse
12 areas of our state. This can best be accomplished by
13 candidates presenting themselves for elections to the
14 citizens on a regional basis for election as provided in
15 House Bill 265.

16 Quality assurance is a legitimate concern of the
17 members of the bar. This also can be best accomplished by
18 candidates presenting themselves to the voters on a
19 regional basis where the citizens have a better
20 opportunity to assess their record and reputation.
21 Election is better than the rough and tumble partisan
22 politics of the confirmation process in the Pennsylvania
23 Senate.

24 History teaches us that liberties lost are rarely
25 regained except by force of arms. Surely we all believe

1 that ballots are better than bullets. As our
2 representatives, I respectfully ask that you would not
3 betray our trust by taking our ballots away. Thank you.

4 CHAIRMAN CLARK: Thank you, Mr. Thompson.

5 Mr. Thompson, you do understand that before the merit
6 selection on a regional basis would become a standard in
7 Pennsylvania, our constitution would have to be amended.

8 MR. THOMPSON: The same as House Bill 265. They
9 both qualify.

10 CHAIRMAN CLARK: Right. And through that process,
11 the voters would decide on whether they want the current
12 system to stay in place versus the regional merit
13 selection. So voters ultimately would decide on which
14 process they are more comfortable with.

15 MR. THOMPSON: My concern is that they won't
16 be offered the opportunity for regional elections versus
17 regional merit selection. I don't think anybody in their
18 right mind would give up their right to vote.

19 CHAIRMAN CLARK: Okay. You also indicated in your
20 testimony that special interests have been trying for
21 years, under the guise of merit selection, to control the
22 system. Do you have an idea of what type of special
23 interests they may be?

24 MR. THOMPSON: Twenty years ago, I was on the
25 Board of Directors of the Pennsylvania Chamber of Commerce

1 before it changed its name. And I was on there for
2 eighteen years. And every year, there were members of the
3 bar trying to convince the Pennsylvania Chamber to amend
4 their stance to support merit selection. And at that
5 point, I'd get up and argue rather futilely because I
6 didn't have a good alternative. But the regional election
7 makes sense to me at this point and that's why I'm pushing
8 it.

9 CHAIRMAN CLARK: So basically you think
10 the legal community has a vested interest in getting this
11 merit selection.

12 MR. THOMPSON: That's right. They would like to
13 control the whole system of justice.

14 CHAIRMAN CLARK: Okay. Also, you indicate that
15 the bill would set up a bureaucratic monstrosity. However,
16 according to testimony earlier from Ms. Sampson, there are
17 a number of states that do have merit selection by
18 commissions and some have them on a geographic basis. So
19 obviously in some states, this process, you know, has been
20 instituted and seems to be working.

21 MR. THOMPSON: I can't comment on other states,
22 but I don't think we need three more commissions that'll
23 just replace what we're already paying for in primary and
24 general elections.

25 CHAIRMAN CLARK: Okay. Representative Schuler, do

1 you have any questions?

2 REP. SCHULER: Yeah, just a couple.

3 Mr. Thompson, let me clarify your position. You
4 are speaking as an individual, I assume?

5 MR. THOMPSON: Well, the Republican State
6 Committee passed a resolution that I authored calling for
7 regional elections of appellate court judges. The American
8 Legion this year at their state convention endorsed a
9 similar resolution. So, as I understand --

10 REP. SCHULER: Was there an alternative to that
11 resolution?

12 MR. THOMPSON: No. It was submitted by a Post 32
13 and then by District 28 and it was rewritten here in
14 Harrisburg and the legislative committee rejected it as it
15 was rewritten and used my language and it was passed by the
16 convention.

17 REP. SCHULER: But that was the only resolution
18 that was presented, there wasn't any . . . ?

19 MR. THOMPSON: No, there was no . . .

20 REP. SCHULER: . . . choice made?

21 MR. THOMPSON: No.

22 REP. SCHULER: You mentioned lawyers and somebody
23 mentioned this morning that the reason lawyers would be for
24 merit is so they wouldn't have to contribute. Personally I
25 think that's the best argument for having merit selection,

1 just on that one basis. But you have made the argument
2 about this sufficiently educating. And, of course, you are
3 actively involved in political parties. My question then
4 is, do you have any suggestion - and I don't mean to put
5 you on the spot, that's not my purpose -- how can you
6 educate the people of Pennsylvania about judges?

7 MR. THOMPSON: Well the one thing is to draw the
8 candidates from the regions. I know the judges in Warren
9 County and Erie County and Mercer County and Venango County
10 and Crawford County and I know their reputations and I
11 think most of the citizens are aware just reading the paper
12 who are the weak ones and who are the tough judges and
13 who'll always vote for people that think as we do.

14 REP. SCHULER: Then your argument is not the
15 education, but because they are closer to the people; I
16 think that's what your saying?

17 MR. THOMPSON: Yeah, but it brings the candidates
18 closer to the constituency because, very honestly, I doubt
19 if there are more than a dozen of us in Venango County that
20 ever met the candidates from Philadelphia.

21 REP. SCHULER: I believe that. I don't think
22 that's particular to Venango County.

23 MR. THOMPSON: Sandy Newman has been to town
24 twice, but the total number of people she has been exposed
25 to has been very limited.

1 REP. SCHULER: Okay. One last question. You
2 mentioned lawyers and I want to pursue that. Are there
3 any other interest groups that you feel play a significant
4 role in establishing . . . ?

5 MR. THOMPSON: Well the majority leader in the
6 Senate is sponsoring merit selection, so I'd submit that
7 those in power and the legislators are very interested
8 in expanding their areas of influence; and there's the
9 pickers that you were referring to earlier.

10 REP. SCHULER: Okay. Thank you.

11 CHAIRMAN CLARK: Mr. Thompson, necessarily to
12 dividing the state into regions and having an election,
13 you're still going to have a fairly large region . . .

14 MR. THOMPSON: Yes.

15 CHAIRMAN CLARK: . . . to cover. And you have the
16 western regions where that could very well mix in with the
17 northwest with the western part and you may end up with
18 judges running from surrounding counties in your district
19 you may never know, no matter how hard you try to get to
20 know them.

21 MR. THOMPSON: Well, those that read the
22 Pittsburgh Press or the Pittsburgh Post Gazette would
23 probably be familiar with them, but the majority of the
24 people read local papers.

25 CHAIRMAN CLARK: And then those individuals would

1 need to raise money and campaign in that region.

2 MR. THOMPSON: Well, there is nothing wrong with
3 campaigning, Dan. If the judges don't get to meet the
4 people and the people meet the candidates, we got no good
5 solid basis for voting for or against. And maybe I am well
6 over-stressing this voting, but I will be 71 next month and
7 I haven't missed an election since I got out of the Army
8 Air Corps. Except, once, I was on the operating table
9 having heart surgery and they just wouldn't let me out.

10 CHAIRMAN CLARK: But they are still going to need
11 to, you know, raise money to be on T.V. and to get
12 some name recognition but . . .

13 MR. THOMPSON: That is a political --

14 CHAIRMAN CLARK: . . . but not necessarily deliver
15 a full and fair assessment of their qualifications.

16 MR THOMPSON: Well, that's what political parties
17 are for, that's our function, is to promote candidates to
18 get them elected whether for township supervisor or for
19 Governor. And I think we do a reasonable effective job,
20 except on these judicial races that are statewide.

21 CHAIRMAN CLARK: Are you satisfied with the -- we
22 had some testimony here earlier about how the political
23 parties endorse their candidates and put them on the
24 ballot; are you satisfied with that process, did you get to
25 know all the candidates, in depth, and that you have a fair

1 and democratic process of nominating those candidates which
2 you endorse to your committee meeting?

3 MR. THOMPSON: My choice -- and it's effective in
4 Venango County -- is open primaries. The party does not
5 endorse. Statewide, we do. And, in fact, I voted to
6 endorse Governor Ridge. I think the first endorsement I
7 ever voted for 20 years on state committee.

8 CHAIRMAN CLARK: Another question. When
9 candidates that run for judge and look for other
10 endorsements, too, from other special interest groups, you
11 know, does that part of the election process bother you at
12 all? That they may go to the AFL-CIO or that they may come
13 in and make a pitch to the chamber or they may come in and
14 make a pitch to EFCA in order to get their endorsements so
15 that their rank and file will follow them to the polls.

16 MR. THOMPSON: Representative Clark, I think that
17 that is a very healthy process because the judge, while
18 he's doing this, is getting educated to what the voters
19 want and demand. Judges have a tendency to get a Jehova
20 complex once they are in office and they seem to be above
21 the rank and file voter and this is a healthy situation
22 before they get in there that they have an opportunity to
23 meet and to hear.

24 CHAIRMAN CLARK: Mr. Thompson, let me leave you
25 with one last thought that you can think about in your

1 drive back to Venango County. Is Judge Breene
2 still out there?

3 MR. THOMPSON: Yes, Venango County.

4 CHAIRMAN CLARK: Do you think who, what all
5 candidates the AFL-CIO have endorsed over the last 30 years
6 to the Supreme Court and what candidates the
7 Chamber of Commerce have endorsed over the past thirty
8 years can you match those up with the political
9 affiliation, and then you tell me if those special
10 interests had an open and full endorsement process where
11 candidates got to come in, express their ideas, got to know
12 the membership and then were fairly dealt within the
13 endorsement process?

14 MR. THOMPSON: I don't believe they ever meet the
15 rank and file members of the unions with the school
16 teachers, but they obviously do quote the support of the
17 special interest groups. But I don't, I haven't heard any
18 of them make any promises or offer any inducements: if I am
19 judge, I will do this. This just doesn't happen.

20 CHAIRMAN CLARK: Well, then why do those special
21 interest groups consistently seem to grasp taking endorsing
22 one party or the other?

23 MR. THOMPSON: Well, I have a problem with that,
24 too.

25 CHAIRMAN CLARK: Okay.

1 MR. THOMPSON: Because I am partisan and you know
2 it.

3 CHAIRMAN CLARK: Any other questions for Mr.
4 Thompson?

5 Thank you very much. I enjoyed hearing from
6 you. And I will tell your chairman that I had an
7 opportunity to speak with you today.

8 MR. THOMPSON: Thank you.

9 CHAIRMAN CLARK: Happens to be a constituent of
10 mine.

11 MR. THOMPSON: Oh, good. Ann is a fine lady.

12 CHAIRMAN CLARK: She is. Thank you.

13 The next person to testify in front of the
14 Committee is Joanna Flum.

15 MS. FLUM: Joanna Hamill Flum, sir.

16 CHAIRMAN CLARK: Joanna Hamill Flum . . .

17 MS. FLUM: We have to get all the names in.

18 CHAIRMAN CLARK: . . . President from the
19 Pennsylvania Trial Lawyers Association. Welcome.

20 MS. FLUM: Thank you. Good afternoon, Chairman
21 Clark, Representative Manderino, Representative Schuler. I
22 have stated my name as Joanna Hamill Flum, and I am
23 President of the Pennsylvania Trial Lawyers Association.
24 On behalf of the Association, I would like to thank you
25 for the opportunity to testify on the subject of the

1 proposed constitutional amendment in Pennsylvania that
2 would eliminate the right to vote for appellate judges and
3 mandate changes in the appointment of appellate judges on
4 a regional basis.

5 My occupation as an active trial attorney for
6 fourteen years in this Commonwealth has provided me a
7 great deal of insight into the quality of our judiciary,
8 both in the Courts of Common Pleas and the appellate courts
9 in Pennsylvania. I have found our judiciary, both in the
10 trial court and on the appellate level, to have the
11 greatest integrity, knowledge of the law and judicial
12 temperament. Generally speaking, my experience with the
13 judiciary has been positive. I have conferred with many
14 colleagues and members of the Pennsylvania Trial Lawyers
15 Association on this issue, and, generally, each of them has
16 had a similar positive experience and attitude toward the
17 judiciary.

18 By way of history, I would like to tell you that
19 on January 23, 1993, the Board of Governors of the
20 Pennsylvania Trial Lawyers Association met and
21 overwhelmingly voted to reaffirm its 1983 resolution to
22 support the right of the citizens of Pennsylvania to elect
23 all judges in Pennsylvania. Our board included in this
24 reaffirmation the support of election reform as it relates
25 to judicial candidates. Later in my testimony, I will

1 indicate the type of election reform that we believe
2 answers the various criticisms of the current election
3 system.

4 During the 1993 - 1994 session, much of the public
5 and press impetus for judicial reform in the selection of
6 our appellate judges came, quite naturally, as a reaction
7 to the events surrounding former Supreme Court Justice
8 Larsen. However, one must remember that in the Larsen
9 situation, there was, for the first time in 145 years,
10 public controversy as to the propriety of the conduct of
11 one of the members of our elected Supreme Court.

12 Fortunately for the system, and for the citizens of
13 Pennsylvania, the situation was appropriately handled.
14 And many of you, on this Committee, are to be personally
15 congratulated and thanked by the citizens of Pennsylvania
16 for assisting in the solution of the Larsen problem.

17 The problem which confronted the public emanating
18 from this particular case are not unique to elected
19 judges, for these problems arise in states where judges
20 are appointed as well. Indeed, the solution to the
21 problem was the ability to effectively investigate and
22 discipline inappropriate conduct. As you undoubtedly
23 know, within the last several years, a serious ethical
24 concern also was raised about the conduct of a former
25 judge of the Cambria County Court of Common Pleas. Yet,

1 at that time there was no serious suggestion that we
2 should appoint, rather than elect, judges to the Courts of
3 Common Pleas. The procedure in Pennsylvania that allows
4 effective discipline and impeachment solved the Larsen
5 situation, and will continue to solve similar problems,
6 far more effectively than changing the method of selecting
7 judges.

8 The Pennsylvania Trial Lawyers Association opposes
9 House Bill 1320. We continue to believe that the phrase
10 "merit selection" is merely a "sound bite" cleverly
11 concocted by those who wish to deprive Pennsylvania
12 citizens of basic rights. The term "merit selection" is
13 designed to connote negativity about the election process.
14 I suggest to you that the term does not equally connote,
15 nor result in, meritorious appointments.

16 Unfortunately, the process of the appointment of
17 judges in House Bill 1320, while not less political, is
18 certainly less public than the current system. The
19 nominating committees will submit to the Governor a
20 proposed list of candidates from which the Governor will
21 appoint with the advice and consent of the Senate. There
22 will be no public hearings, no public scrutiny, no public
23 participation. There will simply be the selection of the
24 Governor's hand-picked person from the list approved by
25 this committee. History bears out that the Governor's

1 appointments are usually always from a person of his or her
2 own political party. On a national basis, more than 90% of
3 all gubernatorial judicial appointees come from the same
4 party as the Governor. This is not meant in any way to
5 cast aspersions on the ability of our current Governor, as
6 our position was identical during the tenure of the
7 previous governor, who, of course, as you know, came from
8 the other major political party in Pennsylvania.

9 We have only to look at the federal system, which
10 is often referred to as the model for appointment of
11 judicial candidates. Over 95% of all federal trial judges
12 appointed by the President of the United States since the
13 Civil War have been members of the President's political
14 party. Under the appointive process politics is a major --
15 if not the major -- consideration in the selection of the
16 judge. Unfortunately, it is the politics of a few chosen
17 elite individuals rather than the politics of the entire
18 electorate. Indeed, "litmus tests" are certainly used in
19 the selection of the federal judiciary. This attitude that
20 it is somehow fair or proper for judges to be questioned at
21 great length about their views on particular controversial
22 issues by an elite screening panel, while denying potential
23 judicial candidates the right to discuss their views and
24 values in the light of the electoral process which
25 currently exists in Pennsylvania, is particularly

1 troubling.

2 We need only look to the past testimony and
3 advocacy of the electoral process by former Commonwealth
4 Court Judge Madaline Palladino, who was appointed to a
5 vacancy on the Commonwealth Court, defeated in the general
6 election, and then ran successfully for a full term during
7 the 1980's. Judge Palladino -- uniquely in Pennsylvania --
8 can speak of the advantages or disadvantages of the current
9 system versus a system similar to that envisioned in House
10 Bill 1320. Judge Palladino, in testimony before the Senate
11 Judiciary Committee in 1993, stated that, because of her
12 experience, she believed totally and completely in the
13 advantage of the electoral system. Like us, Judge
14 Palladino believes there is great benefit to previous
15 political experience in shaping a judicial temperament that
16 is responsive to the needs of a complex, diverse and ever
17 evolving society. A successful political campaign which is
18 broadly based, exposing the candidate to the wants and
19 needs of every element of our culture, is an invaluable
20 educational reservoir from which a judge may later draw
21 experiences to arrive at fair and equitable decisions.

22 Indeed campaigning helps candidates to see and
23 understand the electorate.

24 The Pennsylvania Trial Lawyers Association, while
25 opposing House Bill 1320, does support a package of

1 election reforms known as the "Greenleaf Package."

2 We find particularly offensive the so-called "gag
3 rule" which applies primarily to the public's right to know
4 rather than the candidate's ability to speak. The gag rule
5 does not prevent candidates who have strong biases from
6 seeking judicial office, it simply prevents the voting
7 public from finding out what those biases are before
8 casting their votes. As we indicated earlier, so-called
9 "merit panels" often use probing questions to delve deeply
10 into a candidate's psyche in order to determine that
11 candidate's judicial philosophy. It is extremely
12 troublesome that it is permissible for a few individuals to
13 probe a candidate's innermost feelings, in secret, behind
14 closed doors. It is fundamentally wrong that the public
15 does not have equal access to such information in the light
16 of day. We, therefore, support the language of Senate Bill
17 1004, which proposes a constitutional amendment allowing
18 justices and judges to speak out on political and disputed
19 legal issues in the year of their candidacies. Such a
20 process, however, would require several years, and we,
21 therefore, also urge the adoption of electoral reform
22 proposals which lack constitutional dimension, and could be
23 enacted immediately to provide immeasurable improvement in
24 the election process. We believe this package of bills
25 answers all of the criticism of those seeking an appointive

1 process, while still allowing the public to enjoy broad
2 participation in the selection of one-third of our form of
3 government.

4 To those critics of the election process who say
5 that judicial elections resemble a lottery, we say rotate
6 ballot position. Senate Bill 1005 calls for the rotation
7 of the ballot position of judicial candidates. To those
8 who say our judicial elections have succumbed to
9 regionalism, Senate Bill 1006 eliminates county designation
10 from the ballot. To those who denigrate the public by
11 believing that it is too apathetic to care and too
12 unsophisticated to make knowledgeable selections, we
13 continue to believe that informed exercise of the right to
14 vote can never occur in a system where the candidate is not
15 allowed to speak to anyone other than the editor of a
16 newspaper or a member of a selection panel.

17 The Pennsylvania Trial Lawyers Association always
18 supported public financing of judicial elections such as
19 that contained in Senate Bill 1001. In that Bill, any
20 candidate who applies for, and receives, public financing
21 is forbidden to accept contributions for the election which
22 exceed \$2500 per individual; \$25,000 from the candidate and
23 his spouse; \$2500 from a political action committee; and
24 \$500 from a partnership. We additionally support the
25 passage of Senate Bill 1002, which limits the contribution

1 by an attorney who is a member of the bar of the Supreme
2 Court of Pennsylvania to an amount not in excess of \$50.00
3 per candidate, and limits any law firm doing business with
4 the Commonwealth to a maximum contribution of \$500 per
5 candidate. Actually, we wonder why opponents of the
6 electoral process, who so regularly complain about attorney
7 contributions, do not join Senator Greenleaf in his efforts
8 to promote and pass Senate Bill 1002.

9 To those critics of our current electoral system
10 who suggest there is a corruptive effect of politics among
11 the court because of the electoral system we ask a simple
12 question: What are you going to do about our state
13 legislators, members of Congress, Senators, Governor, and
14 even our President? If elections are truly as corruptive
15 and corrosive as is claimed, can we afford to choose those
16 who serve in the other two branches of government by the
17 same system? Certainly, you would agree with me that the
18 electorate was astute enough and understood the pertinent
19 issues enough to elect each one of the distinguished
20 members of this Committee to office. To imply that the
21 citizens of Pennsylvania are competent to elect members of
22 the General Assembly but not judges, serves only to
23 denigrate the public.

24 It is the firm belief of the Pennsylvania Trial
25 Lawyers Association that election reform proposals which

1 include rotation of the ballot position, elimination of
2 county designation, relaxation of the gag rule, adoption of
3 public financing, and caps on individual attorney
4 contributions, provide a genuine opportunity for
5 improvement in the process by which we elect our judges.

6 We are appalled by those elite who advocate
7 paternalism toward the electorate and not so subtly
8 suggest that the citizens of this Commonwealth are too
9 ignorant to effectively exercise their rights at the ballot
10 box. We continue to believe that the citizens of
11 Pennsylvania should not be stripped of a basic right -- the
12 right to elect those men and women who exercise great power
13 over their lives -- the judiciary.

14 I am open to any questions you may have.

15 CHAIRMAN CLARK: Thank you very much. Previously,
16 we have sort of outlined that the functions of the
17 judiciary is not akin to the function of the legislative
18 and executive branch of government. The legislature and
19 the Governor are representatives of the people and,
20 therefore, campaign and tell people where they stand on
21 issues, how they're going to vote on issues if elected, and
22 they go through a process like that; and we have decided
23 that that was not akin to a judiciary position, or a
24 judgeship, where, you know, they are to be fair, impartial,
25 that they should look at each fact, situation, and apply

1 the law compressing to that situation. And we previously
2 rejected the notion that if the electorate can elect its
3 executive and legislative branch that they could likewise
4 elect their judiciary because of the fundamental
5 differences between those branches of government. And
6 that . . . you know. So, if you could make comments
7 further on that, why, I would appreciate your insight.

8 MS. FLUM: Sure. I understand what you call the
9 fundamental differences. However, there is something more
10 basic than even the fundamental differences you alluded to
11 and that is, the right of a citizen to elect people who
12 hold power over their lives. Now, having a merit selection
13 system would only mean that the people will never get to
14 know what these candidates stand for. The only people who
15 are going to make the determination as to whether or not I,
16 as a citizen, may, can have a judge are elite screening
17 panels; that is not open.

18 I think that whether or not you are electing a
19 representative or you are electing a judge or you are
20 electing anyone, it should be done in the ballot box by the
21 citizenry, and I don't accept the premise that there is
22 that much of a difference. I think that if judges were
23 permitted, if the gag rule were lifted to some degree and
24 judges were permitted to discuss somewhat their judicial
25 philosophy without getting into specific cases, that would

1 give the electorate more information.

2 Also, the way we, the system we have now permits
3 the average citizen to determine whether or not that
4 candidate is qualified in respect other than judicial or
5 lawyer type of background. The people who sit in judgment
6 of other people should be people who understand the average
7 ordinary citizen, not someone who is in the ivory tower and
8 not in contact with the average person. So I do not
9 believe, nor does the Pennsylvania Trial Lawyers
10 Association believe, that a citizen is smart when it comes
11 to elected members of the General Assembly but suddenly
12 becomes stupid when electing members of the judiciary.

13 CHAIRMAN CLARK: And I don't believe the members
14 of the Committee feel that way either.

15 MS. FLUM: I am sure you don't.

16 CHAIRMAN CLARK: I would like to pay a little
17 insight that I have always wavered and probably leaned
18 towards the election process until I received some very
19 good insight last summer, during the impeachment process of
20 Judge Larsen, and that experience had a profound impact
21 on me and I guess led me to believe that the merit
22 selection process is certainly worth our time and efforts
23 here in the legislature.

24 MS. FLUM: Sir, do you believe that that situation
25 which as I mentioned for the first time in 145 years in

1 Pennsylvania occurred, do you believe that there is any
2 less potential for that type of situation to arise if you
3 have merit selection, rather than elective? I don't think
4 so.

5 CHAIRMAN CLARK: Absolutely unequivocally. Not
6 everything that we saw last year and last summer came
7 before the Assembly, it came before the public, and, you
8 know, I am troubled by the process and how that seemed to
9 have influenced the Supreme Court on a very broad and
10 reaffirming basis.

11 Representative Schuler.

12 REP. SCHULER: Just one question. On page eight,
13 you mentioned the fact that the elite, or they may be, I
14 guess that's the committee that would pick these people,
15 are too ignorant to effectively legislate the right ballot
16 box. Wouldn't it follow it also, we are not making that
17 decision. This legislature or that committee is not making
18 the decision. The people of Pennsylvania, through a
19 referendum or a constitutional amendment, are going to make
20 that decision. Are the trial lawyers afraid that they may
21 not make an intelligent decision?

22 MS. FLUM: Absolutely not, sir. Let me --

23 REP. SCHULER: Well, then, what's wrong?

24 MS. FLUM: Well, let me --

25 REP. SCHULER: Go ahead.

1 MS. FLUM: Thank you. As you probably know, in
2 1969, the electors of Pennsylvania, in the primary
3 election, rejected the option of having an appointed
4 judiciary which was presented to them by Section 13(d) of
5 Article V of the Pennsylvania Constitution; rather, the
6 citizens of the Commonwealth chose to select their
7 judiciary by election. In 1980, the citizens of the
8 Commonwealth of Pennsylvania elected, for the first time,
9 their attorney general. Again they were given the option,
10 the opportunity to elect statewide officials, rather than
11 having that official appointed. So two times when this
12 issue came before the citizens of Pennsylvania, the
13 citizens decided that they want to have the right to elect
14 their officials.

15 Now, a third reason would be, why this
16 issue, this issue is not unique, why not put every issue
17 on to a referendum? Which, by the way, as you know, would
18 cost a lot of money to run. But, more importantly, those
19 people who favor merit selection are well-funded by large,
20 rich corporate interests in this state, and one has to ask
21 oneself, why is it that corporations such as Harsco and
22 Alcoa, have an interest in this issue? Why is it that the
23 Pennsylvania Manufacturers Association came out in favor of
24 merit selection? Why is it that those people, some
25 people who testified here today, when they come up to the

1 Hill to lobby you for your votes on this issue, meet in the
2 offices of the Pennsylvania Manufacturers Association?
3 Because very large corporate, private interests want to
4 deprive the citizens of their right to vote. And if
5 there's a referendum, you know very well that they'll use
6 their enormous power, their enormous money to run a very
7 slick advertising campaign in favor of merit selection so
8 that those people have the right to decide who should be a
9 judge and not the electorate.

10 REP. SCHULER: You gave me two reasons that the
11 people voted against it, and that's fine. Why not a third
12 time?

13 MS FLUM: Well, as I said --

14 REP. SCHULER: Are you afraid that they are not
15 going to see the light?

16 MS. FLUM: Absolutely not. In fact, I have
17 appended to my testimony a public opinion poll that was
18 taken, I believe in 1993, showing unequivocally that the
19 population of the people who were polled, who were
20 representative sample, want their right to elect judges.
21 Perhaps people on this Committee may have made a sample of
22 their own districts and found the same thing. Why do we
23 have to go to the expense of having a referendum when we
24 have experience on the issue and public opinion polls show
25 that everyone, that the electorate wants to be able to vote

1 for judges?

2 REP. SCHULER: Then the third reason is the
3 expense involved?

4 MS. FLUM: Yes. I think it is to -- Well, I
5 mean the last time I looked, or the last time I got
6 information on this, it would cost many millions of
7 dollars, as you know . . .

8 REP. SCHULER: It probably would.

9 MS. FLUM: . . . to run a referendum, yes, sir.

10 REP. SCHULER: I agree. My last point here. I
11 wasn't going to ask this, but you brought up the point.

12 MS. FLUM: Oh my goodness. Should I be on guard?

13 REP. SCHULER: You pounded on the Manufacturers
14 Association and everybody else. You didn't include the
15 trial lawyers in that. I can remember a few years ago when
16 we did the insurance reform. Boy, they were quite an
17 active lobbying group. And you know it's like calling the
18 kettle black. You know? But I just have a little problem
19 with the way you address that issue, and you have a right
20 to say it and so forth, and I am sure there was a lot of
21 that. But lets get the record straight, the trial lawyers
22 are not beyond lobbying either.

23 MS. FLUM: Absolutely not. I think there's
24 nothing wrong with lobbying. But, you know, sir, that the
25 trial lawyers is the only statewide group in this

1 Commonwealth who represents totally the interests of the
2 injured citizens of this Commonwealth. So when we lobby,
3 we are lobbying on behalf of those people who are injured,
4 innocent victims.

5 REP. SCHULER: Well, aren't you the benefactor in
6 that?

7 MS. FLUM: Well, of course. I mean to some
8 degree we are. But we do a job. And we have a job to do.

9 REP. SCHULER: Well, first of all, I have a little
10 concern about trying to make it that you are do gooders.

11 MS. FLUM: Well, as a matter of fact, sir, I
12 believe I do good because I believe strongly what I do. It
13 would be very difficult for an injured citizen to go into,
14 perhaps, Mr. Beaser's office and say, Mr. Beaser, would you
15 represent me? He would say, I would like \$500 an
16 hour. Now what I do is, I do service for people and every
17 one of my members does when they represent these people who
18 are injured. I am proud of what I do and I am sure every
19 one of our associate members would say they are proud of
20 what they do, too.

21 REP. SCHULER: I am sure they are and I have no
22 objection to that and I just want to make sure that we all
23 understand where the trial lawyers are coming from. The
24 better you do the job, the better your compensation.

25 MS. FLUM: Well, that's merit, isn't it?

1 REP. SCHULER: All right. Thank you, Mr.
2 Chairman.

3 CHAIRMAN CLARK: Representative Manderino.

4 REP. MANDERINO: Thank you, Mr. Chairman.

5 I guess what I have to say is more by way of
6 comments than questions, but I do have to say that I have
7 been called lots of things in my life but elite has never
8 been one them until today. And I think that there are a
9 lot of people who support merit selection, who support it
10 for as meritorious reasons as you do what you do, who do
11 not believe that either they are elite or that the system
12 is one of elitism, or will produce that.

13 I guess the other point that I just want to
14 make is picking up on what Chairman Clark said. Because I,
15 too, very much believe that there is an important
16 distinction in how we have fashioned our three branches of
17 government, and there is an important distinction with
18 regard to the judiciary and their role being one of
19 independence. I am the representative, and the members of
20 this Committee as representatives of the people, we're
21 voted to come here to make law and to make that law
22 pursuant to the wishes and desires of our constituents.

23 That is not the case with judges. Judges are set
24 up as an independent branch of government to apply the
25 facts that come before them and interpret the law as made

1 by we, the representative body. And I am very troubled by
2 proposals to remove a gag rule and allow judges to campaign
3 on issues that show a judicial bias. Because while
4 everyone's personal baggage that they carry with them as an
5 individual because of their life experiences is, just by
6 the very nature of us being human, part of what forms who
7 we are and how we look at issues, so too is the
8 responsibility of the member of our judiciary to apply the
9 facts before him to the law as we have made it. And I
10 really think that that's an important message that we can't
11 lose sight of, regardless of which side of the issue we're
12 on.

13 Lastly, I guess, I just want to make the point,
14 and Ms. Hamill Flum, you pointed out that, 30 years ago, we
15 made a choice, we asked this question before and I think
16 that's true. I also think that reform comes in cycles and
17 we used to have an appointive system in Pennsylvania and we
18 reformed, so to speak, and switched to an elective process.
19 And it's not, I don't think, too often to ask every 30
20 years about whether or not it's time to reform again. And
21 the answer may be yes and the answer may be no, but the
22 reason it goes to a referendum is not because we want to
23 test the airs of public sentiment but because we are
24 proposing a change to our Pennsylvania Constitution. That
25 is what brings it before the people because it's

1 highlighted enough to be spelled out in our constitution;
2 and so, I don't want people to think that the referendum
3 issue that we're talking about here is a public sentiment
4 referendum issue. It's really saying, how do you want your
5 constitution fashioned, citizens of Pennsylvania? And I
6 would like to see us ask that question again 30 years
7 later.

8 Thank you, Mr. Chairman.

9 CHAIRMAN CLARK: Thank you.

10 Would you like to comment.

11 MS. FLUM: I was just going to comment about the
12 word elite. I certainly did not mean to offend anyone on
13 this Committee. I really was referring to the panels or
14 the committees that would, are contemplating House Bill
15 1320 as being set up as elite screening panels and when I
16 hear words from people who testified today, such as, an
17 elective system is inconsistent with a qualified judiciary,
18 that's a slap in the face to every judge, whom I know, is
19 highly qualified in this state. And when I hear words that
20 election of judges is simply nonsense, to me that sounds
21 like an elitist attitude. And when I hear comments that
22 people don't know who the candidates are, and that sounds
23 like an elite comment. So I want to make it clear that I
24 am referring to the screening panels as set forth in House
25 Bill 1320. Thank you.

1 CHAIRMAN CLARK: Thank you.
2 Do we have any further questions?
3 Thank you very much.

4 MS. FLUM: Thank you very much.

5 CHAIRMAN CLARK: And with that, that concludes our
6 public hearing on the Regional Merit Selection Process and
7 House Bill 1320. Thank you very much.

8 (Written testimony of William M. George submitted
9 for the record.)

10 (Whereupon, the public hearing was concluded at
11 1:50 p.m.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, to the best of my ability, and that this copy is a correct transcript of the same.

A handwritten signature in cursive script that reads "Roxy Cressler". The signature is written in dark ink and is positioned above a horizontal dashed line.

Roxy Cressler, Reporter

Notary Public