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PUBLIC HEARING
THE RULE MAKING AUTHORITY

TESTIMONY OF NORTHAMPTON COUNTY DISTRICT ATTORNEY JOHN M. MORGANELLI BEFORE THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA JUDICIARY COMMITTEE

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 5, 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 State Courts through judicial decisions are deciding hot-button questions of culture, 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 moral positions rather than as legal determinations and those decisions resonate throughout our culture with powerful effects on public attitudes. In the area of the 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. Culture is made the 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 the 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 moral and cultural decisions because 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 and the Executive 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 provided no 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.[1]

A review of the Federalist Papers, Federalist Paper Number 78 authored by Alexander Hamilton gives us an insight as to how the Judiciary was viewed at its inception.

'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 with success either of the other two; .... It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter, I mean so as long as the Judiciary remains truly distinct from both the Legislature and the Executive. For I agree, that there is no liberty, if the power of judging be not separated from the Legislative and Executive powers.'[2]

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, courts line 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 5 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 criticism 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 to appointments have also failed. More serious efforts to limit the powers of 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 5, Section 10 of the Pennsyvlania Constitution provides that the "Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct

of all courts ...." 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 the ravages of 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 just 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. Mulcahey, separation of powers in Pennsylvania: the Judiciary's prevention of legislative encroachment, 32 Duquesne Law Review 539 (1994)

The Supreme Court, under the guise of "rule making", have successfully made their own agenda the law of the Commonwealth of Pennsyvlania contrary to the wishes of our citizens as expressed by the Legislature. Our citizens were outraged by the lengthy delay between the death penalty verdicts and the 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 the 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, on 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. Ledewitz, What's Really Wrong With The Supreme Court of Pennsylvania? 32 Duquesne Law Review 409 (1994)

The federal system does not lend itself to such problems.[3] neither do the rule making systems of the vast majority of states.[4]

It is my personal position that in conjunction with amending the Constitution, that we also focus our efforts at the ballot box. The next judicial retention election for a Supreme Court Justice is in 1999 and it is my view that the public must be informed as to the individual decisions of the Justices and that 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 reigning in the rule making authority of the court. Thank you for your consideration.

ENDNOTES

1. Slouching Toward Ghommorha, Judge Bork

2. The Federalist Papers

3. The United States Constitution is silent on the subject of rule-making. The federal rule-making model, however, is premised on the assumption that Congress has the authority to make rules of procedure and to delegate that power to the Supreme Court. See, Sibbach v. Wilson & Co., 61 S.Ct. 422, 425 (1941). The federal rule-making process has been described as "judicial rule-making pursuant to a legislative delegation and subject to a Congressional veto." Wright and Miller, Federal Practice and Procedure, §1001, p. 6 (2d. ed. 1987)

4. At least thirty-seven (37) states provide direct legislative, shared authority and/or legislative oversight of the rule-making function.