TESTIMONY

BEFORE THE HOUSE JUDICIARY COMMITTEE

AUGUST 30, 1995

ON

APPOINTMENT OF APPELLATE JUDGES (HB 1320)

PRESENTED BY

JOANNA HAMILL FLUM, ESQUIRE

PRESIDENT

PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

Chairman Piccola, Prime Sponsor Clark, and other distinguished members of the House Judiciary Committee. My name is Joanna Hamill Flum, and I currently serve as President of the Pennsylvania Trial Lawyers Association. On behalf of the Association, I would like to thank you for the opportunity to testify on the subject of the proposed constitutional amendment in Pennsylvania that would eliminate the right to vote for appellate judges and mandate changes in the appointment of appellate judges on a regional basis.

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

On January 23, 1993, the Board of Governors of the Pennsylvania Trial Lawyers Association met and overwhelmingly voted to reaffirm its 1983 resolution to support the right of the citizens of Pennsylvania to elect <u>all</u> judges in Pennsylvania. Our board included in this reaffirmation the support of <u>election</u>

reform as it relates to judicial candidates. Later in my testimony, I will indicate the type of election reform that we believe answers the various criticisms of the current election system.

During the 1993 - 1994 session, much of the public and press impetus for judicial reform in the selection of our appellate judges came, quite naturally, as a reaction to the events surrounding former Supreme Court Justice Larsen. Indeed, in the Larsen situation, there was for the first time in one hundred forty five years public controversy as to the propriety of the conduct of one of the members of our elected Supreme Court. Fortunately for the system, and for the citizens of Pennsylvania, the situation was appropriately handled. Many of you on this committee are to be personally congratulated and thanked by the citizens of Pennsylvania for assisting in the solution of the Larsen problem.

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

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

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

Unfortunately, the process of the appointment of judges in House Bill 1320, while not less political, is certainly less public then the current system. The nominating committees will submit to the Governor a proposed list of candidates from which the Governor will appoint with the advice and consent of the Senate. There will be no public hearings, no public scrutiny, no public participation. There will simply be the selection of the Governor's hand-picked person from the list approved by this committee. History bears out that the Governor's appointments are usually always from a person of his or her own political party. On a national basis, more than 90 percent of all

gubernatorial judicial appointees come from the same party as the Governor. This is not meant in any way to cast aspersions on the ability of our current Governor, as our position was identical during the tenure of the previous governor, who, of course, came from the other major political party in Pennsylvania.

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

We need only look to the past testimony and advocacy of the electoral process by former Commonwealth Court Judge Madaline Palladino, who was appointed to a vacancy on the Commonwealth

Court, defeated in the general election, and then ran successfully for a full term during the 1980's. Judge Palladino - uniquely in Pennsylvania - can speak of the advantages or disadvantages of the current system versus a system similar to that envisioned in House Bill 1320. Judge Palladino, in testimony before the Senate Judiciary Committee in 1993,stated that, because of her experience, she believed totally and completely in the advantage of the electoral system. Like us, Judge Palladino believes there is great benefit to previous political experience in shaping a judicial temperament that is responsive to the needs of a complex, diverse and ever evolving society. A successful political campaign which is broadly based, exposing the candidate to the wants and needs of every element of our culture, is an invaluable educational reservoir from which a judge may later draw experiences to arrive at fair and equitable decisions.

The Pennsylvania Trial Lawyers Association, while opposing House Bill 1320, does support a package of election reforms known as the "Greenleaf Package."

We find particularly offensive the so-called "gag rule" which applies primarily to the public's right to know rather than the candidate's ability to speak. The gag rule does not prevent candidates who have strong biases from seeking judicial office, it simply prevents the voting public from finding out what those

biases are before casting their votes. As we indicated earlier, so-called "merit panels" often use probing questions to delve deeply into a candidate's psyche in order to determine that candidate's "judicial philosophy." It is extremely troublesome that it is permissible for a few individuals to probe a candidate's innermost feelings, in secret, behind closed doors. It is fundmentally wrong that the public does not have equal access to such information in the light of day. We, therefore, support the language of Senate Bill 1004, which proposes a constitutional amendment allowing justices and judges to speak out on political and disputed legal issues in the year of their candidacies. Such a process, however, would require several years, and we, therefore, also urge the adoption of electoral reform proposals which lack constitutional dimension, and could be enacted immediately to provide immeasurable improvement in the election process. ~~Indeed,~~ we believe this package of bills answers all of the criticism of those seeking an appointive process, while still allowing the public to enjoy broad participation in the selection of one third of our form of government.

To those critics of the election process who say that judicial elections resemble a lottery, we say rotate ballot position. Senate Bill 1005 calls for the rotation of the ballot position of judicial candidates. To those who say our judicial elections have succumbed to regionalism, Senate Bill 1006

eliminates county designation from the ballot. To those who denigrate the public by believing that it is too apathetic to care and too unsophisticated to make knowledgeable selections, we continue to believe that informed exercise of the right to vote can never occur in a system where the candidate is not allowed to speak to anyone other than the editor of a newspaper or a member of a selection panel.

The Pennsylvania Trial Lawyers Association always supported public financing of judicial elections such as that contained in Senate Bill 1001. In ~~Senate Bill 1001~~ that Bill, any candidate who applies for, and receives, public financing is forbidden to accept contributions for the election which exceed $2500 per individual; $25,000 from the candidate and his spouse; $2500 from a political action committe; and $500 from a partnership. We additionally support the passage of Senate Bill 1002, which limits the contribution by an attorney who is a member of the bar of the Supreme Court of Pennsylvania to an amount not in excess of $50.00 per candidate, and limits any law firm doing business with the Commonwealth to a maximum contribution of $500 per candidate. ~~Indeed~~ Actually, we wonder why opponents of the electoral process, who so regularly complain about attorney contributions, do not join Senator Greenleaf in his efforts to promote and pass Senate Bill 1002.

To those critics of our current electoral system who suggest

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

It is the firm belief of the Pennsylvania Trial Lawyers Association that election reform proposals which include rotation of the ballot position, elimination of county designation, relaxation of the gag rule, adoption of public financing, and caps on individual attorney contributions, provide a genuine opportunity for improvement in the process by which we elect our judges.

We are appalled by those elite who advocate paternalism toward the electorate and not so subtley suggest that the citizens of this Commonwealth are too ignorant to effectively exercise their rights at the ballot box. We continue to believe that the citizens of Pennsylvania should not be stripped of a

basic right - the right to elect those men and women who exercise great power over their lives - the judiciary.