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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Supreme Court's Suspension
of the Acts of the General Assembly

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House Judiciary Committee

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

Thursday, October 30, 1997 - 10:00 a.m.

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BEFORE:

Honorable Thomas Gannon, Majority Chairperson
Honorable Jerry Birmelin
Honorable Scot J. Chadwick
Honorable Daniel Clark
Honorable Stephen Maitland
Honorable Dennis O'Brien
Honorable Robert Reber
Honorable Thomas Caltagirone, Minority Chairperson
Honorable Harold James
Honorable Kathy Manderino
Honorable Joseph Petrarca

KEY REPORTERS
1300 Garrison Drive, York, PA 17404
(717) 764-7801 Fax (717) 764-6367

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ALSO PRESENT:

Brian Preski, Esquire
Majority Chief Counsel

Judy Sedesse
Majority Administrative Assistant

Heather Barnhart
Majority Research Analyst

William H. Andring, Esquire
Minority Chief Counsel

Galina Milohov
Minority Research Analyst

C O N T E N T S

CHAIRPERSON GANNON: The House Judiciary Committee will come to order. Today we are holding hearings concerning the Supreme Court's Suspension of Acts of the General Assembly. The intent of these hearings is to get a better understanding of the relationship of the General Assembly to the Supreme Court, and the Supreme Court to the General Assembly insofar as it relates to suspension of legislation passed by the House of Representatives, passed by the Senate of Pennsylvania, signed into law by the Governor, and in some viewpoints nullified by the meeting of the members of the Supreme Court without a case or a controversy being before it.

With those remarks, I would like to call the Honorable John M. Morganelli, District Attorney for Northampton County. Welcome, Mr. Morganelli.

MR. MORGANELLI: Mr. Chairman, thank you. It's a pleasure to be before your committee once again. I would like to take this opportunity, both personally and on behalf of the Pennsylvania District Attorneys Association, to thank the committee for this

opportunity to be heard on one of the most important issues confronting us today; namely, the power of the judiciary, and specifically Article V, Section 10, of the Pennsylvania Constitution which delegates to the Supreme Court of Pennsylvania certain rule-making powers.

In my view, the issue of judicial power in a democratic society is one of the most compelling issues of the time and one that cannot be analyzed without some historical perspective. In many ways, the American judiciary is now the single most powerful force shaping our society, our culture and our morals. At all levels, the Supreme Court of the United States, lower federal courts, and our state courts, through judicial decisions, are deciding hot-button questions that basically are questions of policy and politics that, quite frankly, are none of its business.

Political victories are being achieved in the courts that could not be achieved at the ballot box or in the legislature. Over and over again judges are inflating enumerated rights and creating new

rights that do not exist in the Constitution which they enforce against democratic decisions often arrived at at both the ballot box and in the legislature. Court decisions are today reported as victories for attitudes or positions rather than as legal determinations, and those decisions resonate throughout our culture with powerful effects on public attitudes.

In the area of criminal law, the rights of criminals have been steadily expanded and those of the community contracted. The American judiciary continues to use the Constitution and parts thereof such as rule making to take basic decisions out of the hands of the people.

The culture today and the law today is a fiat of a majority of nine lawyers with respect to the U.S. Supreme Court and seven lawyers with respect to the Pennsylvania Supreme Court and forced upon the citizens. Contrary to the plan of American government, the courts have usurped the powers of the people and their elected representatives. We are no longer free to make our own fundamental

and moral decisions because the courts oversee all such matters when and as it chooses. A crisis has occurred because the political nation has no way of responding.

The founding fathers built into our government a system of checks and balances, carefully giving to the national legislature, state legislatures and executives powers to check each other so as to avoid either executive or legislative tyranny.

The founders had no idea that a court armed with a written Constitution and the power of judicial review could become not only the supreme legislature of the land, but a legislature beyond the reach of the ballot box.

The court was thought as a minor institution by the founding fathers and, therefore, there were no provided safeguards against its assumption of powers not legitimately its own and its consistent abuse of those powers. The executive legislative branches have checks and balances, but neither of them can stop the judiciary adventures in making and enforcing policy.

A review of some of the language of

the Federalist Papers written by Alexander Hamilton, Federalist Paper Number 78, gives us an insight as to how the judiciary was viewed at its inception. I'd like to read a few quotes from that. This is from the Federalist Papers. We proceed now to an examination of the judiciary department of the proposed government...whoever attentively considers the different departments of power must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to ignore or injure them.

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be

said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack the success either of the other two.

As can be seen from the above quoted language of the Federalist Papers, the founding fathers never contemplated a judiciary that imposes its will over the people. The court's impact on democracy has been horrendous. Today, the court lines up against the majority of the electorate over and over again citing rule-making and other constitutional authority.

We are here today advocating an amendment to the Pennsylvania Constitution rule-making provisions under Article V because it is the judiciary's assumption of power not rightfully its own that has weakened and indeed severely damaged the constitutional structure of our government. It has been the judiciary

that has misled the public as to the role of judges in a constitutional democracy.

Harsh criticisms by political leaders of outrageous judicial decisions has not been enough to restore the proper balance between the branches of government. Changing the behavior of the courts by way of appointments have also failed. More serious efforts to limit the power of the courts run into the familiar refrain that our liberties are being threatened.

Today, however, it is now clear that it is the courts that threaten our liberty, the liberty to govern ourselves more profoundly than does any legislature. Any reform efforts must contend with the sanctity that the judiciary has attained not least through their own rhetoric.

Article V, Section 10 of the Pennsylvania Constitution provides, quote, the Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, end of quote. Despite the seemingly simple and direct language of the Pennsylvania Constitution, our

court has cited this particular power to weaken law enforcement's ability to protect victims, witnesses and all of our citizens from crime.

The Pennsylvania Supreme Court more and more is asserting authority over matters historically left to the legislature in the name of its state constitutional rule-making power. The court has been less and less able to exercise self-restraint, overruling or modifying a broad spectrum of legislation, including laws of evidence, capital punishment proceedings, child videotaped closed circuit TV testimony and the Commonwealth's right to a jury trial to name a few.

Even the academic community has commented on our Supreme Court's propensity to wield its rule-making authority in Pennsylvania as a powerful check on legislative action it does not like.

The Supreme Court, under the guise of rule-making, have successfully made their own agenda the law of the Commonwealth of Pennsylvania contrary to the wishes of our citizens as expressed by you the legislature. Our citizens were outraged by the lengthy delay

between the death penalty verdicts and carrying out of the penalty.

As their representatives you properly enacted sound legislation to do something about it. But our Supreme Court has said that there is nothing you can do about it; there is nothing the public can do about it because it is their prerogative to declare and void legislation under rule-making power.

As you also know, after the court struck down legislation allowing traumatized child abuse victims to testify, you pursued the only avenue available--constitutional amendment. After legislative and public approval, the courts of this state struck it down because of the constitutional rule-making clause. Once again, rule making was used as a weapon against those who would protect victims and fight crime.

The Commonwealth right to a jury trial and the evidence code are additional examples of the court's usurpation of traditionally legislative functions which clearly undermines fundamental principles of democracy. In many ways, the court is now an

obstacle to democracy. Once the court assumes an area of law within its rule-making power, the process of developing rules moves behind the cloak of judicial secrecy, beyond the reach of the other branches of government and beyond the power of our citizens.

Indeed, an author who is himself a criminal defense attorney and law professor has strongly set forth that he believes the rule-making power of our Supreme Court is completely out of control, offends the separation of powers doctrine and robs the Pennsylvania legislature of its power and ultimately thwarts the will of the people.

The federal system does not lend itself to such problems, neither do the rule-making systems of many states. These jurisdictions recognize the danger of the courts using rule making to become a super legislature. Absent some kind of checks and balances, the rules of court are expanded to regulate more than technical, housekeeping matters but to instead affect important social policy questions.

There appears to be only one means at

the present time by which the Supreme Court can be brought back to constitutional legitimacy. That would be a constitutional amendment with respect to Article V, Section 10 of the Pennsylvania Constitution. This public hearing, as well as the public hearings that have taken place, are significant steps in the right direction.

The prosecutors of this state have unanimously endorsed the concept of adjusting the ability of the Supreme Court to legislate under the guise of rule making. Clearly, those who benefit from the pronouncements of the court will cry and suggest that such action endangers the independence of the judiciary and its freedom.

To the contrary, however, as has been stated, it is the courts that are not merely endangering our freedom, but actually depriving us of particularly our most precious freedom, the freedom to govern ourselves democratically unless the constitution actually says otherwise.

Lastly, it also clear to me that amending the Constitution as suggested can only

be the first step by our citizens to reclaim democracy. I can also assure you that it will be met with resistance and with attempts to void your actions. Therefore, the citizens of our state will have to be informed also on a case-by-case basis of the individual decisions of individual justices.

It is my personal opinion that in conjunction with amending the Constitution that we also focus our efforts at the ballot box. The next judicial retention election for Supreme Court justice is 1999, and in my view the public must be informed as to the individual decisions of individual justices and those justices who continuously attempt to legislate and thwart the will of the people not be retained. For the time being, however, while that effort is begun, we ask for your support in reining in the rule-making authority of the court.

I'd like to thank you for your consideration of my remarks. I'll be happy to answer any questions that you might have.

CHAIRPERSON GANNON: Thank you very much. Representative Reber.

REPRESENTATIVE REBER: Thank you, Mr. Chairman. Let me preface my question and/or remarks by saying, I don't necessarily disagree with many of the concerns that you have expressed as a result of actions statewide the court has passed but as somewhat of a follower of constitutional history, I'm a little bit interested because I didn't see it and maybe someone else is going to get to it and you're aware that some other presenter today is going to in detail talk about this. Suggest that to me and I'll certainly reserve that question.

My concern though is the language in Section 10 that, and I know Senator Piccola, who is here, has suggested in Senate Bill 1045 to remove vis-a-vis a constitutional amendment. That is the language that is the last sentence of Section 10 that all laws shall be suspended to the extent that they're inconsistent with rules prescribed under these provisions. I really didn't notice any dissertation, analysis or comparison or contrasting that language as to how the court is moving outside its constitutional purview when they do act in light of that language being in Pennsylvania

Constitution as we know it.

I guess the reason I say that, during the course of your testimony you were citing Judge Bork and citing the Federalist Papers. Of course, that all goes to the federal Constitution. I'm really concerned about, one, the Pennsylvania constitutional history that brought about this particular language, and if there's any history analysis as to why that is there, because, with that language in the Constitution, it certainly provides a very firm linchpin, if you will, for the justices to rely upon the type of activities that in many cases I think are overbroad in their actions.

I'm wondering if you have any background as to, under the current constitutional section that we're talking about, why their action with that language in there is not allowable and justified. Is there any history behind that as to the dynamics as to how far they could go in doing what they're doing based on that language?

MR. MORGANELLI: I think it's a good question. I don't know whether any other

speakers will address it. Let me just tell you what my thoughts are on that.

I believe that you are correct in your analysis that the language that you quoted with respect to the laws being able to be suspended if any laws are inconsistent with the rules and procedures of the court is exactly what the court is doing; for example, with respect to the recent suspension of the act that was passed by you regarding the death penalty appeals. My view is that the problem is their interpretation of what constitutes procedure.

What we're saying I believe is that, if the legislature enacted a law, for example, that said the lawyers who file briefs in the Supreme Court only have to file one brief rather than 25 briefs as the rules of the court prescribe, I believe that that law properly could be set aside under that section saying that that law is inconsistent with their ability to make procedural rules to govern their court operations; how many briefs are to be filed, briefing schedules; how long, for example, courts can take to reach decisions in

matters before the Appellate Courts. There's been recent amendments to the rule that now judges have to act in a certain timeliness.

I believe if the legislature passed any law with respect to that area, the Supreme Court properly could avoid that rule under that provision and say that is inconsistent with our procedural rights as expressed in the Constitution.

I think where the problem is, is the court's expansion of the view as to what is the procedural rules. What they are doing from our perspective is, under the beginning language of the rule, which was quoted, where it states that Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, that particular language is what the court is relying on by saying that the death penalty laws and the code of evidence, and all of the other areas that they've struck down constitute rules of procedure. That is where I think we have a strong disagreement.

The way we look at the court procedures are, rules and regulations that

prescribe the operations of the courts on a daily basis, so I think that you are correct, Representative, that the former language that you read gives them the authority to do and void legislation when that legislation is in conflict with procedural rules internal to the governing operations of the courts.

But, I don't think that's what we're talking about here today. What we're seeing is the Supreme Court saying that everything is a matter of procedure and that they have a right to use the lateral language that you refer to and void substantive legislation that goes to issues that the citizens have a right to decide; for example, how death penalty cases are to proceed and those kind of things. I think that the Supreme Court is overstepping its bound; not necessarily on the language that you quote, but on their expansion of this procedure issue.

REPRESENTATIVE REBER: I intend to agree with that again. But, I still come back to the language that appears in the current Constitution, and it goes to substantive right. Do you have a copy of Section 10?

MR. MORGANELLI: I don't have all of it, but you can read it. I'm familiar with it.

REPRESENTATIVE REBER: If such rules are consistent with the Constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant, nor affect the right, et cetera, et cetera. It goes on to say, all laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

So, it really gives them some lawful room, if you will, on these kind of things. I think it really comes down to what was the intent when this particular section was drafted. I'm not sure because I didn't look at this, and I wish I would have had time to have done so, whether it flowed out of the '68 Constitutional Convention or any of the three prior.

MR. MORGANELLI: I think your analysis is correct. I personally have not looked at the historical background information as to what created that particular language. I think it would be helpful to do that.

I also think that the point that you

bring up is one of the reasons why we need to have some kind of amendment here because, we need to clarify. The court has taken general language in my view, general procedural rules and, of course, they'll be borne out by looking at the history of it, and expanded that into areas I think as I have said are really none of its business and intrudes on the legislature.

I think that's the whole reason why this esteemed body will have to be very careful in terms of the language that, if this does proceed to an amendment and into a ballot question, as to exactly what kind of language we are going to place it with, or whether it will just be abolished. I think that's a matter of your judgment and taking into consideration those issues that you raised.

REPRESENTATIVE REBER: I think that certainly is really the ultimate jugular issue we have to work off of, backing down or doing whatever we do to prepare this for the ballot box.

Thank you, Mr. Chairman. I'm not going to belabor. Maybe we might get into this with someone else who has in fact maybe taken a

hard look at this particular aspect. I think for, one, this is the jugular issue of the committee to determine when we do craft whatever language comes out of these particular hearings and proceedings.

CHAIRPERSON GANNON: Thank you, Representative Reber. Representative Chadwick.

REPRESENTATIVE CHADWICK: Thank you, Mr. Chairman. Mr. Morganelli, I'm not going to take a lot of time. Basically I agree with everything in your statement, right down to the commas and periods. I wanted to pass along an anecdote to you because you have suggested a need for a constitutional amendment.

Earlier this year Senator Piccola and I--he's in the room here--attended a meeting regarding the unified judicial system issue with representatives of the Governor's office and Justice Montemuro. At one point when we were discussing the possibility of a constitutional amendment, Justice Montemuro stated rather glibly the court would not hesitate to rule a constitutional amendment unconstitutional.

Now, we're talking about constituting

an amendment to the Pennsylvania Constitution, passing two consecutive sessions by the General Assembly, ratified by the people of Pennsylvania. He stated -- Truly it was a very glib statement that they would not hesitate to rule a constitutional amendment unconstitutional. Senator, am I correct in my assessment?

SENATOR PICCOLA: Yes.

REPRESENTATIVE CHADWICK: I see the Senator is nodding his head that he agrees with what I thought I heard. I agree with you one hundred percent that this court is out of control. I'm just not sure how we're going to get to the end of it.

MR. MORGANELLI: Let me say this. I disagree with the justice. I don't think that they would be able to state that the amendment emanating from the citizens to amend the Constitution can be declared unconstitutional. I don't think that makes any sense at all.

I also think if that would be the case, certainly impeachment proceedings would be the next step. That would be showing a judicial tyranny and now we would have no way

of controlling one of the branches of government. I would be very surprised whether the majority of the court would have that view if they were really confronted with it. I doubt it, but if they did, I think that would have to be the next step.

REPRESENTATIVE CHADWICK: I'm having a hard time finding anything to disagree with you on. Thank you very much.

CHAIRPERSON GANNON: Thank you, Representative Chadwick. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: Thank you, Mr. Chairman. Just a statement and then a question. My background is early American history and political science. I have been doing some rereading of the Civil War era. Some of the basic protections that we're all afforded that we feel are very very sacred to all of us in this room under our federal and state Constitutions is something that we hold near and dear to us.

We do have the proper checks and balances within distinct and separate areas of our government, both at the state and federal

level. Historically, there have been times where the ebb and flow occurs both in the state and at the national level over the relationship of the three areas of government.

Something came to mind as you were speaking. During the Lincoln administration, which he probably innocently and correctly at the time ignored some of the basic tenets and usurped the powers of our national government by ignoring and basically just putting aside habeas corpus in which he was arresting officials that did not agree with his administration, both at the national and state level and imprisoning them without benefit of trial just as Tanney (phonetic), Supreme Court Justice at the time, said that he was wrong and he shouldn't be doing that. He even toyed with the notion at the time of arresting and imprisoning a chief justice--a little side note.

The courts, they have been around just as long as our government here, especially in this Commonwealth. There are many, many times that we disagree with their decisions and not all of us are happy with those decisions,

and especially those of you who are attorneys know only too well the impact that that can have especially in a prosecutor's realm where you implement the acts of our legislature. Hopefully, we are doing the right things.

I just feel, even in recent history, World War I and World War II things were done in many of the areas concerning our security in which rights of citizens were ignored or overlooked basically for the total protection of this country. In hindsight, when we look back over those years, as history records, some of those things weren't too nice that we did to our fellow Americans.

I hold very dearly the tenets of protections of our Constitution. I mean, we live by written words and law. I understand the concern that many of my fellow colleagues have about the Supreme Court and where they have been taking us as a state and as a legislature. We object to their intrusions. But, I also fear we may get a little bit carried away with this and try to don the black robes.

I'm asking you a question now, don't

you also feel that this is a very dangerous measure that we are embarking upon that cooler heads should prevail and it should be done very cautiously and a lot of consideration should be given when you are talking about amending the Constitution and a possible battle with the Supreme Court over whether or not they could or could not rule that a constitutional amendment could be valid? We're looking for a classic donnybrook to develop here. What's your thought on this?

MR. MORGANELLI: I agree that the legislature and citizens should move cautiously. I feel that whenever we are looking at amending the Constitution, which by the way, I'll be honest with you. My personal opinion is that, I don't like constitutional amendments as a way of trying to turn around court decisions that we don't agree with. But, the problem in this case is not court decisions.

You made the point about the legislature donning the black robes and becoming judges. I think just the opposite is occurring with the court. They're putting on

suits and ties and becoming a legislature, when really there are no cases in front of them.

What I'm getting at here is that, many times the courts rule against the prosecutors and we reach decisions. We may not like the ruling, but we certainly are not in a position to imply that the judges are doing something devious or beyond their power. They interpret the law in a certain manner. I really don't have a problem with that.

The reason I think that we need to look at this rule making is because they are taking general language, which I think really was made for procedural internal operations of the court and using that as a basis to interfere with legislation when there's no case in front of them. There's no case in front of them when they just repealed the death penalty statute and saying that this is just a violation of their prerogative to set the way they think the law should be.

I think there is a distinction between that and where we read decisions where there's two parties in a controversy and they make a judgment or a ruling based on the law.

I think that's a little different than what they are doing with the rule making.

I agree, Representative Caltagirone, a hundred percent that this is something that should not be done in a rush. I don't think it should be done in a few weeks. I think it needs to look at the history, as Representative Reber has indicated, as to the historical background as to when the language was adopted, what was the intent of the framers. I'd like to look at that. I believe you're going to find that it was to be so the courts could regulate their own and you wouldn't have a legislature telling them what to do for their own internal processes.

But I agree, sir. I think that we need to act cautiously. That doesn't mean, though, that we should be afraid to tamper with this section because I think this section needs to be tampered with in some manner. I will leave to the wisdom of you who will have the give and take of the legislative process where I think this belongs to work out the mechanics of the language or how it should be done. But, I do think that it's needs to be attended to.

I think we are seeing over and over again an agenda of a minority of the citizens, the court, not even the whole court. There's a consent on our court as their right to involve itself in legislation. But I agree, and I think you will proceed as you have done in other issues in a cautious manner.

REPRESENTATIVE CALTAGIRONE: I understand that we're looking at the rule-making procedures. I know this is the gist of the genesis of what we're dealing with here. I do feel that -- and having worked with many of the Senators and especially the former chairman of this committee, now Senator Piccola, and, of course, Chairman Gannon, that they are very knowledgeable in areas of the law. They are practicing attorneys. They know too well what the rule-making powers of the court is. I certainly wouldn't want them telling us how to make our rules in the House or the Senate and how we should run our bodies and what we do when we adopt our rule-making capacities in running our chambers.

I'm just curious as to how they are going to be reacting to us telling them about

what they can and can't do. I understand all the implications of what's been said in previous hearings. I'm looking forward to hearing the rest of what's being said today. But, I do think we have got to be extremely cautious in attempting to amend and tamper with areas of our State Constitution that has served us well over 250 years.

MR. MORGANELLI: I think that would be the prudent way to proceed, in a cautious manner, but I do think it needs to be addressed.

REPRESENTATIVE CALTAGIRONE: Thank you. Thank you, Mr. Chairman.

CHAIRPERSON GANNON: Thank you, Representative Caltagirone. Representative Clark.

REPRESENTATIVE CLARK: Good morning. I've conducted, as the Chairman of the Subcommittee on Courts, two hearings on this issue; one in Altoona and one in York. During some of those discussions, which were probably a little less formal than what they are today as we sat around a table, we sort of came to the conclusion that the legislature won't be

able to amend the Constitution; that the courts will find a way to strike down any kind of legislation that would go to that, or strike down the question as it would appear on the ballot given their propensity to do that. In the past they've cited such precedent as the Sheriff of Nottingham in England that we're almost unable to effect this by an amendment to the Constitution.

So, let's give that as a fact for now. Let's focus on your second solution to this dilemma, and that is through the populous. Along those lines we have talked about trying to hold the justices of the Supreme Court and all the Appellate Courts more accountable.

Some suggestions along those lines, one included a Boston Tea Party, which we dismissed. Other ones included the length of their terms, reducing that so that there would be more opportunities for retention; there would more opportunities to discuss the decisions of each judge and how they voted. There's discussions on term limits. There were discussions on opening up the process of judges so they could debate or discuss various court

decisions in the past and how they would agree with those or disagree with those; generally, try to educate the public through those types of forums, and also part of the responsibility of also following political parties to get out the word when it comes to retention elections, which, if we could reduce the term, it would be more frequent. We might be able to have a constant evolving year to year or every two years discussion on our courts and what they're deciding and how they are deciding. I'd like to have you remark on that if you would.

I'd also like to add, my understanding is the federal rules, procedures in federal courts, they are adopted by the justices and they're ultimately approved by Congress. You might want to comment. I appreciate it. Thank you.

MR. MORGANELLI: Let me say, first of all, I did have an opportunity to watch briefly some of the testimony that was done when District Attorney Stanley Rebert testified in one of your hearings on PCN. I noted there was some discussion about whether or not this may be a futile effort and the court may strike you

down. I really do have a problem with that assumption as a fact. I think that appears to be the only legal mechanism that the people, that the citizens have to change the Constitution.

The Constitution is the basic document of our government. The Supreme Court has a right to interpret what is constitutional or what is not constitutional of that document. But ultimately, the document is a result of the rule of the people.

To say that the legislature cannot put on a ballot an amendment to change this Constitution and that the Supreme Court can just say no, we're not going to allow the people to amend its structure of government because we know what's best, I think is outrageous. I think it's an impeachable position to take, and I don't believe that that is accurate.

I know they have struck down attempts to amend the Constitution on technicalities, like having multiple questions on the ballot rather than one question. Then we have to go back to the drawing board and just put one

question on the ballot. That's my view. That's the answer to that. If they find that to be a violation, then we go back and we put it on again and we make it one question. Now we see what happens. But, I don't think they can say you're not allowed to do this and we're going to find some way.

I know your concern is, and I think it's a legitimate concern, but I find that so offensive to government and to the democracy we live in that I just think it would be a most outrageous thing for the court to do, and I think it would lead to a real clash of the branches of government.

The other suggestions that you've raised, quite frankly, I have not had a chance to give much thought to. If you ask and you put me on the spot today and say are those good ideas, I would probably be more cautious and say, I'm not really ready to reduce the terms of the justices or to expose them to the political process anymore. It may aggravate the condition rather than improve it.

I think the idea behind the retention and the long terms was to move the judges out

of the politics and out of the pressure of being forced to have the decisions on the whim of the public in cases because there's controversy between parties. I'm not certain that that's necessarily bad or whether I would want to tamper with that. I think I would need to think about that in more detail.

What I'm concerned about is when they just intrude; when there is no case in front of them at all; no parties before them, and cite this general rule-making authority to come in and take over the legislative process because they happen not to like the legislation. They may not like the death penalty. They may not like other things that this legislature does, but if it's supported by the people, then I don't understand -- unless it violates the Constitution and no one has said that the Death Penalty Act which was passed and now declared invalid under rule making was unconstitutional.

They didn't say it was unconstitutional in the normal sense that we think of unconstitutionality, a violation of the First Amendment or the Second Amendment. It was unconstitutional because they said it

violated their rule-making authority. That is the crux of the matter. We need to change that part of the Constitution because I don't think any of us agree that kind of substantive changes or direction is really procedural as a rule-making authority says.

The other areas I think need to be debated and discussed in the public arena, I am not prepared to endorse any of those ways yet because I really haven't given much thought. But my gut feeling is, I wouldn't want to tamper too much with the isolation of the court from the political process. It's bad enough to have judge races every 10 years. I wouldn't want to have them every two or four years. I think it could create a difficult position for judges who are in the middle of cases and now they're running for election and they're being asked questions about their views and they have to decide these cases. I think it could cause some problems.

Again, I understand we're searching for solutions here.

REPRESENTATIVE CLARK: You indicated that if we would try to amend the Constitution

and the Supreme Court to protect their own interest would strike that down we were headed for some constitutional crisis. I think before we even get to that, I think we're headed for a constitutional crisis on the unified court system, court order which many of us are not inclined to fund or follow. I think that will come to the forefront long before any effort to amend the Constitution to change the rule-making powers.

CHAIRPERSON GANNON: Thank you, Representative Clark. Mr. Morganelli, we thank you for being here today and presenting us with your testimony and insight into this very important issue.

MR. MORGANELLI: Thank you for your courtesies.

CHAIRPERSON GANNON: Our next witness is Senator Jeffrey Piccola and former Chair of the House Judiciary Committee. Welcome, Senator Piccola. We're glad to have you.

SENATOR PICCOLA: Mr. Chairman, and members of the committee: It is indeed a personal pleasure and a high honor and privilege to appear before the committee. As

you know, I know firsthand of all the good work you have done on so many issues. I'm particularly pleased that Chairman Gannon and Subcommittee Chairman Clark have seen fit to schedule this series of hearings on the Pennsylvania Supreme Court's rule-making authority.

Before I begin my prepared remarks, Mr. Chairman, with your permission, as you may recall back in March of 1995 when I had the honor of sitting in the position you're in now chairing the committee, we held a hearing on court reform legislation, including legislation dealing with the rule-making power of constitutional amendment. With your permission I'd like to make the transcript of that hearing from March 2nd, 1995, a part of this record.

CHAIRPERSON GANNON: That's fine. We welcome that testimony.

SENATOR PICCOLA: This could be a somewhat dry and scholarly subject. However, if it is not addressed, we may as well hand over the keys of this Capitol building to the judiciary, because, in this regard, as in some other areas, Pennsylvania Supreme Court is out

of control.

The court's legitimate power in rule making is embedded in our State Constitution, specifically Article V, Section 1, where it says that the judicial power of the Commonwealth shall be vested in a unified judicial system. Section 2, which states, the Supreme Court shall be the highest court of the Commonwealth and in this court shall repose the supreme judicial power of the Commonwealth.

And finally, in Section 10(c) which states that, the Supreme Court shall have the power to prescribe general rules governing practice, procedure, and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees. Later on it goes on to say, and all laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

There are at least four examples, recent examples of the Supreme Court using the cover of this authority to nullify or threaten to nullify acts of the General Assembly. The first took place near the end of the 1993-94

session when we were working on a code of evidence. I'm sure that many of you on this committee will remember the hard work of former Chairman Caltagirone, his staff, my staff at the time, many interested members of the committee, as well as Senator Craig Lewis and the Senate Judiciary Committee.

After working for almost two years during an entire session, compiling a bill that trial judges and litigants, both criminal and civil, both plaintiff bar and defense bar, were anxious to have enacted, the Pennsylvania Supreme Court near the very end of the session notified us that if we enacted it, they would simply suspend it since it was in their view procedural. They appointed a committee to study this issue and to report back to us. As you can see, no report has ever been made, and so far as I'm aware no code of evidence has ever been enacted or promulgated.

The second occurred last session when we enacted a bill to allow for wages to be garnished by landlords who suffered damages to rental property at the hands of tenants. Again, the court suspended that statute without

a case in controversy claiming that garnishment is procedural.

At the end of the last session, we passed a bill on medical malpractice reform. Large portions of that bill were suspended for the very same reason.

Finally, and most outrageously, the court recently suspended a statute passed during the special session on crime requiring certain appeals in death penalty cases to be consolidated. One of the biggest frustrations in the criminal justice system is the fact that in first-degree murder cases where the death penalty is imposed, the appeals process takes such a long period of time. One of the reasons that it takes such a long period of time is that at the state level the convicted individual takes different issues up on appeal separately; thereby, significantly lengthening the process. The legislation in question simply said that these state appeals would be consolidated in one appeal. Again, our Supreme Court said this is procedural and suspended the statute.

Pennsylvania Appellate Courts, and

particularly the Pennsylvania Supreme Court, are out of control. Simply by declaring something procedural in whole or in part, they have nullified and apparently will continue to nullify, even without litigation in front of them, acts of the General Assembly.

These judges and justices are men and women elected for ten-yearlong terms in elections where they are forbidden to speak out about their views on the important issues they might face. These justices are men and women who stand only for retention after ten long years in office. They then are in a position to nullify acts of the General Assembly, whose members, you and I, are elected every two and four years in which the issues are hotly and closely debated. These justices are men and woman who deliberate behind closed doors and who are virtually unaccountable to anyone while they make or nullify the public policy of this Commonwealth.

What should we do about this? When a child is out of control you discipline it. The court needs to be disciplined. There are two ways to do that in our constitutional scheme.

The first is through the appropriations process. We need to look very carefully at the appropriations of the courts during the next budget cycle.

The second is the impeachment process. I must speak carefully on this subject since, as a member of the Senate, I would have to sit in judgment on any article of impeachment the House of Representatives might send over. However, as a former member of the House, intimately familiar with the impeachment process, I would suggest that you look very carefully at whether a judge or a justice of the court in his or her court ruling violated the Constitution by suspending any or all of these statutes.

At the very least, the debate should take place in the House or in this committee on that subject, and for that reason I am so very glad that the Chairman has seen fit to conduct these hearings. An impeachable offense is not necessarily a criminal offense. It can be a political offense such as severely and intentionally violating the Constitution of Pennsylvania by depriving a sister branch of

government of its constitutional prerogative to enact public policy. The judiciary is supposed to interpret and apply the law; not write new law, and impeachment is a legitimate tool of the legislative branch to ensure the court adheres to its rightful function.

Finally, I would recommend to you a constitutional amendment which was discussed in some length earlier, and that is embedded presently in Senate Bill 1045 which I introduced in the Senate this session. This would delete that section of the Constitution giving the court the power to suspend statutes and explicitly forbid them from doing so.

You must remember--this is in partial response to Chairman Caltagirone's comment to the earlier witness--we are not suggesting that we are going to infringe upon the court's power to declare a statute unconstitutional in a case that's properly brought before them in litigation. That must remain part of our constitutional framework.

Our Appellate Courts are out of control, and it is our duty as the legislative branch of government to rein them in. Thank

you for allowing me to testify. I'll be happy to answer any questions that the members of the committee might have.

CHAIRPERSON GANNON: Thank you, Senator Piccola. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: I didn't have a chance to tell you publicly, but I read in the clips you are now a 33rd Degree Mason and congratulations on your accomplishment.

SENATOR PICCOLA: Thank you.

CHAIRPERSON GANNON: Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman. Welcome, Senator Piccola. I'm setting myself up here because I know your astute debate skills, and how anything I will say will make me sound like a fool, but I'm going to risk it anyway.

SENATOR PICCOLA: I don't think you ever sound like a fool, Representative.

REPRESENTATIVE MANDERINO: I guess just as a matter of record, and because we disagreed on it when it was going through the process, I just want to put a counterspin on at least your analysis of what the Unitary Review

Bill did and that it was simply making one appeal. I think it was doing a lot more than that.

In particular, with regard to the article of the Constitution that we keep referring to that gives the court the ability to prescribe general rules governing the practice and procedure and the conduct of the courts, far be it for me to say I told you so.

As I'm looking through the transcript of the special session and the amendments that at least I offered during that special session, I thought my amendments were addressing specifically those court procedures, practices and conduct when it dealt with the time frame for review of the record, and also the requirement that the Commonwealth must file an answer to a petition before we go to hearing.

I'm not suggesting that that's the reason that the court struck it down. I'm just suggesting that there was a lot of meat and substance in there that gives room to the question to arise as to whether or not had we had a time frame of a little bit longer on review of the courts so that it would deliver

review of -- I'm sorry, of the appellate counsel or requirement that not only does the petitioner have to file a petition, but the Commonwealth has to answer before we go to hearing. Those to me seemed clearly procedural. I'm sure you are going to tell me why they weren't.

My only point is, there was a lot of stuff in that bill. It wasn't as simple as I think, at least so far today, we've led folks to believe. I personally thought there were procedural practice time frame issues immersed in that bill that could have been corrected without having infringed upon the idea of unitary review. I know you want to respond.

SENATOR PICCOLA: To respond, and I'll respond generally because I don't have specific recollection of your amendments. To respond specifically to that statute as well as the code of evidence issue, you have to look I think at the words in the Constitution.

I happen to be a strict constructionist. I think that's why I get upset with the court broadly applying what they perceive to be their rule-making function.

Yes, they have a rule-making function under the Constitution and they should have such a rule-making function. But, all the Constitution says about suspending statutes is that, laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

If the court had had a rule that was explicitly inconsistent with a statute, or the statute was explicitly inconsistent or repealed a rule of the court, then I think the court has a right under this section to step in and say; for example, if we said the answer must be filed within 10 days and the court's rule is 20 days, we amended it to say 10, I think the court has the power to say that part of that statute is not applicable. Our rule of 20 days is applicable.

But, the court has taken that and has grabbed statutes in their entirety that maybe touch on a procedure; for example, the code of evidence, they --

REPRESENTATIVE MANDERINO: You never presented anything to them on the code of evidence.

SENATOR PICCOLA: I understand that. They told us in no uncertain terms that they were going to suspend the entire statute. They suspend statutes where there are no rules explicitly inconsistent. They just say, well, this is in the area of procedure. We may or may not decide to enact a procedure and, therefore, we're going to suspend that statute. What is procedure and what is not procedure, as you are well aware, is a very gray area or can be a very gray area.

The court has taken this provision where the legislature might attempt to step in and shorten a filing deadline or do something that is clearly procedural that the court has already spoken on in its rules and said no, the court may do that. That's what this section of the Constitution means in my estimation. The court has grabbed a vast body of jurisdiction that I don't think they are entitled to have. That's where I think we get into our differences of opinion because the court has broadly construed this section of the Constitution and has, unfortunately, applied it too broadly.

REPRESENTATIVE MANDERINO: Thank you.

CHAIRPERSON GANNON: Thank you, Representative Manderino. Representative Petrarca.

REPRESENTATIVE PETRARCA: Thank you, Chairman. Senator, I didn't have the opportunity to serve on this committee when you were in the House. I think we crossed briefly. A quick question or two.

This phenomenon, if you will, with the Supreme Court, is this something in your opinion that is happening very recent, or does this go back a number of years or decades? What is the timetable regarding what's happening?

SENATOR PICCOLA: This has been in the Constitution at least since 1968 and there may have been a similar provision prior to that. I haven't researched it that far back. If you go through Purdon's, you'll see statutes occasionally suspended for a variety of reasons or a section suspended because it was rule making.

REPRESENTATIVE PETRARCA: Has the Supreme Court been overstepping its bounds

since that time or is this recent?

SENATOR PICCOLA: My analysis has been, in the last maybe ten years, and that's an arbitrary number. It might have gone back a little longer or might not have been quite that long. Say the last decade or so, the Supreme Court has increasingly stepped into this area in a fashion much more broadly than they should be stepping.

I think the proof of that is in the pudding. The fact that the Chairman is having these hearings is evidence that the court has obviously tread upon significant areas in which many members of the General Assembly feel we have a legitimate interest in legislating, and the court has stepped in and nullified statutes.

It's a very serious thing, and we could criticize the media for jealousy regarding our powers. I think it's a very serious thing when elected representatives of the people who are elected every two and four years are -- have their statutes, the acts that they enact into law, overturned by a court. It is appropriate that that happen if that statute

is in violation of one of the sections of the Constitution dealing with fundamental rights, Bill of Rights, habeas corpus, what have you. That's entirely appropriate.

However, we're not talking about that. We're talking about the court just coming in, without even having a case in controversy, regarding what it perceives as its powers, and the effect of that is to overturn statutes, many times on substantive law, that the legislature has seen fit to act on.

We can debate back and forth, Representative Manderino and I don't agree on the unitary appeals issue, but my side prevailed on that. The elected majority prevailed. It's a very dangerous area when you allow the courts to get into this area and don't check them. They are increasingly getting into this area. The fact of this hearing I think is evidence that that trend has increased dramatically in recent years.

REPRESENTATIVE PETRARCA: This is obviously much more than a disagreement with the Supreme Court's holdings in a few cases where there are decisions?

SENATOR PICCOLA: Absolutely. We're always going to disagree with court rulings. That's history as long as the republic. There are going to be people that agree and people who don't agree.

If there's a constitutional principle involved, then clearly the court has a responsibility to step in and make a decision that either a statute is or is not constitutional. Nobody is suggesting, nobody is suggesting that we interfere with that power. This has to do with the court nullifying acts of the legislature because they assert that it's procedural. It may or may not be actually in conflict with an actual rule that's in place. They're just saying this whole area is procedural, so that's for us to decide and to make rules about.

REPRESENTATIVE PETRARCA: I think we got close with this with Senate Bill 806 we had in the House not too long ago dealing with search and seizure rights of our citizens and how that was interpreted by some people to be an issue on the forefront because of some disagreements with the Supreme Court holdings

in that area of law. Thank you.

SENATOR PICCOLA: I'm not familiar with that specifically, but if it had to do with search and seizure and we enacted it and a defendant or someone who feels their rights were violated, took that case to court claiming what we did was unconstitutional, there is absolutely -- I have no problem whatsoever with the Supreme Court sitting and deciding whether what the legislature did was in violation of a section of the Constitution dealing with search and seizure. That is the role of the Supreme Court, but that's not what they're doing here.

REPRESENTATIVE MANDERINO: Mr. Chairman.

CHAIRPERSON GANNON: Thank you, Representative Petrarca. Mr. Andring. I'm sorry. Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you, Mr. Chairman. One other question, Senator Piccola. I realize that Senate Bill 1045 is not in our committee, but it was distributed to us as part of today's packet. In thinking about what you've said, and then upon reflection reading the actual proposed change

to the Constitution in this bill, I'm not getting it.

What I heard you say was that the Supreme Court should be able to, for example, using the med-mal bill as an example or using the Unitary Review bill as an example. They shouldn't have struck down the whole Unitary Review bill in its entirety within procedure, but if they thought there were components of that bill that dealt specifically with their procedure, then they should have pointed out those particular components and suspended only those, the narrow construction view.

But, when I read the language proposed here, meaning deleting the wiggle room that said all laws shall be suspended to the extent that they are inconsistent, and then your argument is that they take extent too far, it appears the language goes maybe all the way in the other direction. The Supreme Court shall not have the power to suspend statutes which are inconsistent with the general rules.

Is there not some kind of in-between that tightens the current language, but basically doesn't say -- I read the new

proposal as saying hands off. You don't have a say about anything about what's in the statute.

SENATOR PICCOLA: You're absolutely right.

REPRESENATIVE MANDERINO: That is what it says?

SENATOR PICCOLA: That's what it says.

REPRESENTATIVE MANDERINO: That's different from what --

SENATOR PICCOLA: Well, no. It's different than what I believe -- We wouldn't be here today, I don't think, if the court properly excised the power that it has under the Constitution presently. I think we're here today because the court has overstepped its constitutional bounds.

What I was responding to is what I think the court under the present Constitution can legitimately do, and that is, pick and choose an item. For example, I cited 10 days versus 20 days.

REPRESENTATIVE MANDERINO: What you're suggesting is that, you don't even -- you're not comfortable that even if they were

doing that, that's not really want you want to see.

SENATOR PICCOLA: If Senate Bill 1045 were enacted, that's correct. However, that is only one of my suggestions. There's a couple of other ways of approaching this. Obviously, this is probably the most Draconian, and I would admit to that. There are other ways.

In fact, the court -- To show you the arrogance of the court, the court has on its rules right now a provision for the creation of a judicial council. One of the roles of the judicial council under the rules as they presently exist is that the judicial council, which would include legislative members, would be an advisory body to the court in the rule-making process. Up until just very recently, within the last month or less, the court never, with I think one brief exception in many many years, implemented the judicial council.

One way of involving people other than the court in the rule-making function is to, and I have suggested this as well, as another amendment to the Constitution or

different amendment to the Constitution, is to create a more meaningful judicial council; one that is not totally independent of the court, but involves more legislative involvement; more citizen involvement; more members of the bar involvement; other judges' involvement, so that they would actually do the promulgating of the rules subject to the final approval of the court itself.

I believe if you had a more broad-based involvement in the rule making of the judiciary, you would have less -- it would be less likely that the legislature would be trying to intrude in the legitimate area where the court tries to make rules. That's another way of approaching the same subject, which I don't necessarily oppose.

1045 is the most direct and straight-forward example. I think it makes for the subject of good debate. I would be willing to consider others, but right now -- I would even be willing to consider the court itself making itself available to the legislature in the rule-making power. That's another way of approaching it.

In other words, Congress and the Supreme Court of United States have a procedure, and I'm not totally familiar with it, but Congress is intimately involved in the federal rule-making process. It doesn't seem to do much damage to our federal system to have Congress involved in that process. Maybe we should look toward doing that. I think Senator Greenleaf has a bill to involve the legislature in the court's rule-making function.

Admittedly, and we found this with the code of evidence, many times the procedure and substantive law are intermingled. I'm not going to suggest that they're not. Perhaps, the process of rule making should also be intermingled with the legislature and the judicial branch. Right now the judicial branch in my estimation under the limited powers I think they have, I think they've overstepped it.

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

CHAIRPERSON GANNON: Thank you, Representative Manderino. Mr. Andring.

MR. ANDRING: Senator, this hearing

is limited or directed to the Supreme Court's suspension of the acts of General Assembly and the legislation which has been circulated as a response to that issue. I would consider a fairly narrow identification of a problem and a fairly narrow and limited response. Yet, throughout the hearing we've heard terms like an Appellate Court system or a Supreme Court out of control. You mentioned a possibility of impeachment.

My question goes actually to the scope of the problem that you wish to address. Is the problem limited to the Supreme Court's suspension of the acts of the General Assembly, or are, in fact, what we're dealing with a broader array of problems in the Appellate Court system that at some point are going to need to be addressed by the legislature?

I guess a follow-up to that would be, if there are additional problems, is this type of a piecemeal approach preferable, or does there come a point where the legislature has to bite the bullet and deal with an ongoing series of problems with the Appellate Court system?

SENATOR PICCOLA: I happen to think

there are a number of problems that we have with our Appellate Courts. Rule making is one of them. I think if that issue were to be addressed, that would be the key to bringing some order to the Appellate Courts, although I think there are a number of others that need to be addressed.

I think the court-funding issue that was brought up during the testimony of Mr. Morganelli I think is an absolutely critical issue and Representative Clark alluded to that. I think the issue of how we select our Appellate Court judges, I have a view on that. I know some members of this committee disagree with that in terms of the election process. I just think that contributes to the court's lack of accountability. We think elections are accountable, make people accountable, but I don't think they do with respect to judges for a whole variety of reasons. We can go into merit selection if you want to.

I think there are a number of flaws in our judicial system that need to be corrected. I will refer you specifically to the record of the hearing we had in March of

1995 that I ask the Chairman to make part of this record, because it identifies a whole package of bills we considered at that time, all of which I think are still relevant.

MR. ANDRING: Thank you.

CHAIRPERSON GANNON: Thank you, Mr. Andring. Senator Piccola, I'm probably the most ignorant person on this panel with this issue, although I have a sense of how I feel about it. I want to ask you a question or two and it may sound foolish, but it's because I don't know the answer.

When the court goes through this process of making these rules that suspend statutes either in their entirety or partially, are these promulgated in a public forum? At what point in time would we, as part of the public or part of the General Assembly, become aware this is occurring other than in private communication as you suggested in the evidence?

For example, the suspension of the Malpractice Reform Act, what point did we find out or were we aware they were suspending, and was that process done publicly or not?

SENATOR PICCOLA: The process is not

public at all. The process as it is done in all court deliberations is private. The court probably doesn't even have any hearing on it. I'm not aware of any hearing that was conducted.

Again, I'm probably not the best one to answer this. But it's my understanding that the court simply issues an order, per curiam, and that is probably published in the court reports and, perhaps, even in the Pennsylvania Bulletin. I'm not sure about that. That would be how we would get notice of it.

CHAIRPERSON GANNON: That helps. I'm looking at the language in the Constitution, it says, all laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. I'm trying to get a fair reading of that. I see all laws shall be suspended. I'm wondering whether that's telling the court that you have to suspend any rules, any laws that are inconsistent; or, could it be interpreted to mean if someone brings to your attention that there's a law that may be inconsistent with a rule prescribed--I look at prescribed as a rule

already in existence--

SENATOR PICCOLA: Exactly.

CHAIRPERSON GANNON: -- then a court would determine whether, in fact, that was the case.

I don't see anything in here that says, you guys just get together and look at the statute and decide whether or not you think it interferes with a rule that's in existence or a new rule that you want to promulgate. My impression of what happened to the death sentence appeal statute was that, the court promulgated new rules and said the statute was inconsistent with the new rules they were promulgating. That's how I read what occurred there. That's how I became aware of what happened.

I'm wondering if, perhaps, it would allay some of our concerns if, number 1, when the court was considering a statute was going to be suspended that that be done in a public forum; that they hold hearings on it. They have public debate just as we do in the House or you do in the Senate. Let's see what each justice feels on that particular thing. This

is not a case or a controversy, so I don't believe in my opinion it falls within the prescribed area of not discussing cases that are before the court.

Then if they did that, perhaps, we would have a better understanding of where they are coming from on this rather than just having this order laid on our desk saying, by the way fellows, that law you passed is null and void. I wanted your comment on perhaps -- Maybe that will even bring us to the point where we are now with these hearings.

SENATOR PICCOLA: You're absolutely right. It would be preferable if we had some sense as to why the court -- especially if the court is going to get into nullifying statutes, why they're doing it. All they say is rule making. Rule making, that's all they say.

The difficulty with that is, the courts are not legislatures, and I'm not sure -- I know I don't want them to be. I want the courts to be courts and the legislature to be legislature. They each have their respective functions and they should operate according to their own rules. They also should

be kept separate institutionally. The court has to be somewhat removed from the political fray because they are there to make, perhaps, some tough and unpopular decisions at some point in time.

But, when they step over that boundary into the legislative arena by nullifying statutes, then, perhaps, they should be governed. The problem you are going to run into I think, if we pass the statute telling the court they have to do this under the Sunshine Law, they'll nullify it and say it's procedural, and you'll be back right where you started from.

CHAIRPERSON GANNON: I'm not disagreeing that that's maybe what they do, but that's shame on them if they do that. I'm thinking, perhaps, the court --

SENATOR PICCOLA: They've actually I guess already done that. We tried to apply our ethics code to the court, to lawyers for that matter. The court has said that's within its providence, and has not allowed that to be applied to the court or the judicial branch of government.

CHAIRPERSON GANNON: I agree with you. What I'm suggesting is that, perhaps the court take a look at itself and say, maybe the process that we're doing this is inappropriate and we should be more public about this so those in the public, including the legislature, has a better understanding.

I guess what I'm suggesting, and I think Representative Caltagirone touched on this a little bit, there are lots of decisions that the court makes and I agree with and I really like and I think are doing a super job. Then there's decisions that I disagree with and I think they're terrible, but I'm not suggesting that we then challenge the court's right to do that and try to interfere with that process. I think you feel the same way, at least what I'm hearing.

SENATOR PICCOLA: Absolutely.

CHAIRPERSON GANNON: There may be a incident where we pass a law and in our view it's a great piece of legislation. It should be on the books and people want it, and the court takes a look at it and says, wait a minute, fellows. This really goes over our

rule-making authority. We are going to have a public forum on this so we can discuss it with those parties of interest. Also, we are going to get a good explanation as to where we feel. Perhaps I may not like it, but now I'll understand it. I disagree with them, but they're right.

When we get these decisions that particularly, for example, in the death penalty appeal, where do we go from there? When they hold a statute unconstitutional, we get an opinion that says this statute is unconstitutional because, and there's also a dissenting opinion and a concurrent opinion. Frequently we'll come back and say, you know what, we should reframe this statute to overcome those constitutional objections and get something on the books that's going to pass constitutional muster. I don't see any way that we can do that when they simply nullify a statute under their rule-making authority.

SENATOR PICCOLA: If I could respond, because you're absolutely right. I think, and I don't have any information here at hand, but from my recollection, the federal rules dealing

with death penalty appeals and the like were handled in just that fashion; through the court's rule-making authority, but with the input of the Congress. I would recommend that the committee staff that they take a look at that and see how that was handled.

My response to Representative Manderino's question, that is in my view an acceptable way to proceed, but again, we're going to have to amend the Constitution because the court doesn't appear ready to voluntarily sit down with the legislature and engage in a cooperative rule-making procedure. That's another way to look at the process.

As I said, Senator Greenleaf I think has a bill in to amend the Constitution along those lines. I would agree with you entirely that that would be an appropriate process if we could somehow get it into being.

CHAIRPERSON GANNON: Thank you. My second point, from my reading of this section of the Constitution, and I'm not all that certain whether I'm making a correct reading. The court under the Constitution has the authority to declare a statute unconstitutional

based upon a case or controversy that comes before it. I'm not all that certain that the framers of this Constitution didn't mean the same thing when they were dealing with the rules of the court.

In addition to being able to declare something unconstitutional, you can also look at a statute on a case and controversy basis and say, this violates our rule-making authority. But it would have to have been brought to the court's attention by the litigants who are looking for relief and arguing that, perhaps, the statute violated the rule-making authority. Do you understand?

SENATOR PICCOLA: Yes.

CHAIRPERSON GANNON: It puts it in the forum where, perhaps, it should be and perhaps the framers meant it to be as opposed to being done behind closed doors in some secrecy and the court just issuing orders and violations of the rules.

SENATOR PICCOLA: Absolutely. I think what you're suggesting is, perhaps, and again this goes back to the court looking at itself, and hopefully that's going to be at

least one result of this hearing; that the court will look at itself. Even if they on their own motion think they are going to suspend the statute, that they give notice to the General Assembly and we institutionally can appear in open court to attempt to defend our position before the court takes any action that it's going to take with a court order. I think that's what you're suggesting, and that would be entirely appropriate in my estimation.

Maybe exactly what the framers intended, and that I'm not absolutely certain about, but it certainly would be within the language that's there in the Constitution now.

CHAIRPERSON GANNON: Thank you very much, Senator, for being with us today. Our next witness is Doctor Lee H. McCormick with the Pennsylvania Medical Society. Welcome, Doctor.

DOCTOR McCORMICK: Thank you. Good morning. My name is Lee McCormick. I'm President of the Pennsylvania Medical Society. The Medical Society is the state's largest physician association, representing some 19,000 doctors of all specialties from across the

Commonwealth. I'm a family practitioner in the South Hills area of Pittsburgh. With me this morning is Mr. Ken Jones who is legal counsel of the Pennsylvania Medical Society.

I appreciate the opportunity to talk to you about the issue which our research shows is the number one concern of physicians and has been for more than 20 years. This issue is tort reform. It is pursuit of that goal, and the court's role in that pursuit, which is what I'm here to talk with you about today.

As members of the General Assembly, you have lived with this issue, so you have heard these concerns sometime in the past. But I think it's important to review them with you briefly once again because of their importance to physicians in the state.

First, let me start by telling you the three main concerns physicians have with the current tort system. First, too little of what we pay into the system actually goes to those who the system was intended to benefit, and that's our patients. You've heard us say before that studies show only 47 cents of every malpractice dollar collected goes to patients.

The other 53 cents goes mostly to lawyers for both sides and to administrators. It seems to me that there is something inherently wrong with any system that spends 53 percent on administrative costs. I dare speculate that if it were discovered that Blue Cross/Blue Shield, for instance, was using only 47 cents of every dollar it collected on health coverage, well, there would be a rate change pretty quickly.

Second, the current system is like a lottery. We all agree that those who deserve payment aren't always the ones getting the 47 cents. Beyond that it takes an average of five to six years for claims to work their way through the process. The system is too slow and too arbitrary.

Third, the system is expensive and the expense is unpredictable. For example, Philadelphia area physicians pay probably the highest liability rates in the nation. The effect of that fact on doctors is similar to the effect Philadelphia consumers felt a few years ago when they were paying the highest auto insurance rates in the country. And because of the way our system works with the

CAT Fund, there can be an unscheduled liability premium payment due at the end of the year, depending on claims payment unpredictability. Even though there has been only one emergency surcharge, that one in 1995, it can bring havoc to physician offices at just the time when we are gearing up to pay the next year's liability bill.

So those concerns give you an idea why this issue is of such interest to physicians. Knowing this, the Pennsylvania Medical Society has worked over the past 25 years to make improvements in the system. Let me give you some history which will help explain our concern.

Let's turn the clock back to 1975. The liability market in Pennsylvania was out of control. Insurers were threatening to leave. Doctors had reached the breaking point. We worked with this legislature and reached an agreement. We would agree to mandatory insurance and the CAT Fund system and, in return, would get meaningful tort reform which would help fix a system which was out of whack.

What physicians wanted most was a

binding arbitration system which would have a dual effect. It would move cases to resolution faster and by doing so would save the system money. The legislature passed a bill with an arbitration system; not a binding one, but one where the appeals went to court. It wasn't long until the Supreme Court struck that provision saying that it slowed the process, ironically just what we were trying to fix with binding arbitration. The court also said that the reforms interfered with our patients' right to a jury trial.

When all was said and done, tort reform was struck down and the CAT Fund remained. Wasn't that quite a deal for physicians? No one likes the CAT Fund now, and now more than 20 years later, we're trying to figure out a way to get rid of the fund, but the two billion dollar unfunded liability is standing in our way.

Now let's move forward to 1996. Increases in the amount of CAT Fund surcharges and that one emergency surcharge in 1995 led to a crisis. Physicians still saw a system totally out of whack and threatened not to pay

their 1997 CAT Fund surcharge unless there was some meaningful tort reform. There was an opportunity for some meaningful reform.

As an organization, we analyzed carefully what had happened in 1975 and thought we would learn from the court's insistence that the process be made quicker. We worked with the trial bar this time to come up with tort reform which would eliminate frivolous cases, reduce transaction costs and speed the system. The proposals were agreed upon by everyone, including the trial bar. Rarely has any legislation, particularly on such a controversial subject, enjoyed such a wide-spread support and such a complete absence of opponents.

Did the final proposal include everything we wanted? No. But we thought is was a step in the right direction and decided to work with a broader-based coalition in the future to achieve more reforms.

A year ago, after we reached agreement on language that accomplished some of our goals, the amended bill passed unanimously in both the House and Senate and was quickly

signed by the Governor. Then in January 1997, the Supreme Court suspended certain provisions and directed its Civil Procedural Rules Committee to consider similar rules. We asked the court to adopt the suspended rules, which were designed to speed up the court process and deter frivolous lawsuits. We told the court that those rules were among the least controversial and most widely supported in Act 135.

Despite written support from the Medical Society and the trial bar, the Rules Committee changed the act's provisions. Let me briefly outline a few of the Rules Committee's actions.

Act 135 attacked frivolous lawsuits by requiring attorneys before they file a lawsuit to have a reasonable basis in fact and in law for believing that they can prevail. The court agreed, but instead of imposing a mandatory award of attorneys' fees in frivolous cases, the Supreme Court left that decision to the court's discretion. This change diluted the effectiveness of this provision.

Act 135 also set up time frames for

completion of discovery and obtaining an expert witness report, all running from the date of the filing of the lawsuit. The revised Supreme Court rules also set up time frames, but does not mandate them and runs those dates from the earliest trial date; not the filing of the lawsuit. These changes will not significantly speed up the system.

Finally, Act 135's intent was to eliminate the frivolous suit early. We believe this provision could have had a significant impact. The Supreme Court instead requires an expert report, but only after the earliest trial date. That will not be nearly as effective in eliminating the frivolous cases early.

So that's where we are today. We have been through lots of work and even more compromise. And what do we have to show for it? A liability system that everyone, including the public, thinks needs to be changed. The public can't affect change without the legislature. The legislature made the changes that were agreed upon by all the parties, and some of those changes were

suspended and turned back to the court's own authority. Honestly, it's frustrating, especially when the proposals are reasonable and have widespread support.

Let's face it. We know that not everyone would agree with the proposals of the Pennsylvania Medical Society. But, if we're going to make the system better, the legislature needs the ability to be innovative. Unfortunately, the court has stymied not only innovation, but also stymied your efforts to help us. So, where does that leave us? Sadly, after 20 years, we've made little progress towards addressing the real problems created by our medical liability system.

Thank you, and I'll be happy to answer your questions.

CHAIRPERSON GANNON: Thank you, Doctor McCormick. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: No questions.

CHAIRPERSON GANNON: Just a question or comment. In your statement on page 2 you say, in January 1997, the Supreme Court suspended certain provisions and directed its

Civil Procedural Rules Committee to consider similar rules. Are you saying that at the time that the Supreme Court suspended the statute they did not have rules in place?

MR. JONES: Yes, essentially what happened was, as the testimony indicates, there were no rules on those subjects in effect at the time, but the Supreme Court determined to refer the matter covering those subjects to their Civil Procedural Rules Committee which ended up adopting roughly half and recommending to the Supreme Court roughly half of what had been in the legislation. The Supreme Court has now adopted those amended rules.

CHAIRPERSON GANNON: How long after this January 1997 suspension did the court promulgate its substantive rules?

MR. JONES: If memory serves, it was September of this year. I believe the rules are going to go into effect in December.

CHAIRPERSON GANNON: So approximately 11, 12 months?

MR. JONES: Yes.

CHAIRPERSON GANNON: This may be a rhetorical question, but in light of that, how

does that gel and how is that consistent with the provision that says, rules prescribed under these provisions? The way I read that, the rules would have to be in place before it would determine the statute was inconsistent.

MR. JONES: Obviously, when we supported these provisions before the legislature, and as Doctor McCormick has indicated, there was a lot of compromise and a fair amount of time spent on this. Obviously, we thought that the rules -- the statute that was adopted was going to be constitutional. The reason that you gave is one of those reasons.

The other reason, of course, is the argument about what's procedural and what is not. We thought at least we had a reasonable argument that none of these provisions were procedural. The difficulty we had was, we never got to argue that to the Supreme Court or to anyone else.

CHAIRPERSON GANNON: Thank you very much for your testimony today, Doctor McCormick.

DOCTOR McCORMICK: Thank you.

CHAIRPERSON GANNON: Our next witness is Mr. Jules Epstein, attorney, with Kairys, Rudovsky, Epstein, Messing and Rau. Welcome, Mr. Epstein.

MR. EPSTEIN: Thank you. Mr. Chairman, members of the committee: Good morning. I have provided written testimony, but I would much prefer to depart from that and get to the gist of some of the comments that were made today. I'll briefly explain my background and my interest in being here.

I'm an attorney with 19 plus years experience in the field of criminal defense work, trial and appellate, with numerous appearances before the Supreme Court. I teach part time at Penn Law School. I write about criminal law. My practice is criminal law, and I've tried to study and understand it.

I'd like to begin at the end, almost, and go to a suggestion that you, Mr. Chairman, made earlier I believe when Senator Piccola was speaking. What disturbs me in different ways, but as much as what disturbs so many members of this committee and the legislature is what I call the lack of a proper procedure when the

Supreme Court does things. I don't like the words unaccountable that I heard today because the Supreme Court needs to be this secluded and protective place of deliberation. I certainly don't like the words impeachable coupled with similar discussion that none of us can even agree what is procedural and what is not. I don't know. I'm not sure about evidence.

I have some feelings about PCRA and CURA and those issues, and I'll come back to them in a moment. But, I think the suggestion that you made is the most appropriate because it dovetails with problems in other areas of Supreme Court practice, and that's an opportunity to be heard.

I'm not sure it has to be in the case and controversy context. Frankly, in some ways that's too cumbersome, because if we wait for eight years until the first CURA case gets to Pennsylvania Supreme Court and then they strike it down, no one has been done justice. Those who are opposed to the death penalty--I'll be blunt, I'm in that number--are not done justice. Those who favor the death penalty and are trying to move it expeditiously similarly

have suffered. If you have a flawed procedure, we ought to know fairly early on.

What I suggest is the simple remedy without tinkering greatly with the separation of powers that I think everyone here has stated utmost respect for and understanding of is a notice provision; something that could be as simple as, when the Pennsylvania Supreme Court intends to proceed under the constitutional authority of suspending rules as being inconsistent with their own rules, they have to give 60 days' notice to this chamber; to these chambers I should say. I'm not sure because I only thought of that from your comment and hearing Senator Piccola and the learned exchange that was going on there, I'm not sure if that has to be done legislatively or has to be done by constitutional amendment.

I tend to suspect that if this House and the Senate started with a resolution to the court saying, we'd really like you to do this, it wouldn't hurt. It would be the quickest remedy you all could start with, and it would be very telling to see what the response was. I suspect, because I'm sure they understand

some of these concerns, that that would be a process that would be welcomed.

If not, I agree with some of the other comments here about shame, but that's the issue, isn't it? Because none of us can even say which is procedural; none of us can say which is substantive.

Let me now turn from that. I hope that is a proposal that is welcomed, or at least shows some concern for what is going on here to just a couple other matters that have been touched upon. I will start with CURA, both because I know it and it certainly touches upon my practice which includes heavily representation of individuals charged with homicide.

I say this most respectfully. I'm but one attorney. I found it fatally flawed for numerous constitutional issues. I wish the court had grappled with that. I will advise this body--you may have been aware of this--that there was a petition before the court asking them to reach out and deal with it. They didn't do it in even that semi-orderly way of saying, we've got this petition. Let's have

briefs, whatever.

Again, I suggest to you, as I said before, foes and friends of the death penalty are probably better off that they acted now because I suggest again, most respectfully, that there were such problems of such severe constitutional dimension that having CURA in place for five years would have added five, 10 or 15 years onto death penalty litigation. Although I'm affirmatively personally not adverse to that, I understand that that is not the thrust of the thinking of many people here.

Let me digress only briefly, and some of this is reflected in the materials I submitted here, and talk about the court as seen by me, an attorney. I'm an attorney with a particular bent and a particular practice and that's the practice of criminal defense. I sure don't agree with a lot of their rulings and then some. I heard one previous speaker say they are unfriendly to the death penalty. Please, eliminate that comment from the record. It is woefully inaccurate to say the least. They have bent over backwards from this lawyer's perspective to uphold the death

penalty. I suggest they are so out of line that federal courts may be reversing them in years to come.

Putting that aside, there are problems with the court of process. What this committee is focusing on now is one such problem. Attorneys file petitions in cases and the petitions are lost. It's almost like when an airplane hits a glacier and it gets sucked into the glacier and 40 years later it rises to the surface. Prosecutors see this problem; defense attorneys see this problem. It's there. How that's remedied, I don't know.

The Superior Court seems to run at least somewhat better in terms of getting petitions and acting on them. You get prompt results. Not always what you want by a long shot, but you get a response. People can file petitions and they sit and they go nowhere. So, it's the procedural issues that I suggest are an endemic problem across the board.

If I may turn briefly to CURA which I've already talk about in code of evidence, I have to say again, I'm not sure who should be writing a code of evidence in Pennsylvania. I

say that most deferentially. When I say I'm not sure, it's not said out of disrespect, but I can't figure out where in the constitutional division of powers that law is. I do know at least in that one, the Supreme Court has been creating an evidence code ad hoc for 200 plus years because all rules of evidence were common law.

So, as a personal matter, and I can only say it this way, I'm not that upset or frightened that they are thinking they do have something to do with rules of evidence. I don't know enough about medical malpractice or garnishing of wages to give any opinion as to whether that is procedural.

I will say I found their evidence rule-making process somewhat orderly. They published a proposed code. They solicited comments, all the things I want them to finally be doing. You could even do it by E-Mail, which I did. I submitted written criticisms and compliments and suggested additions and deletions. Now I assuming that that's all under consideration and I hope so.

My last comment, and if it's far off

the mark forgive me. When I first heard about this series of hearings, some people who presented it to me and suggested that I testify were saying, the legislature is looking at judicial activism. I have not heard that term today, although when some people talk about a court out of control or impeachable, it seems to bring with that same resonant. I say this most deferentially. Two points please.

There's judicial activism that's conservative as well as, quote, liberal or radical or wide-eyed and bushy-tailed, or whatever categories we are going to have. I tend to think that in many of their decisions the Pennsylvania Supreme Court has been an activist in going beyond what this legislature passed, in sentencing issues and the like. I don't want to spend time on them. I can give illustrations later if anyone feels the need.

I don't like that terminology, and frankly it somewhat scares me. I'm not a fan of the court in a lot of its decisions. I'm not a fan of some of the personalities. My personal proclivity is, I think we'd probably do better with an appointed judiciary when I

look at examples from other states. I'm not here to pat them on the back. Notwithstanding that, and I know many members of this committee and I hope of the entire Senate and House feel this, the need for their independence cannot be questioned.

I hope that my humble suggestion, which is really your suggestion, Mr. Chairman, and I will end, as I said, where I began which is at the ending is to do some concrete steps to encourage, and I'm not sure it's Sunshine Law steps or whatever, but to encourage consideration of positions before action in an expeditious way. That will resolve most of the problems that led to this set of hearings.

With that, in submission of my written comments, I thank you for the opportunity to appear here today.

CHAIRPERSON GANNON: Thank you, Mr. Epstein. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: No questions.

CHAIRPERSON GANNON. I'm impressed with your testimony. In an earlier comment you made, you said we probably don't know the

difference between procedure and substantive law. I'm going to meet you halfway. We probably do know the difference between procedure and substantive law. The problem is, none of us can agree on it. Each individual probably can say I can tell you what it is. As a group we disagree. I recognize that and that's why I made the comment that I thought, perhaps, we should look to the process first and see if that would help alleviate the situation.

I guess judicial activism whether you are for it or against it depends on where you stand on that particular issue. That would concern me if we start to take a vent towards disagreeing with decisions and then acting on that, or agreeing with decisions and acting on that. As I said earlier, there's lots of decisions I agree with; there's lots I disagree with, but that doesn't necessarily mean I should meddle in the court's business. But at the same time, and I think many members of this panel feel the same way, we don't want the court meddling in our business. Perhaps that's maybe the underlying reason that we're looking

at it from this aspect.

I do appreciate your comments and the written testimony you submitted. Thank you very much for being with us today.

MR. EPSTEIN: Again, thank you for allowing me to appear. Good morning, everyone.

CHAIRPERSON GANNON: We are going to take a break for about 10 minutes until 12 noon. We'll reconvene at 12 noon exactly.

(Short recess occurred)

CHAIRPERSON GANNON: Judiciary meeting reconvened. Attorney General Fisher is presently in court defending the rights of the Commonwealth. He may or may not get here at all, depending on how long the hearing will last. We're going to ask Mr. Robert Graci, Esquire, Chief Deputy Attorney General for the Attorney General's Office to speak in place of the Honorable D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania. You may proceed, Mr. Graci.

MR. GRACI: Thank you, Mr. Chairman. Good afternoon, members of the Judiciary Committee. On behalf of Attorney General Mike Fisher, I want to thank you for the opportunity

to testify concerning the subject of this hearing, the Supreme Court's rule-making authority and its related authority to suspend acts of the General Assembly to the extent they are in inconsistent with properly promulgated rules prescribed by the Supreme Court.

As you mentioned, Mr. Chairman, the Attorney General is unavailable today because he's in court defending the rights of the Commonwealth. He's in the Commonwealth Court as we speak on a motion for preliminary injunction filed by individuals in the last two weeks trying to strike from the ballot scheduled for vote of the populous next Tuesday of that constitutional amendment passed by this body and the Senate in conformity with the appropriate provisions of the Constitution that would amend that part of the Constitution dealing with pardons and paroles. He regrets he's not able to be with you. He hoped that he would, but the hearing is apparently going longer than he anticipated.

With your permission, Mr. Chairman, I'd like to present my testimony by first giving a brief history of the Supreme Court's

rule-making authority and its power to suspend acts of the General Assembly. Next, I would like to describe the court's order of August 11, 1997, suspending in its entirety the Capital Unitary Review Act, or CURA, and along with that Attorney General Fisher's petition seeking reconsideration of that order.

Finally, Mr. Chairman, I wish to offer comments and suggestions to strip the court of what it apparently believes is an exclusive grant of constitutional power and which, as presently interpreted, is a completely unchecked and unreviewable grant of power.

Turning if I might, Mr. Chairman, and members of the committee, to the history. The present source of the Supreme Court's rule-making authority and its authority to suspend acts of the General Assembly is, as Senator Piccola pointed out, found in Article V, Section 10 of the Constitution. The relevant parts of that section provide, the Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts...and the administration

of all courts...if such rules are consistent with this Constitution--that is, the Constitution of the Commonwealth--and neither abridge, enlarge nor modify the substantive rights of any litigant; nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace; nor suspend nor alter any statue of limitation or repose. All laws shall be suspended to the extent they are inconsistent with rules prescribed under these provisions.

While this grant of rule-making power to the Supreme Court was only added to the Constitution in 1968, the general concept had been part of our statutory law; that is, acts passed by this body, since 1937, more than three decades earlier.

By the Act of June 21, 1937, the General Assembly gave the Supreme Court, and I quote from the statute...the power to prescribe by general rule...the practice and procedure in civil actions at law and in equity for the Courts of Common Pleas...and for such other courts having jurisdiction in civil actions. Provided, that such rules shall be consistent

with the Constitution of this Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any of the said courts, nor affect any statue of limitations.

Of particular note was the last paragraph of the Section of 1937 Act of Assembly. It said, and again I quote, From and after the effective date of any rule promulgated under this Section 1, and so long as said rule shall be operative, the operation of any act of assembly relating to practice or procedure in such courts, and inconsistent with such rule, shall be suspended insofar as such act may be inconsistent with such rule.

Two decades after passing that statute, Mr. Chairman, members of the committee, the legislature granted like authority to both the Supreme and Superior Courts with respect to promulgating rules of procedure in criminal cases. The first grant had been limited to civil cases. Like its counterpart, the legislative grant of rule-making power in criminal cases and proceedings concluded with language identical to the

language found in the 1937 bill, which gave the court the power to suspend duly enacted statutes, but only to the extent inconsistent with rules promulgated pursuant to the legislative grant.

It's interesting to note from an historical perspective, and given we are presently most concerned with the Supreme Court's wholesale suspension of a statutorily based post-conviction proceeding as set forth in CURA, that the 1957 statute was the authority by which the Supreme and Superior Courts by orders dated January 24 and January 27, 1968, respectively, promulgated the original rules to implement the 1966 enactment of the Post-Conviction Hearing Act, which, as you all know, is the predecessor of today's Post-Conviction Relief Act.

It was also by that authority that the courts, after promulgating the rules to implement the PCHA, suspended the PCHA, but only to the extent inconsistent with the rules. There was no wholesale suspension of the PCHA. The courts specifically stated, in suspending the parts of the PCHA that were inconsistent

with the new rules, that, quote, this is done in accordance with the provisions of Section 1 of the 1957 act.

Indeed, the Supreme Court's Criminal Procedural Rules Committee would later say of the rules promulgated in 1968, these rules were not intended to provide a complete procedural framework for post-conviction proceedings, but were to supplement, implement and clarify the procedural provisions of the PCHA. The present rules do not, therefore, supersede all or even particular individual sections of the PCHA. Instead, Rule 1507 suspends the PCHA only insofar as it is inconsistent with the Criminal Procedural Rules, and there are very few inconsistencies.

These statutory provisions are the genesis of the current constitutional provision found at Article V, Section 10(c).

This historical background is important for several reasons. It informs us of the basis for the current constitutional text. For all intents and purposes, the language is identical to that found in the earlier statutory grants of rule-making power.

The limits found in the Constitution are the same limits found in the predecessor statutes: Rules adopted by the Supreme Court may neither abridge, enlarge nor modify the substantive rights of litigants nor the jurisdiction of the court. Those matters are left to the Constitution itself or to this body, the General Assembly, as the policy-making branch of government.

And of particular importance for today's hearing and your consideration, the authority of the Supreme Court to suspend the operation of any act of the General Assembly is limited by the Constitution itself...as it was in the statutes as recognized by the Supreme Court...to only those situations where there is an inconsistency with an existing, properly prescribed and promulgated rule.

That, Mr. Chairman, brings me to my second point: The Supreme Court's August 11, 1997 order suspending CURA in its entirety. That action, according to the text of the order, was taken pursuant to the court's authority under Article V, Section 10 of the Constitution of Pennsylvania. If I might give

some background.

Immediately upon taking office, Governor Ridge convened a special and extraordinary session of the General Assembly on crime to consider 11 specific subjects. The first subject listed in the Governor's proclamation was to consider legislation for, and I quote, an orderly process to implement the death penalty.

In response to the Governor's call, the General Assembly enacted a bill amending the PCHA (sic) and adding CURA. That bill was enacted on November 17 and became effective 60 days later on January 16th of 1996.

The PCRA, as amended, still provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. It applies to all noncapital cases and to capital cases in which a death penalty was imposed before January 1, 1996.

CURA, on the other hand, establishes the sole means of challenging proceedings that resulted in a sentence of death. CURA replaced post-appeal collateral review of death penalty

cases as was previously provided under the general applicable PCRA with pre-appeal collateral review. It combined the direct review process with the collateral review process in capital cases and was to apply in all cases in which the death penalty is imposed on or before January 1, 1996.

In providing for unitary review in death penalty cases, the General Assembly recognized that in these most serious cases the normal course after trial, conviction for murder of the first degree and imposition of the sentence of death was the filing of post-sentence motions followed by the statutorily required, automatic direct review in the Pennsylvania Supreme Court.

The General Assembly knew when it enacted CURA that frequently in these cases new counsel replaced trial counsel at the post-sentence and direct appeal stages and frequently raised and litigated claims of ineffective assistance of trial counsel. The General Assembly also knew when it enacted CURA that in most of these cases review was sought in the United States Supreme Court by way of

petitions for writs of certiorari after affirmance by the Pennsylvania Supreme Court.

The General Assembly was aware when it enacted CURA that after the direct appellate process was over, a death sentenced convict would do nothing by way of seeking collateral relief until the Governor issued a warrant scheduling an execution, at which point the condemned would file a petition under the PCRA, obtain a stay of the scheduled execution, litigate the petition, and, assuming the conviction and death sentence remained intact, the trial court's decision on the PCRA petition would almost automatically be appealed to the State Supreme Court.

The General Assembly knew when it enacted CURA that these layered proceedings collaterally attacking lawfully imposed death sentences contributed to lengthy and unnecessary delays in these cases and thwarted the legislatively established public policy of the Commonwealth. It was against this backdrop that the General Assembly enacted CURA as seeking an orderly process to implement the death penalty by replacing post-appeal

collateral review of death penalty cases with pre-appeal collateral review.

By order dated August 11th of this year, the Supreme Court permanently suspended CURA in its entirety, claiming authority to do so under Article V, Section 10 of the Constitution of Pennsylvania. But the Supreme Court may constitutionally suspend laws only to the extent that they are inconsistent with rules prescribed under the provisions of Article V, Section 10(c), as I said in outlining the history of the constitutional grant of rule-making authority.

CURA, as I just noted, established the sole means of challenging proceedings that resulted in a sentence of death, and replaced post-appeal collateral review with pre-appeal collateral review. None of the rules promulgated by the same order that suspended CURA to align Chapter 1500 of the Rules of Criminal Procedure with the recent legislative amendments to the PCRA have anything to do with replacing post-appeal collateral review with pre-appeal collateral review in capital cases where a sentence of death was imposed after

January 1, 1996.

While the Supreme Court could constitutionally promulgate rules to implement this sole means of challenging post-January 1, 1996 death sentence proceedings with pre-appeal collateral review, just as it has promulgated rules to implement the action provided for in the PCRA, it is not, that is, the Supreme Court is not constitutionally empowered to simply ignore this sole means of collateral attack in cases to which it applies under the guise of its constitutionally limited rule-making authority.

The Attorney General believes that in suspending CURA without prescribing rules for pre-appeal collateral review in cases to which CURA would apply, the Supreme Court has exceeded its constitutional rule-making authority under Article V, Section 10(c).

On September 26th of this year, Attorney General Fisher petitioned to the court to reconsider its order suspending CURA and parts of the PCRA. There are several bases for that petition, including the one that I've just noted; that is, the Supreme Court exceeded its

authority. I will outline the others for you.

In the order suspending CURA, despite the fact as I indicated that it conflicts with no court-made rule on pre-appeal collateral review, and amending Chapter 1500 of the Rules of Criminal Procedure, the court observed that the recommendation of the Criminal Procedural Rules Committee, which it purports to adopt, and I quote, had been published before adoption in the Pennsylvania Bulletin in May 18, 1996, 16 months before the court adopted these rules.

However, the recommendation of the Criminal Procedural Rules Committee contained in the Pennsylvania Bulletin was concerned only with the PCRA. The committee in its explanatory comment clearly said that, quote, It concluded that the rules of criminal procedure should continue to implement only the PCRA, and agreed to add a committee note, to make it clear that Chapter 1500 does not apply to the new Capital Unitary Review Act. With that statement, it was disingenuous for the court to suggest that the Bench and Bar at large were on notice of the possible suspension of CURA, in its entirety, under the court's

constitutionally limited rule-making authority.

The proposal which was published by the Criminal Procedural Rules Committee was substantially altered to the form which accompanied the court's order of August 11, 1997, including for the first time, and without the possibility of public comment, substantial provisions dealing with death penalty cases which were not previously specifically addressed in the Rules of Criminal Procedure related to post-conviction proceedings.

Pursuant to the Supreme Court's own rules of judicial administration, previous distribution and publication of proposed rules may be dispensed with only where exigent circumstances require immediate adoption of the proposal, or where the proposal is of a typographical or perfunctory nature, or where the court determines that such action is required in the interests of justice or efficient administration.

The amendments to Chapter 1500, needless to say, are neither perfunctory nor typographical. There is no stated exigency, and none readily appears since the Criminal

Procedural Rules Committee published its original PCRA proposal, without regard to CURA cases, more than 14 months before the court's August 11, 1997 order, and CURA itself did not become effective until two months after it was enacted.

Moreover, the court identified no interest of justice or efficient administration to justify its drastic action of suspending a carefully crafted act of the General Assembly intended to implement the Commonwealth's public policy of having a death penalty and of having an orderly process to implement it.

Suspending CURA and implementing rules which perpetuates post-appeal collateral review in these cases under the guise of the courts rule-making authority, without prior publication and distribution, therefore, violates the court's own procedure for adopting rules.

Moreover, in suspending CURA, the Supreme Court abridged the rights of the Commonwealth of Pennsylvania, a litigant in every death penalty case, by prolonging these cases and delaying final judgment and execution

in violation of the policy of the Commonwealth as promulgated by the only branch of the Commonwealth's government with the authority to do so, this body, the General Assembly.

The court, in violation of the constitutional limits on its authority, enlarged or modified the rights of defendants in capital cases where a death penalty is imposed by maintaining a regime of post-appeal collateral review which was rejected as a matter of policy in these cases by the policy-setting branch of the government of the Commonwealth.

Lastly, the Supreme Court acted unconstitutionally, in excess of its authority, by suspending the statute of limitations found in CURA, which, as I indicated, is the sole means of challenging proceedings that resulted in a death sentence imposed after January 1, 1996, and as well, unconstitutionally affected the right of the General Assembly to determine the jurisdiction of the Supreme Court in suspending the 1995 and 1997 amendments to Section 9546(d) of the PCRA concerning jurisdiction to hear appeals from denials of

PCRA petitions in capital cases.

It's Attorney General Fisher's hope that the Supreme Court vacates its order suspending CURA and adopts rules implementing it, including the promulgation of counsel standards for these most serious cases known to our criminal justice system.

But even if that happens, it does not address the larger question with which you, and quite properly should be concerned. Should the Supreme Court's apparently absolute and unchecked rule-making authority continue unabated? Attorney General Fisher thinks not. The Constitution must be rewritten.

I'm going to make a quote, Mr. Chairman, and it states, by the Constitution of 1968, power was given to the Supreme Court to prescribe general rules governing practice, procedure and conduct of courts, justices of the peace and the officers serving process. Since that time, rule making by the Supreme Court has gained impetus.

The rules which have been prescribed under this provision have been generally viewed as promoting the efficiency of the judiciary,

but whether the rapidly increasing use of this power by the Supreme Court is leading to excesses remains for future determination. At present, the legislature and the Supreme Court differ over where the line separating the powers of each should be drawn. Drawing the line through the gray area will take time. The friction between these two branches of government surfaces in the cloakrooms of the legislature and, presumably, in the conference rooms of the court; if not in the sunshine of the printed record.

Although the separation involves technical problems not always recognized or fully understood by all legislators, some believe the court is trespassing on legislative territory. On the other hand, the court is convinced the legislature is invading the judicial field to which the Constitution gives exclusive power to the courts. This is an ever-existing struggle for power, end of quote.

Mr. Chairman, these are not my words. They are the words of the eminent Pennsylvania constitutional scholar, Judge Robert Woodside, taken from his treatise, Pennsylvania

Constitutional Law, written 12 years ago. They were written more than a decade ago but they could have been written today. In that decade, the Supreme Court's use of its power has led to excesses. The time for drawing the line has arrived. The future, Mr. Chairman, is now.

Almost 20 years ago, in responding to a claim that it overstepped its constitutional rule-making authority and made substantive law, the Supreme Court said, and I quote, It should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right. Assuming this proposition is correct, the converse must also be correct.

The Supreme Court has recognized that this body, the General Assembly, has the power to promulgate all the substantive law of this jurisdiction. The courts, quite simply, do not. That a substantive enactment by the General Assembly, when exercising its constitutional legislative power, has a collateral effect on procedural questions necessary to its implementation cannot prevent the General Assembly from exercising its

constitutional power to make, alter and repeal laws.

As has been recognized by at least one member of the Supreme Court, the legislature, this body, with unique fact-finding capacities designed not only to correct but also to anticipate social problems, both broadly declares public policies and minutely provides for details of implementation.

Presently, however, the Supreme Court always gets the last word. Once the court concludes that a matter is proper for rule making, even if it agrees that a rule has a collateral effect on a substantive right, and virtually all of them do, the court has the ability, in its sole determination of the scope of its rule-making authority, and often without the benefit of the adversarial advocacy as it did in striking CURA from the statute books, to upset the policy established by the legislative branch of our government. Under the present constitutional scheme, the rule-making power and the power to suspend laws which the court determines to violative of that rule-making power knows no checks. The court and the court

alone decides the limits of its power.

Such unrestrained power is unheard of in a democracy. It certainly should not exist in the hands of the least democratic branch of government where, once elected, its members are virtually unaccountable to the will of the people.

The Pennsylvania Constitution, members of the committee, should be amended to allow for rule making in the courts as allowed under the federal system, with legislative oversight. Under that system, a proposed rule is not effective until the Congress has the ability to review and change it.

In addition, the Congress can write rules of procedures in the first instance. This provision recognizes that oftentimes procedural rules are necessary to effectuate policy choices made by the legislature. Last year, for example, the Congress amended the federal habeas corpus rules at the same time it amended the statute when it attempted to streamline that federal collateral review process.

Court rule making should be a matter

of legislative delegation. The Attorney General agrees with Duquesne University law professor and criminal defense attorney Bruce Ledewitz who, in 1994, proposed that Article V, Section 10(c) be repealed, to be replaced by a simple statement which he suggests should say, quote, the Supreme Court shall exercise such powers and performs such duties as may be imposed by law. The Attorney General agrees, Mr. Chairman.

I hope these comments are helpful to you and the members of the committee as you consider this serious separation-of-powers problem. I would be happy to try to respond to any questions the committee members might have.

CHAIRPERSON GANNON: Thank you very much, Mr. Graci. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: No.

CHAIRPERSON GANNON: Representative Manderino.

REPRESENTATIVE MANDERINO: Thank you. Thank you, Mr. Graci. I'm just a little confused. This is out of ignorance because I never saw what was actually published, came down from, whatever the right word is, the

Supreme Court on the CURA thing. I guess I was led to believe by prior testimony that it was just basically a blanket, this is suspended because it interferes with our rule-making authority.

But then something that you said led me to believe that there was more to it when you talked about in the order suspending CURA the Supreme Court observed that the recommendation of the Criminal Procedural Rules Committee, which it purports to adopt, had been published prior to the adoption, et cetera, et cetera. What specifically came down? Where was it published? Where can I get a copy of it? Maybe I can decide for myself what it said. That would be very helpful.

MR. GRACI: Representative Manderino, it's published in the Pennsylvania Bulletin. I thought I had a copy of it with me. I do not. I looked at it enough, particularly preparing the Attorney General's petition asking the court to reconsider it, that I have it pretty much committed to memory.

It was a standard order similar to any other order by which the Supreme Court

adopts rules. It was, I believe in five or six paragraphs. The first paragraph indicated that it was taking its action pursuant to Article V, Section 10.

The first numbered paragraph said that it was suspending permanently that portion of the Act of November 17, 1996, with the particular subsections listed which we know to be CURA.

It then suspended permanently several portions of PCRA which made reference to unitary review, so just for consistency purposes. It then suspended the 1995 and 1997 amendments to Section 9546(d) of the PCRA which was the provision that this body had amended to limit the right of direct appeal from denials of PCRA and substituting for that a provision for petitions for allowance of appeal.

I guess what the effect of that was, it left the system in place as it was before the 1995 amendment, although quite frankly, I received an order in the mail today or yesterday that transferred a capital case from the Supreme Court and its capital appeals docket to the Superior Court. I don't know

what that did.

The next paragraph, as I recall, noted that there were rules attached to the order and they were the rules amending the Chapter 1500 of the Rules of Criminal Procedure which implement the PCRA, including, adding a few subsections and one full section dealing specifically with post-appeal collateral review, normal PCRA petitions but in capital cases; setting time limits and things of that sort. Quite frankly, drawing the time limits that were found in CURA, but flipping the thing over from pre-appeal collateral review to post-appeal.

They said, since the Criminal Rules Committee had prepublished its proposal in May of 1996, we don't have to prepublish under the rules of judicial administration. We'll just adopt these. Well, as we stated both in the petitions to the court asking them to reconsider their wholesale suspension of CURA, as well as in the testimony I gave this morning, its disingenuous to look back to that action of the Criminal Procedural Rules Committee.

I served on the Criminal Procedural Rules Committee for better than six years. The process was, when the Rules Committee would propose a rule, before it would be submitted to the Supreme Court for its consideration, it would be published in the Pennsylvania Bulletin and in the Atlantic Reporter to get comment from the Bench and Bar. We frequently got comment, and frequently it made us change what we had initially published. Then and only then, after the committee reconsidered what it would do, would we send the proposal onto the court.

In May of 1996, there was a proposal to amend the PCRA rules, and that was published, to bring it into conformity with the changes that the legislature had adopted in November of 1995. But the committee's explanatory comment said, we're not dealing with CURA. These provisions only apply to PCRA. Now, 14 months later, and I see the Attorney General has arrived, and I'll finish my answer and then I'll ask him to -- I'll ask him to join me anyway. They said they weren't dealing with CURA. Now, 16 months after the

fact, without any forewarning to the Bench and Bar at large, they suspend CURA. The last thing they did, they had attached to their order the new rules that they were promulgating. I would be happy to send you a copy of the order.

REPRESENTATIVE MANDERINO: The time frame sets up a whole interesting scenario from my point of view. I'm wondering who was preemptively striking who in this scenario that you set up. Have the recommendations already been adopted as rules? I know they have not. My question is, had they already been adopted as rules when CURA was enacted, would we then have enacted a law that was indirect -- that would make that whole argument we've been hearing this morning about whether there was a specific rule that this did or didn't contradict, would that have made that argument different?

MR. GRACI: I believe no.

CHAIRPERSON GANNON: Can I interrupt just for a second? I want to recognize Attorney General Fisher who has now joined us. He can chime in on the answer.

ATTORNEY GENERAL FISHER: I will try to interject. I apologize for not being able to be here at the scheduled time. I was in Commonwealth Court arguing the validity of the constitutional question on next Tuesday's ballot to amendment the Pardon's Board. We just finished that argument. Obviously, Bob Graci, who is the Executive Deputy Attorney General in charge of our Legal Appeals Review Section is here in my place. He is very ably addressing the issues on CURA and the issues before this committee. I thank you for allowing us. I'll turn it back to Bob.

MR. GRACI: Thank you, General.

CHAIRPERSON GANNON: Thank you, General.

MR. GRACI: Representative Manderino, the answer to the question would be no. If I understand the question correctly, if the rules that were promulgated on August 11 were in existence, could this body have adopted CURA? My answer would be yes, because CURA brought to the jurisprudence of the Commonwealth the concept of pre-appeal collateral review. None of the rules promulgated has anything to do

with pre-appeal collateral review.

That's one of the several points made in Attorney General Fisher's petition asking the Supreme Court to reconsider its rules. We stated in that petition, as I stated in the testimony today, and I go back to something Senator Piccola said. If you adopted CURA as you did and said an answer has to be filled in 10 days and the Supreme Court came along and said, we're going to adopt rules to implement CURA but we are going to say 20 days, then to the extent that 10 days is inconsistent with 20 days, 10 days is suspended. But, they didn't do that. They made no attempt to give effect to the will of this body that we telescope down the amount of time that these cases take and that we have an effective death penalty.

Again, I know when he was in the Senate the Attorney General argued forcefully that we are not eliminating any rights of review. We are just consolidating these things. We are not taking away any issues from defendants, but it has to be done. The death penalty in this Commonwealth is a laughing matter because they are never carried out. We

have cases go on for years and years and years, frustrating the will of this body and frustrating the will of the people who you represent, because we know that these people have been sentenced to death. We know that victims, families are waiting for lawfully imposed sentences to be executed, but time and time again we have to say no, not yet. It's still in the courts. That was what CURA was designed to do.

All the Supreme Court had to do and what the Attorney General has asked them to do is adopt procedures that give effect to the new procedure that you said shall be the law of this Commonwealth. If they want to tinker with the numbers, so be it, but they shouldn't be tinkering with the whole idea. That's what their wholesale suspension does.

REPRESENTATIVE MANDERINO: Getting the time frame right, the unitary review, CURA was passed even prior to this committee that was meeting for the Supreme Court on rules with regard to post-conviction? CURA was already in existence as a law prior to that committee coming out with any kind of rules regardless of

whether they apply pre- or post-conviction?

MR. GRACI: Absolutely. If you look at that, and I have it cited in the testimony. If you look at that Pennsylvania Bulletin provision, it's clear that they were thinking about amendments to PCRA because this body had just amended PCRA, and it's further clear that they sidestepped the question of whether or not to promulgate rules to implement CURA when they said, we're adopting these rules only to implement the changes wrought by the amendments to PCRA and not to deal with CURA.

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

CHAIRPERSON GANNON: Representative Reber.

REPRESENTATIVE REBER: Thank you, Mr. Chairman. Good afternoon, Attorney General Fisher. I almost said Senator. Mr. Graci, I appreciate the historical perspective you put in the testimony earlier on. It's that particular arena I'd like to go and ask you for some insight. If there is any hard empirical data, that would be interesting to me.

My concern is the grant of

ruling-making power as you stated was added in the Constitution as we know it in the '68 Constitutional Convention. Then we had the time frame from '68 back until '37, or I should say '37 to '68 where the analogous rule-making power was done vis-a-vis statute. Is that a correct statement?

MR. GRACI: Yes, sir.

REPRESENTATIVE REBER: Are you aware or have you categorized the types of orders that were emanated from '37 until '68 by the court under that type of authority? And what degrees, if you can capsulize or summarize, what were the degrees of action taken by the court in their suspension orders? Didn't we have forms of wholesale statutory, emasculation as we have been seeing, at least has been alleged by some people, recently? I think that's very important.

Then with that being said, I'd like to go back from William Penn, et al. up until 1937, if there was any kind of countervailing rule-making authority that was used.

It seems to me, and I have been on this committee for 18 years, my full 18 years

in the General Assembly. I've always been one to be rather resistive of constitutional amendment changes that come before the House and certainly before this committee. I really really tread down that path with great intrepidation because it's just so sacrosanct in my mind. This, though, has taken new heights.

I think some of this historical perspective to, in essence, capsulize and highlight how we have seen such emasculation would be very helpful to me if in fact we have the background precedence to substantiate it. That's a long-winded question. I hope you understand where I'm going.

MR. GRACI: I think I do, Representative, and I'll try to answer it. I have in front of me the orders entered in 1968 by both the Supreme Court and the Superior Court. The 1957 statute said that the Supreme and Superior Courts had dual authority to promulgate rules of criminal procedure, which certainly is unusual as we think about it today.

In 1968, and I reference this in my

testimony, the President Judge of the Superior Court and the Chief Justice of the Supreme Court issued an order promulgating, among other things, rules to give effect to the 1966 adoption of the PCRA. It set forth they were doing exactly that by the power granted to them by the 1957 statute.

One of the rules, the last rule, 1507 is entitled "Suspension of Acts of Assembly". It says, the Act of January 25, 1966, which was PCHA, is hereby suspended insofar as it is inconsistent with the rules. This is done in accordance with the provisions of Section 1 of the Act of July 11, 1957. They were very cognizant of their authority that it derived from a legislative enactment and they only did it -- There was a note that was part of the rules as adopted, a note to Rule 1506 that said Rules 1501 through 1506 implement the PCHA.

So they understood, it seemed to me, the limits of their authority and that their authority at that time was not something that came full-blown from the common law. You reference going back to the founder, Mr. Penn. It was something that was given to them only

ten years earlier in the criminal field by the legislature. It doesn't have any long historical genesis.

It seemed to me they were conscious of -- They weren't getting rid of PCHA. As I mentioned, later on, I think it was 1982, when PCHA was to be repealed after a long process as part of the codification of the judicial code, the Rules Committee, and I quoted a passage from their view, that there really wasn't a lot of inconsistency, and what they were basically doing was implementing and supplementing the procedures that the legislature had divined in adopting PCHA.

There seemed to be a blended -- recognizing that the legislature had some opportunity, at least to define the general context of the proceeding, but leaving it to the court to come up with the minutia, if you will.

One of the things that came to mind as you asked the question was their provision with respect to the appointment of counsel. Under PCHA, before counsel was to be appointed for a PCHA petitioner, the court was to examine

the petition to determine whether or not it was wholly frivolous. If the court determined it was wholly frivolous, that was to be the end of it and it was to be dismissed. The Supreme Court adopted a rule which it subsequently in some case laws, and I have those cases if you are interested, broaden the right to counsel. They basically said by rule, if the petitioner satisfies the court that he's unable to procure counsel, the court shall appoint counsel to them.

They interpreted that rule as taking away from the court the idea that you're suppose to determine frivolousness first. They expanded, and one might say, quite frankly I believe, that that rule enlarged the substantive rights of a criminal defendant, petitioner in PCHA hearings, and probably was in excess of their authority back then. Nobody has complained about it. I'm not suggesting we shouldn't have counsel for these things. Certainly we should have them in capital cases.

As a matter of fact, if I might digress a moment, the witness immediately before me, Mr. Epstein, had referenced a

petition had been filled with the court to do away with CURA. Last year we filed an answer to that petition in the form of a brief setting forth all the reasons why--when I say we, the Office of Attorney General--the statute was constitutional. One of the points we made was, as it related to the provision that you wrote into CURA asking the Supreme Court to adopt counsel standards. Here you have the legislature clearly defining a right to counsel in post-conviction proceedings in capital cases, and saying to the Supreme Court we don't want ineffective lawyers handling these cases develop standards.

That was one of the prime -- Now, consider this. This was a challenge brought by the defense bar, the people who represent capital defendants, saying that this exceeded the legislature's authority. It seems to me to be a salutary thing for the legislature to do, to say we're going to have counsel in all of these proceedings from trial through post-conviction proceedings as we know them in CURA, and we ask you, the Supreme Court, to look at the background of these lawyers and set

experience standards and things of that sort, but they said that that was an unconstitutional exercise by this body.

Quite frankly, as it presently exits, there's is no statutory basis; and therefore, I think no constitutional basis for the Supreme Court to dictate by rule that everybody who files a PCRA petition, no matter how meritless or frivolous has a right to counsel. That issue is pending as we speak before the courts.

REPRESENTATIVE REBER: Let me again go back, and putting aside the example, PCHA and PCRA that you have been alluding to, Senator Piccola talked about what he termed nullification, statutory nullification and actions by the court, wholesale and garnishment cases, med-mal cases and death penalty cases.

Going back again to my time frame that I talked about, are you familiar with any other topical areas similar to those where there was wholesale action taken by the court under this authority pre-1968 to '37, or '37 back until the time of --

MR. GRACI: Pre-1968, Representative, I am not; certainly since, and I thought that's

where Judge Woodside's comments were particularly telling. He recognized this as a problem 12 years ago when he wrote. The problem I think has exacerbated on the criminal side. I've looked at District Attorney Rebert's testimony from last week or the week before. He cataloged some of them; the right to jury trial.

Now, that arose in the context of a case. It wasn't that they just came along and said we're suspending, but there are other examples in the modern era where they just issued an order suspending a statute as being inconsistent with a rule.

REPRESENTATIVE REBER: The reason I'm going in this direction, Woodside quotations were somewhat emblematic to me because of the date when they were made. There seems to be a feeling in some of the testimony that this is a rather recent phenomenon of the current cast of characters sitting on the bench, if you will, on the high bench. The Woodside comment would tend not to suggest that to be the case; that it had been there in other various forms and degrees. It's that historical perspective that

I'm trying to really develop in my own mind for the necessary remedial language, if some is necessary, in the form of a constitutional amendment to rectify it.

MR. GRACI: In the commentary I cited the language in the Supreme Court's opinion in the Laudenberger case. Quite frankly, that is referenced in Judge Woodside's treatise.

REPRESENTATIVE REBER: That was the Roberts' dissenting opinion?

MR. GRACI: The majority and the dissent. It was the majority that said, we recognize that some of our procedural rules may have an impact on substantive law, but that's okay. If that's true, and as the dissenter, as Justice Roberts properly pointed out; if that's true, then it's likewise true that you're going to adopt policies, and in order to have an effective death penalty sandwiching down the time is an important aspect. You have to have the ability to be able to say that it's an important aspect. Otherwise, these things go on interminably.

ATTORNEY GENERAL FISHER: If I could in response to Representative Reber's question,

historically, I remember it was probably around 1981, it was shortly after I was elected to the Senate, after serving in this body, that there was a judicial council that had been part of the judiciary article. I believe the last actual meeting of the judicial council was in the early '80's. I was asked to attend that meeting of the judicial council by the then Chairman of the Senator Judiciary Committee Senator Snyder.

One of the controversies that attended at that time and has begun to brew from the late '70's was, what was perceived to be an intrusion by the court into the legislative arena. Representative Reber, you have been here during that almost same period of time, over a period of 18 years. I think the intrusion has slowly grown over the 18 to 20-year period.

But, I know of no situation, and that's why I felt so strongly in CURA, not only as a previous sponsor of that act in the Senate but also when I was the Attorney General. I know of no other situation analogous to this where the court went out and suspended a law

where they had no rules. It was one thing to argue procedure versus substance, and procedure versus substance was an ongoing debate. I sat as a member in the late '70's and once again in the early '80's as a member of the court's Criminal Procedural Rules Committee, as has Mr. Graci in the past. That was also an ongoing debate. Sometimes the legislature encroached across the line.

REPRESENTATIVE REBER: Like in med-mal there's discovery, and in garnishment there execution of the rules, so there's at least some nexus on those situations.

ATTORNEY GENERAL FISHER: There's a debate, and that's probably a healthy debate that goes on. I don't think in and of itself those kind of debates are reasons to change the Constitution, but it does concern me.

As I say, that's why we felt so strongly and filed the petition which we did, which is an extraordinary petition to be filed, asserting that they made a mistake in their rule-making power by suspending CURA and leaving the void which CURA tried to cure.

So, I would hope, one, that this

isn't a trend, but if you look at history it does appear to be a trend. It's a disturbing trend that's getting wider. I would hope that we can get a resolution on the CURA issue as a result of our petition, but there's no certainty of that.

Honestly, I'm filing it as the Attorney General. I'm hopeful -- I believe the district attorneys continue to have some interest in that. But, I'm not sure that we have -- We can't come to you and say, repass CURA because the current attitude of the Supreme Court wouldn't do any good. We're stuck. It's a trend that concerns me and I know that's why you are having these hearings.

MR. GRACI: Mr. Reber, if I might add one final note on the historical perspective. It was something that came up during the testimony of one of the earlier witnesses. That had to do with the process by which the rules were adopted or should be adopted.

Back in 1978 there was what the Supreme Court referred to as a letter of address. The legislature had adopted Section 1703 of the judicial code which purported to

require the Supreme Court when acting in its rule-making authority to hold open meetings, the same as any other legislative body has to do.

The Supreme Court wrote a letter to the Governor, who obviously signed the bill to make it law to the President Pro Tempore and the Speaker of the House, signed by all the members of the Supreme Court saying no. You can't tell us -- Our rule-making authority derives from the Constitution. It's a judicial function as set forth in Article V, specifically Section 10(c) and you can't tell us under penalties generally applicable to the Open Meeting Law, Sunshine Law, that we have to promulgate rules in any particular fashion.

That was another instance I wanted to use historically to show that without anything pending before them, and certainly none of them have been arrested for violating the Sunshine Law, they said we're not going to follow it. We're going to suspend it as it applies to us, but that gets to the question of, how can you curb, if at all, if you wish to, the rule-making authority? If they're deriving that

authority from the Constitution, you can't pass a statute that says follow this procedure because that's been tried once. They've said no. I hope that adds to the --

REPRESENTATIVE REBER: It does. Thank you very much.

CHAIRPERSON GANNON: Thank you, Representative Reber. Mr. Andring.

MR. ANDRING: Just one question. There were two pieces of legislation circulated today, Senate Bill 779 and Senate Bill 1045, each of which proposes a rather limited amendment to the existing language of Article V, Section 10 of the Pennsylvania Constitution. Is my understanding correct that you don't believe that these amendments would be sufficient to correct the problems as you perceive it?

In fact, the Office of Attorney General is advocating the complete repeal of Article V, Section 10 of the Pennsylvania Constitution to be replaced by the language contained in the testimony that the Supreme Court shall exercise such powers and perform such duties as may be imposed by the law?

MR. GRACI: The language we propose, the very simple statement we believe puts the rule-making authority back to where it was before the 1968 amendment to the Constitution. I have not examined in great detail, although I have read them, 779 and 1046, which seem to me have to be -- they have to dovetail. Certainly to adopt 1046 without a constitutional amendment --

Quite frankly, I don't know why Sections 505 and 1722 are in the judicial code because all they do is reiterate what's in the Constitution, and that portion of the Constitution, as I read it, and certainly as the Supreme Court has interpreted, it doesn't need legislation to make it effective.

The provision in what would be the resolution to amend the Constitution would be similar in -- We didn't propose putting it in the Constitution, but part of the Attorney General's testimony would suggest the adoption of the federal model where the Supreme Court has committees and the Supreme Court proposes rules and the Congress has -- I forget how many months. I have the statute with me, but they

have so many months to review it. If they don't do anything, it would become the law; become a rule, or they could tinker with it; or, as I mention in the habeas corpus rules last year, they could actually write them if they want. This is a little bit more I think of a limitation than what the Attorney General proposed, but I think they could go hand in hand.

MR. ANDRING: Just to clarify then, it is correct that the Attorney General is essentially proposing rather than a modification of Article V, Section 10, a complete repeal of Article V, Section 10 and the establishment of essentially the federal type system relating to the jurisdiction powers of the Appellate Courts?

ATTORNEY GENERAL FISHER: That's correct.

MR. ANDRING: Is that a fair statement?

ATTORNEY GENERAL FISHER: That's correct.

CHAIRPERSON GANNON: Thank you, Mr. Andring. Mr. Preski.

MR. PRESKI: One question. Attorney General Fisher, you referred to--Mr. Graci might have answered this--that you're concerned that we might be seeing a trend here with the Supreme Court that they've started very gradually and moved on and on. We have a proposed evidence code that the Supreme Court is now promulgating.

Do you see or do you have any thoughts about the evidence code which had been the creature of legislation from what I understand to be many years sponsored by Senator Greenleaf in the Senate to the point now that we are about to have an evidence code created not by the legislature at all, but purely by court rule? Do you have any thoughts about that?

ATTORNEY GENERAL FISHER: There was always a question as to whether rules of evidence were substantive or procedural. Unfortunately, under our current constitutional makeup, it doesn't matter what the General Assembly felt. If the court felt it was procedural, the court was going to be able to suspend what the General Assembly put in place

and adopt their own.

It's a close call. It's a call that I was part of in some of the debate when the bill was in the Senate a few years ago. I think the important thing is, we'd like to see a code before, get on the books somehow.

MR. PRESKI: Thank you.

CHAIRPERSON GANNON: Just a question. It seems to me from the gist of the questions and the testimony, and I think Mr. Preski touched on this, prior to the constitutional amendment it seemed the court periodically would work on the edges of what we call substantive law. It seemed people would take a look at it and say, what they did wasn't a bad idea and it's really not coming too far. It doesn't seem to bother anybody that much.

But, there really wasn't any evisceration of any statutes that had been in place wholesale. Then subsequent to 1968, and now where we are today where we saw that they didn't have any rules in place, and then peremptorily suspended an entire statute presenting that it violated the rule-making statute. That's purely what I'm seeing that

perhaps prior to '68 because it was a statute enacted by the General Assembly and signed by the Governor and I think that's always an important consideration. This isn't all done in a vacuum. The Governor looks at everything we pass. He has the right to veto it or sign it into law. He has his legal scholars take a look at it and determine whether or not they feel it's constitutional or unconstitutional.

It seems to me that a lot of this happened, prior to that when it was by statute, seemed to be a sense from the testimony and questions that the court would say no, if we go too far the legislature can always come in and take a look at this and could amend that statute or change that statute in some way to affect what we did. Whereas, subsequent to '68 with it being an constitutional enactment, that the court -- not only do they make the rules, but they determine the definition of a rule. It seems to me that definition is continually expanding from what they said.

That brings me to a question. These statutes that were referenced in your testimony you make a note they are repealed. Do you know

whether or not they were specifically repealed or repealed by the adoption of the '68 constitutional amendment?

MR. GRACI: No. They were repealed, if I recall, Mr. Chairman, with the adoption of the judicial code and the Judicial Act Repealer Act.

CHAIRPERSON GANNON: Then my question --

MR. GRACI: Title 19 of what used to be Purdon's Statute was entitled "Criminal Procedure". Title 17 was "Civil Procedure". It was in those statutes -- Actually, both of those acts were found in Title 17. Those were wholesale repealed in 1976 or '78 with the adoption of the judicial code.

CHAIRPERSON GANNON: If the people of Pennsylvania in their wisdom decided to repeal that section of the Constitution that grants this exclusive authority to the court to make their own rules and replace it with language that's suggested in this article by Mr. Ledewitz, we would have to reenact a statute, or I guess replace the statutes that would give it rule-making authority.

MR. GRACI: Or you would have to reenact Title 17 and 19 and adopt rules. The idea, if I might, Mr. Chairman, and I think when you look at the way the Constitution particularly now is constructed and the extreme -- the legislative authority is in the General Assembly and executive authority in the Governor and judicial authority in the Supreme Court, you can adopt rules for how you conduct your proceedings here in the House, how you consider bills and all those kind of things.

It was Judge Woodside as a member of the Constitutional Convention that proposed giving the Supreme Court constitutional rule-making authority as it existed in the statutes. That makes sense if you are talking about actual procedure; you know, should something about by a petition or should it by rule to show cause? Should it be by a motion? Should we have answers? What times should --

Those things nobody here should be overly concerned about. That's regulating what's goes on in the court. But, defining a right and ultimately defining what is a rule and what's procedure and what substantive is, I

think belongs with the popularly-elected body and not with the court.

As I said at the conclusion of my testimony, right now if they say it's a rule, it's a rule and you can't do anything about it. The comment that the Attorney General made, if I can just to expand upon the evidence code thing, I don't know as Mr. Epstein said is that substantive or procedural. I remember that debate going back when I was in law school and nobody tried to resolve it then.

Look at the statutes right now. In Title 42 there's a section that's called code of evidence, all of the privileges and immunities. One that's particularly important in the business we're in, the privilege against self-incrimination, which is obviously a constitutional dimension, but the statutory authority for either the Attorney General or a district attorney to seek an order of immunity, that's set forth in a statute. The Supreme Court has said that that statute is constitutional. The Supreme Court has said that it's a matter within the discretion of the Attorney General. That's part of that code of

evidence. Is that not going to be good anymore?

You've done a lot of things, things like the business records exception; a lot of exceptions to the hearsay rules are legislatively adopted and have met with approval in the courts. Now all of a sudden we're looking at a thing that's about this thick (demonstrating) that they're calling not a code of evidence as it was called when it was in the legislature, but now the rules of evidence, and I think they're called rules for a reason in what has been published. The Attorney General's proposal would put the power where it should be, with the representatives of the people.

CHAIRPERSON GANNON: It just seems to me, prior to '68 everybody knew what was procedural and what was substantive and maybe a little bit of wiggle room. Now all of a sudden nobody knows what's substantive, what's procedural, and we've got ourselves in a situation where we see a statute being essentially declared unconstitutional without anybody having an opportunity to petition or

have a hearing or --

ATTORNEY GENERAL FISHER: And without any substantive rules.

CHAIRPERSON GANNON: -- or substantive rules. I thank you very much, Attorney General Fisher, and Mr. Graci for your testimony today.

ATTORNEY GENERAL FISHER: I would like to indicate to the committee, as you can see, Mr. Graci is probably one of our premiere experts in this Commonwealth on this entire issue. Mr. Graci certainly is willing to help this committee and any members of the committee as you move forward on this issue. He certainly is a resource for the General Assembly to use.

CHAIRPERSON GANNON: I'm glad you spoke, Attorney General, because you are an elected official, elected statewide, and you have come here voluntarily to present your position on this very important issue. I would extend an invitation to every member of the Supreme Court or a member that they would designate that they would come down and met with this panel and present their views on this

very important issue, either separately or however they see fit. I would be willing to reconvene the committee at anytime convenient to the court or the members of the court or a member of the court who wish to come down and address us and discuss this with us in a very friendly fashion so we can get a better understanding how the court views its authority today under this Constitution as written now. Thank you very much.

ATTORNEY GENERAL FISHER: Thank you, Mr. Chairman.

CHAIRPERSON GANNON: Our next witness is Larry Frankel with the American Civil Liberties Union of Pennsylvania. I think we'll take a five-minute recess for the stenographer.

(Recess occurred)

CHAIRPERSON GANNON: Mr. Frankel, you may proceed.

MR. FRANKEL: Thank you, Chairman Gannon, Subcommittee Chairman Clark, and Representative Manderino for hanging in there this long. My name is Larry Frankel. I'm the Executive Director of American Civil Liberties Union of Pennsylvania. I do not have written

testimony. I don't know if I should or should not apologize for that. I do not have written testimony. I thought better that I listen to some of what I heard today and offer some of my own reflections of what I heard, as well as provide you with some information on a few suggestions that I came across in some reading I did with relevance to the testimony and the subject matter here today.

I feel like we're reliving history almost. It seems that you go back and look throughout American history, and I think Representative Caltagirone referred to this earlier. There's been a consistent tension between the branches of government, whether it's between the legislative and the executive, the legislative and the judiciary, the executive and the judiciary. A hallmark of our history and our form of government is a certain amount of tension between those branches because that accounts for the checks and balances which I would submit have served this country very well.

I think almost every other country in the world envies the stability of our

government and its ability to function and respond and make change normally, without violence; normally through an orderly process, and the system of checks and balances has served us well in that regard. The system of separation of powers has also served us well. I think those are the issues that really are at the heart of what is at stake here.

How do we maintain a separation of powers? How do we maintain the checks and balances? Certainly, the legislature does have the right to inquire whether the judiciary has intruded into the legislative arena, just as the judiciary has the right to tell the legislature you cannot intrude into the arena which the judiciary has control of. This is historical. It's not new. It's not novel. There may be one or two recent instances that have caused it to reappear on the radar screen here in Pennsylvania.

I would be interested myself to ask one of my board members if he has information about what Representative Reber was asking, what's the history in Pennsylvania? How often have laws been struck down both under the 1968

constitutional provision, the prior statutory provision, and what occurred even prior to the statutory provision? There may be some historical context here in Pennsylvania. Certainly there is in this country with regard to the U.S. Supreme Court periods where there's been great tension between the legislative and executive branches and the courts.

In most instances we weathered those storms without need for drastically changing our form of government. We've had a system that has indeed worked.

I think about Pennsylvania, and if I recall correctly, we have the oldest state Supreme Court in the country. To all of a sudden believe that the court is out of control or something is mistaken in the wholesale manner about what they're doing I think is a disservice to the history of that court, which has been here even longer than the U.S. Supreme Court.

Although the Constitution has been revised, we have one of the oldest established set of rights for individuals in this country. In fact, portions of the Bill of Rights were

fashioned upon provisions that existed in the Constitution of Pennsylvania that was in effect at the time the Bill of Rights was adopted. I think we have some great historical precedent here in Pennsylvania that we should pay attention to.

I believe the lessons from Pennsylvania were well-heeded by the founders of the republic. Interestingly enough, I was reading some of the Federalist Papers myself. I guess this hearing has caused some of us to read or reread some of the important documents.

District Attorney Morganelli referred to the Federalist Paper Number 78 which, in essence, was the argument for life tenure for federal judges. Like some of the questions about term limits, the Federalist system has life tenure, and there was an argument about why to make those judges be able to serve for life, and that was to preserve their independence.

Interestingly enough, and I don't think it was intentional on Mr. Morganelli's part, but he left out what I found to be one of the most telling passages of the Federalist

Paper Number 78 in referring to the judiciary and the importance of the judiciary. I'll read what we believe Alexander Hamilton wrote about the judiciary. In the republic it is a no less excellent barrier to the encroachment and oppression of the representative body, and it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws. That's what the judiciary does. You ask the legislature to make the policy, but the judiciary in its turn make sure that there's an impartial administration of the laws.

Justice Marshall way back in Marberry versus Manson established the right and the authority of the courts to review statutes to make sure that it complied with the Constitution. I only refer to the Federalist Papers and Justice Marshall to again impress upon this committee and any members of the public that may tune in to watch the proceeding that we are talking about concepts that have great historical precedent, and again, have served our country well; not that it always worked one hundred percent perfectly.

We did fight a Civil War in this country, but I think if you look at societies and governments throughout the world over the last 200 plus years, it would be hard to find one that functioned as well as ours did, and the judiciary authority is very important in that regard.

And again, not to say there haven't been times of great tension between other branches of government and the judiciary. Back when Franklin Roosevelt was President, the, quote unquote, liberals were complaining about judicial activism, and Franklin Roosevelt suggested that he be allowed to pack the court. Fortunately his plan did not succeed. The judiciary survived.

The question of whether one or two judges might have felt intimidated by President Roosevelt, there's a phrase about the switch in time saves nine, but that is another historical antecedent. There was much concern during the latter years of the Warren court about whether that court went too far. This time it was, quote unquote, conservatives complaining about an activist court. Again, there is some

history to what I see going on.

Just this last term of the U.S. Supreme Court they struck down four laws duly passed by Congress, which was the most federal legislation that had been stricken down by the Supreme Court in many years. In many cases one would say that the conservative justices were the activist because, at least in two or three of those cases they found that the state's rights were being violated by the Congress and too much power was being given away. This give and take and tug between the courts and the legislative branch has been part of our history. We can solve this problem without amending the Constitution.

In that light I'd like to make a couple of suggestions based on the reading that I have done. One of them follows through on what we've heard today. That is setting up some kind of mechanism, whereby, there is some dialogue between this body and the court. I'm not sure how to implement that. I'm not sure what restrictions the court may feel. I'm not sure what restrictions, whether they be legal or political, the legislature may feel.

I will provide committee staff after I get back to my office a copy of two law review articles which talk about setting up some type of formal or informal mechanism for state legislatures and state courts to communicate with each other, not only about constitutional questions, but questions of statutory interpretation. Sometimes the court maybe can learn more about the legislature's intent and process and how it arrived at its statutes. Sometimes those statutes are purposely ambiguous and will require interpretation by the court, and similarly, the court can let the legislature know a little bit more about how it works and what it thinks.

I certainly want to see an independent judiciary, and the ACLU itself is quite cognizant that it's usually the courts that are the best protectors of individual freedoms and liberties, but that doesn't mean the court doesn't have an obligation to explain what it does and try and educate not just the legislature but members of the public when it takes action.

The other suggestion I have is to

remind people who disagree with court action that sometimes they need to bring another case and make a better argument. Certainly, the Attorney General is trying to do that with his petition to the court on the Capital Unitary Review Act. Go back to the court. Try and make a better argument. Try to convince them why they were wrong. Don't threaten them with impeachment. You don't need to threaten them with a constitutional amendment.

There's many areas of the law that the ACLU has been involved with when it didn't win the first case, but somehow we rethought the issues, rethought the approach, maybe had a better set of facts, maybe found a better lawyer and were able to go back to court and obtain a change. We don't have to rely on threats to the court or the cumbersome amendment process with its unknown consequences to necessarily affect the change. Perhaps a little dialogue with the court rather than a hectoring of the court would be appropriate.

I believe that this legislative body does want to comply with the Constitution, and the court is there to make sure the

Constitution is complied with. Maybe further discussion in a more reasoned atmosphere without some of the -- and I'm not implying anything here today, other than the word impeachment being tossed around I think rather improperly. But the kind of dialogue and discussion which can be engaged in by people who want to make good public policy and want to comply with the Constitution could be a beneficial way of resolving some of the tension that seems to have developed over the last few years between the court and the legislature.

Finally, I would also note that frequently it's the majority of the legislature who is most upset when the court strikes down laws. I'm sure all of you are well aware that very soon the majority could be the minority. They might be very happy to have a court ready there to strike down laws that the majority has passed.

The courts inherently protect the rights of the minorities. They are the ones who make sure our process, which is not one hundred percent democratic -- We have a limited form of government. They want to make sure the

democratic process doesn't undo that limited form of government, and we need to all remember that the courts protect all of us even when the majority is trying to impose its views on all of us in a way that is contrary to the Constitution.

Thank you, and if you have any questions I'll be happy to answer. I will provide staff with references, if not copies of two law review articles which talk about the informal or formal mechanisms that could be developed for better dialogue between the state court and state legislature.

CHAIRPERSON GANNON: Thank you, Mr. Frankel. I have a question. In light of your reference to Alexander Hamilton's Federalist Papers, would you support a federal model insofar as rule making is for the Pennsylvania Supreme Court?

MR. FRANKEL: I and my organization have not even begun to discuss that issue or take a position. I'd certainly be willing to take a look at it. I also think it would be important to understand the impetus behind the 1968 Constitutional Convention.

During the break I was chatting with Mr. Graci to see if he had more information since I believe he did present some good information about what happened, how the provision, that issue here today became part of the Constitution and statutory predecessors. He didn't really have that much information, but there is some good legislative history and maybe there is something that would be very enlightening from that constitutional convention; why they decided to vest this authority in the court in the Constitution rather than leave it as statutory.

I'm going to defer a definitive answer until we can look at that legislative history or constitutional history, as well as consult our board of directors before I opine on that.

CHAIRPERSON GANNON: Thank you very much. No questions, thank you for being here today and offering your testimony and information. We appreciate it.

MR. FRANKEL: Thank you.

CHAIRPERSON GANNON: Our final witness is Deb Spungin, President, and Julie

Good, Executive Director of Families of Murder Victims. Along with them is Detective Patrick Boyle and Nancy Boyle. I understand Deborah Spungin is not here.

MS. GOOD: Good afternoon, members of the Judiciary Committee and guests. Thank you for the opportunity to testify concerning the rule-making power of the Pennsylvania Supreme Court relating to the death penalty appeal process. I am here today particularly to speak about the effects of delays in the death penalty appeals on the victims of crime.

I am the Executive Director of the Anti-Violence Partnership of Philadelphia, which is a private nonprofit organization that addresses the cycle of violence in Philadelphia through victim services and violence prevention programs. One of our two main programs is Families of Murder Victims.

Families of Murder Victims was started in 1980 as a support group for relatives and close friends of homicide victims, who we call co-victims. Over the past 17 years, Families of Murder Victims has grown from the original support group to a

multidisciplinary victim service program, which provides a variety of supportive services to co-victims, including extensive assistance throughout all stages of the criminal justice system, case and system advocacy, and individual and group therapeutic counseling for adults and children. During this time we have provided services to thousands of co-victims both within and outside of Philadelphia.

At Families of Murder Victims we have learned over the years that the criminal justice system is one of the many factors that can cause a secondary assault on homicide survivors. A secondary victimization can elicit a similar emotional reaction as that which occurs following the original criminal act. In some cases a co-victim can be even more traumatized by this second injury. The co-victim is in a state of emotional dependency, trusting that help will be provided by systems for which he or she has formed lifelong and trusting expectations. Because of this, co-victims are often further shocked and frustrated by lack of the criminal justice system's response to their needs.

This is especially true regarding the long delays that are caused by appeals in criminal litigations for the death penalty. In Pennsylvania, it often takes 15 years or longer for all appeals to be heard while not denying the defendant any of his legal constitutional rights. During this period, co-victims repeatedly experience an acute grief reaction on every occasion the case is brought before the court. They are unable to work on their grief or to work through a resolution until the court has made a final ruling on this case. There are severe emotional reactions as the co-victim rehears and relives the circumstances of the murder in the courtroom. So, in effect, homicide co-victims live in a clouded world of grief for years after the murder occurs.

Co-victims report that they must put their grief on hold during this long period because the emotional energy is not available to deal with both court proceedings and the emotional rigors of working through their grief.

Despite common perceptions, it is not true that all co-victims actively seek the

death penalty for the murderers of their loved ones, especially in states such as Pennsylvania in which the criminal code includes a sentence of true life without parole. However, once an arrest has been made and a conviction secured, all co-victims need a final and unalterable conclusion to the criminal justice process in order for them to redirect their energy and attention to focusing on a new direction in life. Those of us who work closely with co-victims understand that life will never be the same as it was before their tragic loss. The best situation they can hope to achieve is a new normal that will allow them to find peace and comfort in future relationships.

However, as long as the appeals process extends through decades of time, this sense of closure and completeness is denied to co-victims. I heartily support all measures that will result in a reduction of the time needed to exhaust the proper constitutional appeals of defendants who are sentenced to the death penalty. Until that time, the criminal justice system will continue to inflict a second victimization on co-victims of homicide.

It is unfortunately all too true that in these cases for the surviving loved ones of homicide victims, justice delayed is truly justice denied.

Thank you for the opportunity to speak on this important issue.

CHAIRPERSON GANNON: Thank you very much for your testimony. Detective Boyle.

DETECTIVE BOYLE: Good afternoon. I wish to take this opportunity to thank you all for affording me this opportunity to speak to you today about this issue.

As stated, my name is Patrick Boyle. I'm a detective with the Philadelphia Police Department. I have served the City of Philadelphia for 32 years. I want to give you a little brief history of my family. Two of my brothers followed my footsteps into the police department, as did a brother-in-law who was shot in 1972. Fortunately he survived. He attempted to stop two men that was robbing a bar and its patrons. He's on disability now.

To the point, my son, Officer Daniel Boyle, followed our footsteps into the police department and graduated from the police

academy in June of 1990. He is assigned to the 26th District of Philadelphia, East Girard and Montgomery. If you know the area, and I think some of you do, it's a very high crime area.

On February 4, 1991, approximately 2:40 in the morning, Danny stopped what he suspected to be and turned out to be a stolen automobile. The operator of this automobile jumped from the car and proceeded to fire a 9-millimeter semiautomatic handgun at Danny. One of the 13 shots fired struck Danny in the right temple. Danny died of his wounds two days later at Temple University Hospital. Danny was 21 years old and he served for one year and one day. I guess we are the co-victims that the previous witness spoke about.

The perpetrator of this crime was arrested, tried and convicted of first-degree murder. He was tried and convicted by a jury of his peers and sentenced to death. Now after almost six years of appeals, legal maneuvering, we as a family are now facing yet another hearing on December the 15th at City Hall. The defense team is using that catch-all phrase

ineffective counsel. All other appeals were denied. The defense is also alleging that the defendant suffers from some sort of mental disorder. After six years it's discovered.

We, as a family, have suffered the worst kind of loss possible for anyone, the loss of a child, the loss of a child to violence. The only person seems to be important today is the one left alive--the convicted killer sentenced to death.

Many people seem to forget about the victim. They forget about the families left behind. We don't seem to count anymore. We often wonder if any of these legal do-gooders ever sit back and reflect and think about the victim. Do they think about my Danny? Do they think about the families left behind? Do they think about the devastating effects that we have to face on a daily basis? Do they understand or does anybody ever care? Do they understand that through each nonsensical appeal we must relive Danny's injuries, the shooting, the hospital vigil and his funeral.

As the days and the weeks and the months and the years go by, we have done our

best to get our lives into some sort of order. But, every time we start to feel on a certain level, a certain plane this comes up in arrears once more. We start back again on that emotional roller coaster up and down. When is it going to end?

Victims' families, we need and we deserve to know that there is a legal end to this nightmare. Being a member of the law enforcement I do agree wholeheartedly with the appeal process. I understand that we -- I would be the last one to deny a defendant his right to an appeal. But, there has to be an end. There has to be a time limit. There has to be a light at the end of this tunnel for the families of these people. I'm not talking just about me. I'm talking about every family of a murder victim throughout this state and throughout this country for that matter.

We all need and we all must have some sort of closure so that our loved ones may finally rest in peace. Thank you.

CHAIRPERSON GANNON: Thank you very much, Detective Boyle.

DETECTIVE BOYLE: I'd be happy to

answer any questions you might have. Excuse me for my --

CHAIRPERSON GANNON: That's quite all right. Representative Caltagirone.

REPRESENTATIVE CALTAGIRONE: No questions.

CHAIRPERSON GANNON: I have no questions, but a comment that your testimony is compelling that what happens here in the Capitol does not happen in the vacuum; that people's lives are affected and changed by what we do, whether it's here in the General Assembly or in the court, in the Supreme Court. Certainly, and I'll finish with this, as one United States Supreme Court justice once said, justice delayed is justice denied. It's very evident in your case that justice has been denied.

DETECTIVE BOYLE: Thank you, sir.

CHAIRPERSON GANNON: We would hope that the Supreme Court of Pennsylvania would reexamine it's prerogative under its rule-making authority and pay more attention to the will of the people as expressed through the General Assembly where it's appropriate. I

thank you for being here today and we share with you the sorrow that you have.

DETECTIVE BOYLE: Thanks very much.

CHAIRPERSON GANNON: This meeting of the House Judiciary Committee is adjourned.

(At or about 1:50 p.m. the hearing concluded)

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C E R T I F I C A T E

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

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

Dated this 17th day of November, 1997.

Karen J. Meister

Karen J. Meister - Reporter
Notary Public

My commission
expires 10/19/00