

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 Subcommittee on Courts

York County Commissioners' Room
York, Pennsylvania

Thursday, October 16, 1997 - 1:15 p.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson
Honorable Al Masland
Honorable Jere Schuler

IN ATTENDANCE:

Honorable Thomas Caltagirone
Honorable David J. Mayernik
Honorable Michael Waugh

KEY REPORTERS

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ALSO PRESENT:

David L. Krantz
Minority Executive Director

Heather Ruth
Majority Research Analyst

C O N T E N T S

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WITNESSES

PAGE

Opening Remarks 3
Honorable Daniel Clark

H. Stanley Rebert, Esquire 5
District Attorney of York County

Michael A. George, Esquire 17
District Attorney of Adams County

Garry Kling 32
Landlord, City of York

Gary Gilden, Esquire 40
Dickinson School of Law

Suzanne Eng 72
Parent of Crime Victim

Jeff Gunnet 83
Husband of Crime Victim

1 CHAIRPERSON CLARK: I want to thank
2 everyone for coming out this afternoon. My
3 name is Representative Dan Clark. I'm the
4 Chairman of the Judiciary Committee
5 Subcommittee on Courts. This afternoon in York
6 County, we're going to have a public hearing
7 which focuses on the Suspension of the Acts of
8 the General Assembly by our Supreme Court of
9 Pennsylvania. That is the official title of
10 the hearing, and hopefully, the hearing will
11 take shape along the lines of how the Supreme
12 Court has been able to frustrate some of the
13 matters that the legislature has tried to
14 address as doing the people's business.

15 Recently, we have passed laws in the
16 area of medical malpractice, tort reform,
17 landlord tenant law and review of our death
18 penalty appeal process in efforts to answer
19 concerns of our constituents and also concerns
20 of the Commonwealth and have found a lot of
21 those efforts were not after the Supreme Court
22 had ruled on them.

23 Also as a member of the Judiciary
24 Committee, we have sought to address various
25 issues. One would be the Commonwealth's right

1 to a jury trial. It appears as we get into
2 hearings on those issues and research those
3 issues, we run into problems that they may
4 violate the Supreme Court's rule-making
5 authority and, therefore, be deemed
6 unconstitutional. It appears that the Supreme
7 Court has taken this rule-making authority,
8 which is provided by the Constitution, but has
9 expanded that far beyond any intent of when
10 that was placed in the Constitution back in
11 1968.

12 I think that is some of the testimony
13 we want to glean today, and hopefully, after a
14 number of these hearings, ending with a hearing
15 in Harrisburg on October 30th, when we will
16 have a little better handle on the issues
17 before us; hopefully, have some remedies to
18 those, and be able to move in the legislature
19 to rectify some of our concerns and to
20 hopefully balance out the participation of the
21 three branches of government in governing this
22 Commonwealth.

23 I'd like to introduce to you other
24 members of the Judiciary Committee who are with
25 us today. I think what I'll do is have them

1 introduce themselves. I'll start here with my
2 far right. We'll just go across the panel.

3 REPRESENTATIVE SCHULER: I'm
4 Representative Jere Schuler, Lancaster County.

5 REPRESENTATIVE CALTAGIRONE:
6 Representative Tom Caltagirone, Berks County,
7 Democratic Chair of the Judiciary Committee.

8 REPRESENTATIVE MASLAND: I'm Al
9 Masland. I represent most of western
10 Cumberland and a small part of northern York
11 County.

12 CHAIRPERSON CLARK: And with that,
13 we'd like to welcome our first people who will
14 provide us with testimony, H. Stanley Rebert,
15 who is the District Attorney of York County,
16 along with Michael A. George, who is the
17 District Attorney of Adams County.

18 MR. REBERT: Good afternoon,
19 gentlemen, and good afternoon, ladies and
20 gentlemen in the gallery. I appreciate the
21 opportunity to testify today on behalf of the
22 Pennsylvania District Attorneys Association
23 concerning our Supreme Court's rule-making
24 powers.

25 Article 5, Section 10 of the

1 Pennsylvania Constitution provides: The
2 Supreme Court shall have the power to prescribe
3 general rules of governing practice, procedure
4 and the conduct of all courts. All laws shall
5 be suspended to the extent that they are
6 inconsistent with rules prescribed under these
7 provisions.

8 This particular power of the court
9 has come to greatly impact the ability of law
10 enforcement to protect victims, witnesses, and
11 all of our citizens from the ravages of crime.
12 This committee is well aware that the Supreme
13 Court has increasingly asserted authority over
14 matters historically left to the legislature in
15 the name of its state constitutional
16 rule-making power and has become increasingly
17 incapable of exercising any self-restraint in
18 this area; thereby, overruling or modifying a
19 broad spectrum of legislation including, but
20 not limited to, laws of evidence, capital
21 punishment proceedings, child videotaped/closed
22 circuit TV testimony, and the Commonwealth's
23 right to a jury trial. Even the academic
24 community has commented on our Supreme Court's
25 propensity to wield its rule-making authority

1 in Pennsylvania as a powerful check on
2 legislative action it does not like.

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

11 The Supreme Court consistently uses
12 its fortified rule-making authority to reduce
13 law enforcement's ability to protect our
14 citizens from crime. As an example: Child
15 videotaped and closed circuit testimony. After
16 the court struck down legislation allowing
17 traumatized child abuse victims to testify, the
18 General Assembly pursued the only avenue
19 available--constitutional amendment.

20 The amendment was improved by you in
21 two consecutive sessions and presented to the
22 public, which overwhelmingly approved this
23 amendment. But our courts do not like it, and
24 by means of truly Byzantine logic, the
25 Commonwealth Court held that even that wasn't

1 good enough. It struck down the amendment
2 holding that because of the constitutional
3 rule-making clause, the question before the
4 voters was twofold: Should child videotaped
5 and closed circuit testimony legislation be
6 permitted? Should the legislature be empowered
7 to enact laws in this area? You and I may
8 easily see that these are simply two sides to
9 the same question, but our opinions don't
10 count. Once again, the rule-making clause is
11 used as a weapon against those who would
12 protect victims and fight crime.

13 Commonwealth's right to a jury trial.
14 Although the Commonwealth has throughout most
15 of its history been placed on an equal footing
16 with the defendant with respect to having a
17 jury hear the case, the Supreme Court in the
18 '70's took that right away. The General
19 Assembly, offended by this inequity,
20 statutorily reinstated the Commonwealth's right
21 to a jury trial by an overwhelming vote. Our
22 Supreme Court, however, in a split decision
23 stripped the power to legislate in this area
24 away.

25 So, even though the General Assembly

1 wants victims and criminal defendants to be on
2 a level playing field, the court has, through
3 its rule-making clause, said that what the
4 public wants and what you, as the public's
5 representatives want, simply doesn't matter.

6 Evidence Code. There historically
7 has never been any question about the General
8 Assembly's power to promulgate evidentiary
9 rules. When the General Assembly moved,
10 however, to consolidate all of the evidentiary
11 rules into a comprehensive and organized
12 Evidence Code, the Supreme Court once again
13 decided to use the rule-making clause as a
14 means to take over this area of law making as
15 well. Why this was not impermissible
16 rule-making before, but is today, no one has
17 ventured to explain and no one has ventured to
18 speculate where it will stop.

19 Death Penalty Collateral Appeals.
20 State Habeas Corpus Law has always been
21 acknowledged by the Supreme Court as falling
22 within the purview of the General Assembly.
23 Amazingly, when the legislature moved to
24 shorten the time period for death penalty
25 appeals by consolidating the direct and

1 P.C.R.A. appeals, the State Supreme Court did a
2 complete about-face, implicitly taking over the
3 role of legislating State Habeas Corpus Law as
4 it applies to death penalty cases.

5 The court has suspended and, in
6 effect, thrown out the Capital Unitary Review
7 Act contained in Act 32 of 1995, reinstating
8 the much lengthier double appeal process. The
9 court, at least for now, has graciously
10 permitted the General Assembly to retain its
11 power to enact P.C.R.A. legislation for
12 non-capital defendants. The public is,
13 understandably, outraged by the lengthy delay
14 between the death penalty verdict and the
15 carrying out of the penalty.

16 As their representatives, you
17 properly enacted sound legislation to do
18 something about it, but our court has said no.
19 There is nothing you can do about it. There is
20 nothing the public can do about it, and that no
21 matter what you or your constituents want,
22 these seven individuals will decide what is
23 best.

24 From a personal perspective, I
25 consider this the most important in terms of

1 the public's confidence in the efficacy of the
2 criminal justice system--that of capital
3 litigation.

4 There are eight defendants on death
5 row as a result of York County prosecutions.
6 We are second only to Philadelphia in that
7 statistic. Yet, not one of those defendants
8 has received the penalty that was imposed by a
9 jury of his peers, despite the fact that some
10 convictions date back to the early 1980's, and
11 that at least two of the condemned prisoners
12 have acknowledged their guilt and requested
13 that no action to prevent their execution be
14 taken.

15 These cases are all at various levels
16 of appeal in the state and federal court
17 systems. That is not justice. A ninth
18 defendant, who was convicted early on in my
19 administration, is the only one to have reaped
20 his just rewards, and that was a natural death
21 due to AIDS.

22 To say that death penalty cases are
23 over-litigated is, perhaps, the grossest of
24 understatements. In an effort to expedite the
25 process, while in the meantime respecting the

1 rights of criminal defendants charged with such
2 awesome crimes, you enacted the previously
3 mentioned Capital Unitary Review Act. The
4 purpose of the act was to expedite the cases
5 going through the system while giving the
6 defendants not only the opportunity to directly
7 appeal their convictions, but also the
8 opportunity to wage collateral attack on those
9 convictions. Now, however, the Pennsylvania
10 Supreme Court has interceded and suspended the
11 Capital Unitary Review Act.

12 The court has not ruled that the act
13 is unconstitutional or that it is illegal. It
14 has simply made a judgment that the act is, in
15 effect, a rule of practice and procedure and
16 that rules are created and imposed by the
17 court; not the legislature. In effect, the
18 court has advised the legislature that it's not
19 your job to legislate rules; that is our
20 bailiwick and our bailiwick alone. So the net
21 effect is that, we take one step forward and
22 two steps back. In terms of litigation,
23 everything is now being returned to the Court
24 of Common Pleas to commence again the
25 collateral process.

1 Just a few days ago I spoke with Jeff
2 Gunnert, whose wife was carjacked and murdered
3 by Mark Spatz, the closest thing to a serial
4 killer that will ever have been my duty to
5 prosecute in York County. Mr. Gunnert was
6 asking about the progress of the defendant's
7 appeal. My last contact with this husband of a
8 victim was to advise him about CURA and how I
9 felt it would expedite the litigation that we
10 both knew the defendant would relish. I could
11 hear the disappointment in his voice at our
12 setback.

13 The court's annexation of
14 traditionally legislative functions cuts to the
15 heart of our nation's democratic principles.
16 Once the court assumes an area of law within
17 its rule-making power, the process of
18 developing rules moves behind the cloak of
19 judicial secrecy, beyond the reach of the other
20 branches of government, and beyond the power of
21 our citizenry to correct or even to monitor.

22 Indeed, by founding their actions on
23 the state Constitution, the court renders any
24 statutory provisions on that point of law null
25 and void.

1 This is in marked contrast to the
2 promulgation of court rules in the federal
3 system and in the vast majority of states.
4 These jurisdictions recognize that rules of
5 court can be expanded to regulate more than
6 technical housekeeping matters, but to instead
7 affect important social policy questions such
8 as the revelation of prior sexual conduct to
9 attack rape victims, the release of dangerous
10 criminals on bail, the availability of
11 sanctions for frivolous lawsuits, and the right
12 of the victims of crime to have their cases
13 heard by a jury of their peers.

14 Accordingly, in most of our nation,
15 the promulgation of court rules is subject to
16 the democratic process. The legislature
17 delegates to the courts the initial function of
18 developing proposed rules, usually through a
19 system of advisory committees. The legislature
20 then must approve these rules or, in particular
21 cases, itself formulate them. In this way, the
22 public benefits both from the expertise of its
23 judiciary and from the perspective of its
24 elected officials.

25 This public hearing today is a

1 significant step in the right direction. The
2 prosecutors of this state have unanimously
3 endorsed the concept of bringing Pennsylvania
4 in line with most other jurisdictions by
5 assigning to the court system the initial
6 responsibility for proposing rules, while
7 reserving to the legislature its proper power
8 to approve or disapprove rules before they can
9 become law.

10 The rule-making power, although
11 perhaps, esoteric in its particulars, has
12 significant impact on many citizens who must at
13 one time or another have recourse to the court
14 system. Pennsylvania District Attorneys
15 Association urges you to move forward with a
16 constitutional amendment providing democratic
17 oversight of the rule-making powers of the
18 court.

19 Thank you for allowing me the
20 opportunity to speak on this important matter.
21 I apologize. I am not used to reading my
22 closings, but I received instructions from the
23 association that I better have the script in
24 writing so that I don't miss anything.

25 CHAIRPERSON CLARK: You did a

1 wonderful job. I think now I'll have another
2 member of the legislature just appeared
3 introduce himself to you. Then we'll open it
4 up for any questions that you might have of
5 District Attorney Rebert or District Attorney
6 George. Representative Waugh.

7 REPRESENTATIVE WAUGH: Thank you, Mr.
8 Chairman. I know several folks here. I'm Mike
9 Waugh, a member of the House representing the
10 south side of the City here in York County.
11 I'm not a member of the Judiciary Committee,
12 but since you're here in York with us today, I
13 thought I would take a little time to join you.
14 Thank you.

15 CHAIRPERSON CLARK: Thank you, Mike.
16 Do you have any questions?

17 REPRESENTATIVE WAUGH: No.

18 CHAIRPERSON CLARK: Representative
19 Schuler.

20 REPRESENTATIVE SCHULER: Thank you
21 very much, Mr. Chairman. Clarify some points
22 in your testimony for me. Am I correct that
23 when the courts get into this rule-making
24 process, that that rule would come to whom; the
25 legislature, or would we go through like we do

1 with other rules in the legislature, like the
2 Independent Regulatory Review Commission? Are
3 you familiar with that?

4 MR. REBERT: I'm not totally familiar
5 with that, but I don't believe the rule would
6 come to the legislature. No. I think the rule
7 is concocted, for lack of a better word, by the
8 court.

9 REPRESENTATIVE SCHULER: Let us
10 assume they come up with a rule and it's in
11 conflict with people's wishes, the legislature.
12 How would we handle that?

13 MR. REBERT: I think you handled it
14 in the same manner in the child abuse scenario.
15 An amendment was proposed that you passed and
16 then the people passed and --

17 REPRESENTATIVE SCHULER: They
18 overruled us.

19 MR. REBERT: Right.

20 REPRESENTATIVE SCHULER: How do we
21 correct that?

22 MR. GEORGE: Sir, I think, if I may
23 address that, that's exactly why this issue is
24 important to the Pennsylvania District
25 Attorneys Association. What we have is a

1 situation where rules are being pronounced,
2 handed down which are more than procedural
3 rules. For instance, the number of briefs that
4 somebody files on appeal, that's something
5 logistically that, perhaps, the Supreme Court
6 ought to be able to dictate.

7 But, when we get into situations
8 where the Supreme Court is taking legislative
9 initiatives and saying that they're improper
10 because they interfere with their rule-making
11 ability, it's causing a problem. It's causing
12 a problem because all of us, you at that table,
13 us sitting out here and litigating on behalf of
14 the public in the courtroom are responsible to
15 the public. We have accountability.

16 We often hear who polices the police?
17 Well, the district attorneys police the police.
18 The legislature polices the police. The
19 Attorney General polices the police. There's a
20 check and balance there. In this particular
21 instance that doesn't apply. The appropriate
22 question is, who is policing the Supreme Court
23 when they are legislating things against the
24 will of the majority of the population?

25 REPRESENTATIVE SCHULER: The district

1 attorney mentioned, we passed an amendment; the
2 people passed a constitutional amendment to
3 take care of this situation that you used in
4 your testimony, but yet, the court still
5 overruled. How do we address that issue? Do
6 we have elections every two years for judges?

7 MR. GEORGE: Well, there potentially
8 could be addressed through a constitutional
9 amendment. We hate to keep waving we need to
10 amend the Constitution because that's a serious
11 matter and it's something that shouldn't be
12 taken lightly.

13 REPRESENTATIVE SCHULER: What
14 amendment would you propose to address this
15 issue?

16 MR. GEORGE: That the rule-making
17 situation of the Pennsylvania Supreme Court,
18 there is accountability; perhaps, a veto power
19 by the legislature on it or that it's limited
20 to the procedural --

21 REPRESENTATIVE SCHULER: That was my
22 original question. If we disagree with the
23 rule making, how do we handle it? Does it come
24 back to the legislature and we override their
25 rule?

1 MR. REBERT: I think, if I may,
2 because of the rule-making power arises from
3 the Constitution, it --

4 REPRESENTATIVE SCHULER: Therefore,
5 we would have to amend the Constitution.

6 MR. REBERT: Again, I have to repeat
7 what Mr. George has said. We don't like to
8 mess with the Constitution if we don't have to,
9 and I'm sure you don't either because it's a
10 complex process and it's not good to go
11 changing what our founding fathers came up
12 with. But, since the rule-making power is
13 vested in the court in the Constitution, the
14 ultimate solution has to be an amendment to the
15 Constitution to put that rule-making authority
16 elsewhere.

17 CHAIRPERSON CLARK: Excuse me. I
18 think what we see here is two things. Number 1
19 is the frustration that we went through with
20 the child witness amending the Constitution and
21 only to have the Supreme Court come back and
22 say, well, the question wasn't proper on the
23 ballot. Let's take a hypothetical that we
24 took, this Article 5, Section 10, and have a
25 Constitutional amendment to strip it. It was

1 voted in the past by the people of the
2 Commonwealth, went through two sessions of the
3 legislature; voted by the people of the
4 Commonwealth to take that section out, only to
5 have Supreme Court to come back and say, well,
6 there's something wrong with the question.

7 So, even when we do get through that
8 process, it seems that we can't get through
9 that process. I think that's one of the
10 frustrations of, how do we do it when we have
11 done it once before and have that struck down?
12 I don't know if anyone can answer that for us.

13 The second thing I think Jere was
14 trying to get to was, how would the solution to
15 this work if the legislature took an active
16 role like the other states do as far as rule
17 making? Maybe you can expound how the other
18 states handle the rule-making power and who
19 gets the last say or how those resolutions
20 conflicts there?

21 MR. REBERT: I'm not familiar with
22 how the other states handle this kind of a
23 situation. As a matter of fact, I spoke with
24 the association this morning, their legislative
25 group. I said, well, I see what you're saying.

1 How is this amendment going to be worded? I
2 simply don't have an answer to that question
3 for you at this point. I really don't.

4 REPRESENTATIVE SCHULER: That's all I
5 have.

6 CHAIRPERSON CLARK: Representative
7 Caltagirone.

8 REPRESENTATIVE CALTAGIRONE: Thank
9 you, Mr. Chairman. The thing that I want to
10 get across to the District Attorneys
11 Association, members of the General Assembly is
12 that, we perceive a problem and there may very
13 well be a problem.

14 But, being a student of history and
15 looking back over what we do, especially we are
16 a country of law, we are a state of law, we do
17 have three distinct bodies that we operate
18 under the federal and state Constitution, and
19 that's the legislative in my mind first, the
20 executive and the judiciary. It's a constant
21 swinging of that pendulum that takes place in
22 our society where many of us in the legislature
23 feel that the courts try to don our jobs
24 instead of their robes. Many times they accuse
25 us of wearing their robes in making

1 legislation. All I urge is that we proceed
2 cautiously.

3 You had mentioned about tampering
4 with the Constitution. I think we have to take
5 that very, very seriously because, anytime we
6 make changes in the Constitution, it's not
7 something that we can alter or change quickly
8 to suit our needs. It depends, I think, and
9 Jere and I were talking before the hearing
10 started, about the individuals that serve many
11 of the courts. We are, I think, maybe
12 criticizing the Supreme Court of the State of
13 Pennsylvania today, but we were talking earlier
14 about the problems that we have with the
15 Appellate, the federal judges who serve for
16 life.

17 At least in this state we have
18 retention, albeit there's very few judges
19 either Common Pleas judges or the Commonwealth
20 or the Appellate judges in the state system
21 that ever get defeated for retention. We did
22 change that, as a matter of fact, through a
23 Constitutional amendment several years back.

24 But, there are many local judges that
25 we hear complaints about from time to time;

1 common Pleas judges let alone the Appellate
2 judges. But when you look at the federal
3 system and they're appointed for life, and, of
4 course, much of what you do in your courtrooms
5 throughout the state and counties, bubbles,
6 percolates into the federal courtrooms. We're
7 never going to be assured of the type of
8 justice that people are going to receive at the
9 hands of the federal judges or even the state
10 judges.

11 The point that I'm making is this,
12 that I think extreme caution has to be taken
13 when we look at changing the system of justice
14 as we know it. I'm not saying that what
15 they've done in these issues -- I have been
16 very involved in several of these issues that
17 you highlighted in your testimony. I know that
18 it upsets many of us in the legislature that we
19 worked long and hard, and it's not the flick of
20 a finger that you can get legislation through
21 and the process -- both of you have worked with
22 us in the process of getting legislation
23 through the legislature and the time it takes.
24 Then, of course, with the litigation that takes
25 place and the review of our acts by the Supreme

1 Court, there are many of us that are not always
2 happy with the decisions that they render.

3 Like I said, the point that I'm
4 trying to make is that, I think we have to be
5 very, very cautious, because I know at the end
6 of your testimony it's hanging in the air there
7 about the rule-making process, the powers of
8 the court and how far we should go and what
9 specifics it should address with the
10 Constitutional amendment that you've suggested
11 from the District Attorneys Association.

12 Of course, here again, we are only
13 moral; we're only human, and words can mean
14 different things to different people. Of
15 course, you have to boil that down to a
16 Constitutional amendment, the people in this
17 Commonwealth have to approve it. Again, we
18 always have it left open to the interpretation
19 of the courts.

20 MR. REBERT: Neither one of us nor
21 the association would disagree with you about
22 amending the Constitution. That's a very
23 dramatic step. One of the reasons that I was
24 not prepared to give you a quote on the
25 proposed amendment is, I think it's going to

1 take a lot of work. We all are going to have
2 to sit down and go over the proposals and weigh
3 all the pros and cons and submit it to you for
4 review. We're a long way from doing that.

5 We share your concern with amending
6 the Constitution. I think I can speak for the
7 association on that issue. So, that's going to
8 be a very complex process that we're going to
9 certainly think through quite completely.

10 MR. GEORGE: I tend to agree that the
11 association is very reluctant to mess with the
12 Constitution. It's something, though, that we
13 feel is important enough it should be
14 considered in this particular instance.

15 You had mentioned the federal system.
16 I think we can look at the federal system as a
17 model. My understanding of the federal system
18 is that, the rule-making policy or procedures
19 is a legislative authority and it is delegated
20 to the Supreme Court, subject to legislative
21 veto. That is not Pennsylvania's model
22 currently, but perhaps, that might be something
23 that we want to look at when we're considering
24 a Constitutional amendment.

25 REPRESENTATIVE CALTAGIRONE: Thank

1 you. Thank you, Mr. Chairman.

2 CHAIRPERSON CLARK: Thank you.

3 Representative Masland.

4 REPRESENTATIVE MASLAND: Thank you,
5 Mr. Chairman. Just picking up on Chairman
6 Caltagirone's comments, I think that
7 frustration is a very appropriate word to
8 describe how we in the legislature feel; not
9 just how you feel out in the trenches.

10 But, as Chairman Caltagirone will
11 recall, we spent during my first term in the
12 legislature a substantial amount of time
13 dealing with a code of evidence. We had all
14 kinds of working groups over there dealing with
15 a bill that made its way through the Senate and
16 we worked long and hard on it in the House,
17 only basically to be told, don't waste your
18 time because whatever you do we're really not
19 going to pay attention to and we're going to do
20 our own thing. That's the message from the
21 Supreme Court.

22 That was frustrating; the videotaping
23 was frustrating. I guess it's something that
24 we're not really going to get away from even if
25 we do have a Constitutional amendment. It's

1 been my ultimate belief that we might be able
2 to address that and probably could tighten it
3 up. But, if you look at the language in
4 Article 5, Section 10, it says, general rules
5 governing practice, procedure and conduct. I
6 think that's fairly tight. I think --

7 MR. REBERT: It's all encompassing
8 terms.

9 REPRESENTATIVE MASLAND: Maybe we
10 should take conduct out or maybe define
11 practice more closely. But, I think we all
12 agree that the court should have power to do
13 something with it; the basic conduct of the
14 courts, the basic, as you said, how many briefs
15 do you file if you're going to be arguing a
16 case before the court? That makes sense.

17 The problem, though, is that they're
18 getting into more legislative matters; that
19 they're not just proposing rules, but they're
20 basically setting policy via rules and that's
21 the frustrating thing. We constantly have to
22 be aware of that whenever we do anything.

23 For instance, we are now discussing
24 the lobbyist disclosure bill to try to set some
25 guidelines as to those individuals who lobby us

1 in the legislature. Well, some of those
2 lobbyists, a fair number, are lawyers and
3 there's a great concern that no matter what we
4 do, if we say a lobbyist has to file this
5 document, a lobbyist has to tell us this, that
6 the Supreme Court will come in and say, you
7 can't dictate how those lawyers conduct their
8 practice. Well, they're lobbying us. They are
9 coming in trying to influence legislation and
10 we should have some control over what they're
11 doing.

12 But, there is a fear in that instance
13 that they might come out and say again, well,
14 that's the practice of law. Well, they're not
15 going to court. They're coming to the General
16 Assembly. I for one will say we ought to have
17 some control over that.

18 I don't know if this debate probably
19 started with Madison and Hamilton. I doubt
20 that they assumed that the Supreme Court of the
21 United States or any Supreme Court of any of
22 our states would go quite as far as ours has
23 done in striking down things which our
24 legislative in saying that that's really their
25 rules power. I think we probably should look

1 into how other states do it and see if that
2 will solve the problem. Again, I fear that
3 they're going to interpret things the way they
4 want to interpret it.

5 Any thoughts on that? I'll put a
6 question mark at the end of there in case you
7 want to respond to that.

8 MR. GEORGE: Perhaps, Madison and
9 Hamilton resolved that issue and that's why the
10 federal system is set up differently than our
11 state system is currently.

12 REPRESENTATIVE MASLAND: Good point.

13 MR. REBERT: I think you have a good
14 point in the all encompassing nature of that
15 section of the Constitution. That ultimately
16 answers the question that I think we need to
17 take a real close look at amending the
18 Constitution.

19 Since the Supreme Court bases
20 everything on our state Constitution, we're
21 locked into their decisions. I sympathize with
22 the fact that you've been down this road once
23 and you got knocked down anyway, and I think
24 you just need to press forward.

25 REPRESENTATIVE MASLAND: Again, to

1 echo some of the other concerns, nobody up
2 here, I guess that may be a surprise to some
3 people out in the audience that we're going to
4 have a few Constitutional amendments to vote on
5 in November. But, we in the legislature don't
6 relish the idea of amending the Constitution at
7 the drop of your hat. We want to proceed
8 prudently.

9 But, to try to do something in this
10 area I think would be prudent, but the problem
11 is trying to do it and define what you're doing
12 in such a way that you really have the result
13 you're looking for and you don't just end up
14 with the same situation.

15 MR. GEORGE: Just so there's no
16 misinterpretation, the association shares your
17 prudence. We want to be very careful about how
18 this is worded and how it is done. It's not
19 something to be done lightly.

20 REPRESENTATIVE MASLAND: Thank you
21 for your testimony.

22 CHAIRPERSON CLARK: Seeing no further
23 questions, I want to thank both of you
24 gentlemen for providing us with your insightful
25 testimony today. You are certainly welcome to

1 stay with us as we hear from the rest of the
2 individuals that are going to testify today.
3 Thank you very much.

4 MR. REBERT: Mr. Chairman, I might
5 want to just comment that I see that Jeff
6 Gunnet is listed as a witness, if you will.

7 CHAIRPERSON CLARK: Yes.

8 MR. REBERT: He indicated to me that
9 he did not have any prepared remarks to make,
10 but I certainly assume that he is still welcome
11 should he want to say something.

12 CHAIRPERSON CLARK: Absolutely. The
13 next individual who is scheduled to present
14 testimony for the subcommittee is Gary Kling.
15 Good afternoon.

16 MR. KLING: Good afternoon. Terrible
17 thing we have to have a microphone to talk 20
18 feet, but such is life. Gentlemen, my name is
19 Gary Kling. I'm a landlord here in the City of
20 York. I've been active in our local Landlords
21 Association since its founding in 1972.

22 In the time that I've been a landlord
23 I find that the state laws regarding landlords
24 have gradually changed working against the
25 landlord until just recently. Then we had our

1 legislature try to put some balance back into
2 it so we don't have strictly a one-sided thing
3 because a lot of landlords are just people like
4 everybody else. They depend on their rents to
5 pay their bills, their taxes, their insurance.
6 And, if their operations are not profitable,
7 they take a loss. Well, you only take so many
8 losses until you lose your capital, and that's
9 one of the things that we're confronted with.

10 So, when tenants do not pay their
11 rent, we like to have at least a reasonable
12 type of recourse. Our recourse has gotten
13 better in the last couple of terms here with
14 the changes of some of the laws regarding the
15 timeliness of court actions when it becomes
16 necessary to take action against the tenant to
17 either collect rent or to get possession of the
18 property back.

19 I was thrilled to see the way the
20 legislature took care of that. We had a good
21 change in law. It was balanced. It wasn't a
22 flop back the other way. It was a good step.
23 Unfortunately, the law was passed. It was
24 supposed to go into effect and now we have a
25 delay; not imposed by legislature; not imposed

1 by any reasonable time lags that's necessary
2 for implementation; rather, by the
3 Commonwealth's court system.

4 Until we got the law implemented with
5 the rules that were passed down by the court,
6 we wound up with a lot less than what the
7 legislature gave us. The legislature was fair
8 when they gave us the change in the laws to
9 bring balance back to the landlord/tenant
10 relationship. The Commonwealth of Pennsylvania
11 managed in almost every case to take what the
12 arrangement was and compromise between where it
13 was and where it is. That's not, I think, what
14 the intention of the legislature did. They
15 have done a good job. I know some of the work
16 that went into this legislation getting it
17 through both Houses and passed. It's
18 ridiculous to have it modified by the courts.

19 I was always under the impression
20 that the courts was there to get keep you guys
21 straight; not to do your job for you; rather,
22 they just keep you in line with the
23 Constitution. I don't know what to do. But,
24 there's a term that comes to my mind that has
25 not been applied against judges for a long

1 time. Maybe we should look it up again and see
2 what impeach means. Because, when people don't
3 do their job and they're doing somebody else's
4 job; they're messing with things that they
5 don't have the authority to work in. I stand
6 here as a citizen, as a landowner, a property
7 owner, standing behind the Assembly and the job
8 that they did in that particular area of
9 legislation.

10 I don't have an awful lot to say
11 that's good about what the court system has
12 laid down on that. They have defeated part of
13 what was worked very hard on to come up with a
14 fair and straightforward law. That's all I
15 have to say. I'll answer any questions.

16 CHAIRPERSON CLARK: Could you expound
17 a little bit on some of the problems that would
18 reoccur as a landlord? Then possibly how they
19 were sought to be fixed.

20 MR. KLING: The biggest problem is
21 that the old law assumed that the landlords
22 were rich; that they had an infinite amount of
23 money, and that the poor tenant had absolutely
24 no recourse. And so, they gave tenants time to
25 get their families out of a property and it was

1 at the landlord's expense.

2 Well, at one time that was a
3 reasonable thing, but margins aren't what they
4 used to be. Margins in apartments are as
5 close. We now have federally funded, if you
6 would, housing units that are providing very
7 inexpensive housing. The private landlord must
8 compete with that.

9 What we find is, we lose good tenants
10 to public housing all the time. So, we try to
11 keep our rents as low and reasonable as we can.
12 We are constantly being confronted with
13 increase in cost. Apartment buildings are
14 worth more than most single-family dwellings.
15 The result is that the tax bills are higher.

16 With the situation so far as
17 insurance is concerned, landlords, if they can
18 get insurance, it's at exorbitant rates. I can
19 remember when I could insure a building within
20 my working for a hundred to \$200. That same
21 building to carry less insurance on it now
22 costs me twelve to \$1500. That's not a small
23 increase. That's a lot of tenants that got to
24 pay rent.

25 When things happen that causes a

1 landlord to take further losses, it has two
2 effects. Number 1, either the landlord takes a
3 loss and absorbs it, which you have mortgages
4 to pay and there just isn't any room for that
5 kind of thing; or you pass it through to the
6 tenants who stay and pay who are honorable
7 decent people who want a roof over their heads,
8 a decent place to live in, but they find that
9 their rent is going up because somebody moved
10 out or didn't move out but decided they're just
11 not going to pay the landlord.

12 As the result is, the change in the
13 law was such, instead of taking 42 days plus to
14 evict a tenant who was not paying the rent, had
15 no right to stay in the building because they
16 did not want to pay the rent, it wasn't that
17 many times is not even based on the ability of
18 the tenant to pay the rent. Many times it's
19 their choice. They'd rather use dope or drink
20 booze, or whatever, live beyond their standard
21 of living.

22 When they don't pay for housing, I
23 don't think they are entitled to housing, at
24 least not in my housing. Forty-two days
25 without any income from a unit is a dent in the

1 your annual income. That's six weeks; that's a
2 good size chunk of the year. Couple of those
3 people in the units, particularly if you only a
4 few units, your bottom line goes negative real
5 fast.

6 The change in the law would allow us
7 to get that tenant out in under 30 days. The
8 way it was changed, we could have -- If the
9 tenant didn't pay the rent the first of this
10 month, by the first of the next month that unit
11 could be empty and a new tenant could come in
12 if we could find such an animal. But with the
13 changes in the law now, it's back over the 30
14 days and we're back approaching the 42 days
15 that we had before. I thought getting under 30
16 was a reasonably good approach at being fair.
17 Taking it back above the 30 days is just not --

18 Does that answer your question?

19 CHAIRPERSON CLARK: Yes. A
20 follow-up. You indicated that the Supreme
21 Court suspended that statute and those rules
22 or --

23 MR. KLING: No, no, they didn't
24 suspend them. They took their good old time
25 getting around, they put a hold on everything.

1 Took their good old time to put it into motion.
2 But then, when they did come out with rules,
3 instead of following the law they said, well,
4 we don't like the way the law is. We're going
5 to put it our way. The legislature gave us 10
6 days and the old law was 30 days, we now wind
7 up with 20 days instead of the 10 days that was
8 given to us by the law.

9 CHAIRPERSON CLARK: So you do have a
10 new set of rules? They're just less than
11 what --

12 MR. KLING: What the law says we
13 should have. I really object for them
14 rewriting the law the legislature amended. If
15 you guys in the legislature mess up the laws,
16 then it's us to come back to you and get them
17 to be amended. That's a good and normal
18 procedure. It takes a little time, but
19 everybody has input who is affected by it, both
20 those who profit and those who pay the bill.

21 But, to have it arbitrarily changed
22 by somebody who has no interest in what it is,
23 without any grounds, without going through the
24 process of a hearing -- hearings, et cetera, I
25 think is just highly unfair.

1 CHAIRPERSON CLARK: Thank you very
2 much. I understand your point. Hang on, I'm
3 going to see if there are any more questions.

4 (No response)

5 CHAIRPERSON CLARK: Okay. We thank
6 you very much.

7 MR. KLING: Thank you, gentlemen.

8 CHAIRPERSON CLARK: The next
9 individual to testify before the committee is
10 Gary Gilden, Esquire. He's from the Dickinson
11 School of Law.

12 MR. GILDEN: Good afternoon, members
13 of the Subcommittee: My name is Gary Gilden.
14 I'm a Professor of Law at the Dickinson School
15 of Law of the Pennsylvania State University.

16 First, let me make sure the committee
17 understands, I am not here to address the
18 exercise of the Supreme Court's rule-making
19 power. That was the understanding when Mr.
20 Preski called me up. But rather, I want to
21 address some other matters that, perhaps,
22 properly confine the inquiry to that scope to
23 identify maybe what is not the issue and to
24 narrow that issue.

25 There really are two other dimensions

1 to what some people are categorizing as this
2 new crisis with respect to the Pennsylvania
3 courts. As this Subcommittee is well aware,
4 very recently a trial judge in Pennsylvania
5 declared that a portion of Megan's Law that
6 required the defendants to prove that they are
7 not sexually violent predators, that that
8 provision of the legislation violated the
9 Constitution.

10 Also, there has been recent
11 controversy over the interpretations of the
12 Pennsylvania Constitution, not as to the
13 rule-making power, but as to the substantive
14 rights set forth in the Constitution. For
15 example, the Pennsylvania Supreme Court has
16 held that under the State Constitution, law
17 enforcement requires a warrant to search
18 containers and automobiles. The United States
19 Supreme Court has held no warrant is required
20 under the United States Constitution.

21 Actions like this of judges have
22 certainly upset the will of the legislature, to
23 use one of your colleague's word, frustrated
24 the will of the legislature. The action of the
25 courts in cases like that certainly have placed

1 burdens on law enforcement as it sought to
2 gather evidence and protect the public.

3 Decisions of the sort may well be
4 contrary to the will of the majority of the
5 citizens of this Commonwealth. All of this
6 combined has generated what some members have
7 perceived to be a new crisis as a result of the
8 courts. What I'm here to suggest today is what
9 has been perceived as a crisis is, in fact,
10 proof that the system is operating precisely in
11 the fashion in which it was designed.

12 Again, let's make that perfectly
13 clear, I'm not speaking about the exercise of
14 the rule-making power because I have no
15 competence or information on that. I'm talking
16 about the extent to these other two aspects of
17 judicial decision making had been brought into
18 the same basket by some person, and I want to
19 address those two and those two only.

20 To put this in perspective, let's
21 first identify, if you indulge me, areas in
22 which the courts have not been acting, indeed,
23 cannot act to frustrate the will of the
24 legislature. First of all, where the
25 legislature passes a bill that does not pose a

1 constitutional problem, the role of the court
2 is quite limited both in theory and in
3 practice. The court's job is not and has not
4 been to decide if a statute is wise as a matter
5 of the balancing of competing policy interest.
6 Where no constitutional issue is presented, the
7 court defers entirely to the judgment of the
8 legislature. If there's some ambiguity in that
9 statute, the court's job is not to decide what
10 it would have promulgated as the provision, but
11 simply to identify what it believes this
12 legislature's intent has been.

13 And if, for some reason, the court
14 has misinterpreted the legislative will, no
15 constitutional amendment is required to cure
16 that. The legislature can simply pass amending
17 legislation to correct the misinterpretation of
18 its will. In other words, in areas where the
19 legislation does not touch upon any
20 constitutional provision, it is and always has
21 been the legislature, not the courts, that have
22 the final word. So, that's an area which poses
23 theoretically and practically no particular
24 problem.

25 There's a second category of cases,

1 where again, the legislature always has the
2 final word. That is an area as where the court
3 acts in the first instance under common law to
4 resolve situations where the legislature simply
5 hasn't chosen to act at all. If we look to the
6 origins of our tort system where the early
7 cases came up with respect to persons injured
8 by other persons driving, persons injured by
9 defective products, because there was no
10 legislation on the books, it fell to the courts
11 in the first instance to allocate the rights
12 and the responsibilities among the various
13 participants.

14 Under the common law, judge-made law,
15 but again where there is no constitutional
16 issue raised, this legislature has the power,
17 acting within constitutional bounds, to enact
18 any bill it wishes to reformulate those rules
19 to exert its own policy judgment. Again, no
20 one needs to be reminded of what seems to be a
21 constant stream of tort reform legislation
22 where the legislature is called upon to
23 reformulate the common law rules created by
24 judges.

25 As with other areas of decision

1 making, the court ultimately does and must
2 defer to the legislature, again so long as what
3 is happening does not touch any constitutional
4 issues. The court is not in the position to
5 either in practice or in theory to second-guess
6 the policy judgment.

7 In those two situations where this
8 committee and its colleagues passes legislation
9 that raises no constitutional issue, or where
10 this committee passes -- and its colleagues
11 passes legislation to change common law rules
12 created by the courts that don't touch the
13 constitutional dimension, this legislature has
14 always had the final word. The only area in
15 which the courts have the power and the ability
16 and the history of acting in a way that
17 countermands the will of the legislature is
18 when legislation touches upon the Constitution.

19 Again, I see from the agenda that one
20 area which this has arisen is the area of the
21 exertion of rule-making power, but as I said, I
22 have nothing to say on that matter because I
23 have not studied the issue and no expertise or
24 even modest competence. But, I do want to talk
25 about how the court does no disservice to the

1 legislature, to the citizenry, to the
2 Commonwealth to its role when it acts to strike
3 down legislation that invades the Constitution.

4 The Constitution, apart from
5 allocating powers among the branches of
6 government, prescribe certain rights of the
7 individuals that limit government, including
8 limitations on the prosecution, including
9 limitations on the police, including
10 limitations on the legislature. By definition
11 these rights which are designed to limit
12 government are prescribing rights that limit
13 what the majority has decided to do.

14 The rights were enshrined in the
15 Constitution because of fear that there would
16 be times when looking in terms of short-term
17 expediency government would claim the need for
18 power to invade certain rights. And rights
19 were enshrined in the Constitution because of
20 fear that majorities acting in their
21 self-interest would fail to protect the rights
22 of minorities.

23 And when the court finds that a piece
24 of legislation which was, by definition,
25 designed to carry out the will of the majority,

1 when it finds it violates the Constitution,
2 obviously, its decision is going to upset the
3 legislature. Obviously, its decision is going
4 to upset the majority of the populous that the
5 legislation was designed to carry out that
6 popular will, but that's precisely what the
7 court system was intended to do with respect to
8 constitutional rights.

9 And, in fact, the exercise of the
10 power of judicial review to strike down
11 legislation that is unconstitutional, far from
12 being something that's a cause of concern in
13 this Commonwealth, across the nation; in fact,
14 the exercise of this power by the courts has,
15 in fact, historically made the United States
16 the envy of the world for its protection of
17 liberty, for its protection of freedom.

18 Newly-emergent democracies in eastern
19 Europe are seeking to emulate the American
20 legal system, including the power of judicial
21 review over constitutional issues as the best
22 way to balance the need to preserve order
23 without unduly trampling civil liberty.

24 Obviously, when the legislators take
25 the oath to uphold the Constitution, the

1 premises that they have made to consider
2 judgment that a piece of legislation is
3 constitutional. However, ever since the United
4 States Supreme Court's decision in Marbury
5 versus Madison, it has been accepted that
6 despite the legislators taking the oath, we do
7 need the courts as the ultimate arbiters of
8 constitutionality.

9 I suppose there are a variety of
10 reasons, but the two most prominent ones, as I
11 see it, are, first of all, judges are duty
12 bound to decide their cases based upon
13 precedence rather than individual value
14 judgment, individual policy judgments, or what
15 the court believes the majority of the people
16 in a particular point in time want. That gives
17 us some consistency; it gives us some distance;
18 it gives us some objectivity.

19 The other reason that this is reposed
20 in the courts is that, perhaps the judges need
21 to feel less fearful of a wrath and retaliation
22 of voters. As was just pointed out recently,
23 retention is much less ominous as a threat than
24 automatically standing for reelection every two
25 or every six years.

1 And, indeed, history has proven the
2 wisdom of giving courts this particular power.
3 It's the courts that have guaranteed and
4 furthered attempts to provide equal rights to
5 racial minorities against the short-term
6 desires of majorities to perpetuate
7 discrimination. It's courts that have
8 protected freedom of speech against hysteria of
9 McCarthyism at a time where there were
10 overblown fears of somehow Communist
11 infiltration of the United States.

12 So, I think we have to accept it as
13 the premise of the system that the
14 dissatisfaction that the courts have overridden
15 legislative judgments when the court is
16 interpreting the constitutional rights that
17 were invaded is evidence not that the system is
18 dysfunctional, but instead, evidence that the
19 system is functioning.

20 What I want to address more
21 particularly is the issue of what happens when
22 the Pennsylvania Supreme Court and the lower
23 Appellate Courts and even the trial courts
24 decide a case under the Pennsylvania
25 Constitution that reaches a different result

1 than the United States Supreme Court has
2 reached under the United States Constitution.

3 I know I heard the District
4 Attorneys Association say that they don't take
5 constitutional amendments lightly, but I am
6 well aware that it was a year or two ago that
7 they proposed an amendment designed to respond
8 to this supposed crisis that the Pennsylvania
9 Supreme Court was finding rights under the
10 Pennsylvania Constitution and handcuffing law
11 enforcement in areas where the Supreme Court
12 had found no right to exist.

13 Let me give you a couple of examples.
14 I want to address the concerns in why I think
15 they are misplaced.

16 The United States Supreme Court, as I
17 said in my opening remarks, has held no warrant
18 is required to search an automobile or
19 containers in that automobile. The
20 Pennsylvania Supreme Court has insisted under
21 the Pennsylvania Constitution Article 1,
22 Section 8, that the officer who believes he has
23 probable cause to search a car or its container
24 must seek a warrant from the magistrate unless
25 there is some exigency that would excuse that

1 requirement.

2 The actions of the Pennsylvania
3 Supreme Court in this case and other cases of
4 its ilk have been cast as a maverick court
5 defined the precedence of the United States
6 Supreme Court. It resulted, as I just
7 mentioned, in proposal being floated to amend
8 the Pennsylvania Constitution to mandate that
9 the Supreme Court of Pennsylvania interpret
10 Article 1, Section 8, in precisely the same
11 fashion that the United States Supreme Court
12 has interpreted the Fourth and Fourteenth
13 Amendments to the United States Constitution.

14 I submit that these concerns with
15 these decisions are both misplaced and, indeed,
16 unprincipled and perhaps hypocritical.

17 Let me first address why the concern
18 that somehow the Pennsylvania Supreme Court is
19 engaged in reckless activism, thumbing its nose
20 as the United States Supreme Court is entirely
21 misplaced.

22 It must be understood that the
23 Pennsylvania Constitution is a source of rights
24 that is entirely independent from the United
25 States Constitution. In fact, it's no

1 different than when this legislature passes
2 laws in areas where the federal government has
3 acted as well. We know there's federal
4 legislation protecting investors and
5 securities. There's an array of federal
6 securities act. This legislature has also
7 passed acts protecting under Pennsylvania law
8 investors regulating in some fashion the
9 issuance of security. There are countless
10 areas where both the federal government and the
11 state government have legislated to afford
12 protection of assigning rights and
13 responsibilities.

14 Just as the state legislation has its
15 own history and its own intent as an
16 independent source of rights, so too does the
17 Pennsylvania Constitution have its own unique
18 history, its own unique intent, and its own
19 unique definition as a protector of rights. In
20 fact, the Pennsylvania Constitution is not a
21 clone of the United States Constitution.
22 Article 1, Section 8 of the Pennsylvania
23 Constitution was not cloned from the Fourth
24 Amendment to the United States Constitution.

25 Quite to the contrary, from a

1 chronological standpoint, the Pennsylvania
2 Constitution was adopted in 1776, a full 10
3 years before ratification of the United States
4 Constitution, a full 15 years before
5 ratification of the Bill of Rights that
6 contains Article 4.

7 Indeed, the Declaration of Rights
8 under the Pennsylvania Constitution was not an
9 amendment to the Pennsylvania Constitution. It
10 was part of that organic document and not,
11 coincidentally, Article 1 happens to be the
12 very first provision of the Pennsylvania
13 Constitution; whereas, the Fourth Amendment was
14 an add-on in an amendment to the United States
15 Constitution some 15 years after Pennsylvania
16 had adopted its Constitution.

17 So, we have out there two wholly
18 independent documents deserving of wholly
19 different and independent interpretation.
20 There's absolutely nothing in theory that
21 dictates that the Pennsylvania Constitution
22 must be interpreted in an identical fashion to
23 the United States Constitution; just as there's
24 no dictate in an area where this legislature is
25 not preempted. There's no mandate that

1 whenever this legislature acts, it is simply
2 walking in lock step with the federal
3 government.

4 Now, apart from the fact that we have
5 a unique genealogy between the Pennsylvania and
6 United States Constitution and that they are
7 wholly independent rather than interdependent
8 sources of rights, there are institutional
9 reasons which virtually guarantee that the
10 United States Supreme Court will interpret the
11 United States Constitution to afford less
12 generous rights than a State Supreme Court will
13 in interpreting the State Constitution.

14 You don't have to read any sort of
15 legal theory. You just have to read the
16 opinions of the United States Supreme Court
17 itself where it admits, when we are called upon
18 to decide whether a right exists under the
19 United States Constitution, we are in every
20 case constrained by two factors, two factors
21 that dictate we ought to be very, very careful
22 before we recognize a right.

23 Factor Number 1 is the circumstance
24 that when we declare a right, it applies across
25 the 50 states. No state has discretion to

1 refuse to confer rights if we interpret the
2 United States Constitution to demand it. And
3 because our decisions cut across a wide
4 geographic swath of 50 diverse states, we may
5 not be very certain of the practical effect of
6 our decisions. Therefore, we better be very,
7 very careful if we are going to advance rights
8 because we're not certain whether each of the
9 50 states can implement that.

10 Institutional Constraint Number 2 is
11 federalism. The United States Supreme Court
12 has also recognized that when it chooses to
13 find a right exists, it disempowers the state
14 from reaching a contrary decision. There are
15 concerns not only with the fact that we don't
16 know what will happen as a practical matter,
17 but we have to be very, very careful about this
18 gentle balance in terms of the allocation of
19 power between the federal government and the
20 state government. When we find a right to
21 exist under the Fourth Amendment, no state
22 government, no local government has any
23 discretion but to follow that rule.

24 Neither of these two institutional
25 limits is present when a state Supreme Court

1 interprets its own Constitution. Or more to
2 the point, when the Pennsylvania Supreme Court
3 decides whether a warrant is required under
4 Article 1, Section 8, apart from interpreting
5 an entirely different document, it is not
6 shackled by the same two institutional
7 constraints.

8 The decisions of the Pennsylvania
9 Supreme Court go no further than the boundaries
10 of the Commonwealth of Pennsylvania. The
11 Pennsylvania Supreme Court has a much greater
12 understanding of the diversity in the
13 Commonwealth of Pennsylvania and the ability of
14 government to recognize a right as a practical
15 matter than the United States Supreme Court
16 does when its decisions apply equally in
17 California, Rhode Island, Alaska, Hawaii,
18 Maine, Georgia, whatever.

19 Secondly, the Pennsylvania Supreme
20 Court does not have to worry about federalism.
21 The Pennsylvania Supreme Court when it
22 recognizes a right, does not have to worry
23 about whether it has stepped on the toes of a
24 different branch of government. While, the
25 Supreme Court worries about the federal

1 government invading the province of the state,
2 the State Supreme Court is not worried about
3 stepping upon the federal government's toe when
4 it recognizes a right. In effect, the United
5 States Supreme Court has said, we conceive and
6 the system conceives that it is the states that
7 are to be the laboratories for individual
8 rights. This is where experimentation as to
9 whether a right may be properly tolerated
10 without unduly burdening government or public
11 order. It's the states that we look to to
12 advance individual rights because they lack the
13 two institutional problems that we do.

14 So, the Pennsylvania state Supreme
15 Court does no disservice to the United States
16 Supreme Court when it reaches a different
17 decision under its own Constitution than the
18 Supreme Court has done under Article 4. The
19 state Supreme Court does no disservice to any
20 other organ of government when it chooses to
21 recognize a right under the State Constitution.

22 The Pennsylvania Supreme Court did no
23 disservice to anybody when it found in
24 Commonwealth versus DeJohn that in Pennsylvania
25 police may not routinely inspect our bank

1 records without cause, even though the United
2 States Supreme Court said as a federal matter
3 that's not a problem. The Pennsylvania Supreme
4 Court did no disservice to anybody in the
5 Commonwealth when in Commonwealth versus
6 Mellili it found that without cause the police
7 may not routinely use pen registers to find out
8 phone numbers that were dialed even though the
9 United States Supreme Court refused to mandate
10 that rule across the nation.

11 The Pennsylvania Supreme Court would
12 do no disservice to anybody if they were to
13 find that the right-to-bear arms under the
14 Pennsylvania Constitution is broader than
15 whatever interpretation the U.S. Supreme Court
16 decides under the Federal Constitution.

17 Not only is the concern that somehow
18 the Pennsylvania Supreme Court is trampling
19 upon the United States Supreme Court when it
20 affords a differential interpretation to the
21 Pennsylvania Constitution; not only is that
22 concern misplaced, but efforts to reign in the
23 courts by mandating that they follow the
24 decisions of the United States Supreme Court is
25 rather hypocritical.

The Legislative and Executive

1
2 branches of this Commonwealth have fought to
3 preserve their sovereignty against the federal
4 government. The legislature has objected to
5 the undue mandates of federal law, especially
6 the unfunded mandates of federal law.

7 Why then would the legislature
8 somehow seek to insist that the Pennsylvania
9 courts are somehow to be enslaved to follow
10 federal court decisions; to forego their
11 sovereignty; to lose any power to give any
12 meaning to the charter of this Commonwealth?
13 The only answer I can give concerning efforts
14 to require the Pennsylvania Supreme Court to
15 interpret its Constitution in exactly the same
16 way that the U.S. Supreme Court has interpreted
17 the Federal Constitution is an effort to put
18 short-term expediency ahead of principle and
19 sovereignty because of short-term
20 dissatisfaction with particular decisions.

21 If any government is going to prosper
22 and earn the respect of its citizens, as, by
23 the way, ours has quite successfully for over
24 200 years, the legislature has to remain
25 faithful to the overall structure of separation

1 of powers. It has to be faithful to the
2 overall concept of checks and balances that
3 have guaranteed its integrity.

4 That's true even if an individual
5 court decision reaches a result under the
6 Constitution that the legislature disagrees
7 with as a matter of policy. I respectfully
8 submit that apart from the rule-making power,
9 upon which I have no opinion, that what we're
10 witnessing in 1997 is absolutely no different
11 than how the system has thrived for the past
12 200 years.

13 I would be happy to answer any
14 questions apart from the rule-making question
15 that the committee may have.

16 CHAIRPERSON CLARK: Thank you very
17 much. I'd like to welcome Representative Dave
18 Mayernik. Representative Schuler.

19 REPRESENTATIVE SCHULER: I don't
20 disagree with you, sir, dealing with
21 interpretation of the law. That's the function
22 of the courts. Let's use -- That's not really
23 a hypothetical situation, but right now we have
24 an education issue in Pennsylvania. It's
25 before the courts. If the courts come down and

1 say, we believe that the funding system now in
2 operation in Pennsylvania is unconstitutional,
3 all right, I can live with that. But if the
4 courts come down and say it's unconstitutional,
5 this is what you have to do to make it
6 constitutional, then I have a problem. Would
7 you respond to that?

8 MR. GILDEN: Yes. I'm used to asking
9 those questions rather than answering, so it's
10 fun to be on this side. Let me give you the
11 typical two-answer.

12 If they found that the alternative
13 system was the only system that is tolerable
14 under that particular constitutional provision,
15 then I have no problem because the court would
16 be saying that the framers of the Constitution
17 mandated this as the only avenue.

18 But if they say this is a way to make
19 it constitutional, but, of course, the
20 legislature always retains the power to come up
21 with a better idea which, of course, then we
22 retain the power to apply it to the
23 Constitution, I have no particular problem with
24 this legislature saying, well, here's what they
25 say could make it constitutional. We've got a

1 different idea. We think our idea complies
2 with the new constitutional standard, and the
3 court would be called upon not to say, listen,
4 we told you what you must do, but then to
5 assess whether what you came up with was
6 constitutional or not.

7 Ultimately, the courts said we strike
8 it down again because this is the only way, I
9 think the ultimate remedy is, if that's what
10 they believe the Constitution is interpreted to
11 mean, and the legislature is dissatisfied with
12 that and it violates what it believes the
13 Constitution ought to mean, the constitutional
14 amendment always stands as the ultimate power
15 in the citizen to correct what someone
16 perceives to be abuses of the court's power.

17 I don't think the court ultimately
18 can shackle or hamstring the citizens or this
19 legislature, because ultimately the power
20 resides in the people and the people have every
21 opportunity; obviously, more cumbersome than
22 legislation, but intentionally so, to amend the
23 Constitution to comport with what they think is
24 tolerable as we approach that 21st Century.

25 REPRESENTATIVE SCHULER: Thank you.

1 That's all.

2 CHAIRPERSON CLARK: Let me ask -- I
3 don't want to put any words in your mouth, but
4 you've indicated that the tort arena would be
5 an appropriate area for the legislature to
6 delve into because it derives from common law
7 and there was a void in legislation developed
8 through the court system. The legislature
9 tried to address the tort system with the
10 medical malpractice. Maybe if you could
11 comment on where we want to file in that
12 process, I'd appreciate that.

13 MR. GILDEN: Yes and no. I'll only
14 speak at the level of theory. To the extent
15 that the legislature changed the rules that did
16 not touch upon the Constitution, its power was
17 essentially the final word. At some juncture,
18 and this is what has happened in tort reform
19 legislation that has placed caps on recovery,
20 that the courts have said certain tort reform
21 provisions have violated the Constitution.

22 It's funny, I had brought before me
23 the Civil Justice Digest from the Roscoe Pound
24 Foundation from spring of 1997, one of the
25 articles under Civil Justice System is tort

1 reform proponents unveil a new goal, limited
2 judicial powers and circumvents state
3 constitutions. It suggests that one of the
4 problems that legislatures ran into is that
5 their attempts to change common law in some of
6 the provisions created constitutional problems.
7 In other words, some tort caps, some caps had
8 found to violate the provisions of the
9 Constitution.

10 CHAIRPERSON CLARK: Maybe you can
11 help me with the next step. The legislature
12 cannot infringe on individual's constitutional
13 rights. Yet, the courts decide what is a
14 constitutional right or not. And the question
15 is, how broadly or how narrowly they define a
16 constitutional right.

17 Perhaps in the legislature's mind the
18 Supreme Court is broadening that to a point
19 that they have hamstrung what the legislature
20 is trying to do. The legislature is looking,
21 possibly, for a way to reign that back in. Any
22 comments on how it's been done in the past that
23 this is a circular process, why, I'd appreciate
24 your insight.

25 MR. GILDEN: There is one way and

1 it's not the simplest way, but it's the way the
2 system is designed. The people always reserved
3 the power to amend the Constitution, at least
4 if we're dealing with the State Constitution.
5 So, if the Supreme Court were to say that your
6 tort reform legislation invades the provision
7 of the State Constitution and your constituents
8 believe that they have misinterpreted the
9 Constitution or reached a result that they
10 don't wish to have; again, not as simple as
11 legislation but deliberately not as simple as
12 legislation, now there is the power to amend
13 the state Constitution. Obviously, there's a
14 whole different issue presented if it's found
15 to violate the federal Constitution. But
16 that's a bigger problem; same avenue; far more
17 cumbersome, however.

18 CHAIRPERSON CLARK: Let me move you
19 another step further. If the Supreme Court
20 indicates that there's a constitutional right
21 that the citizens by amendment feel -- the
22 citizens feel too broad and by amendment want
23 to constrict that constitutional right, and the
24 Supreme Court again frustrates that by
25 indicating that the phrase in the legislation

1 wasn't proper or it wasn't advertised properly
2 pursuant to statute or it wasn't properly
3 formed in the proper question, is there a way
4 to address that?

5 MR. GILDEN: Yes. There's two ways
6 to address it. One is to anticipate that.
7 Obviously, before a constitutional amendment is
8 proposed, the legislature should take great
9 pains to do the same legal research they'd
10 ultimately have to do to defend what they did
11 in court, rather than, let it happen and then
12 ask after the fact, gee, did we follow the
13 proper procedures? It would be prudent to
14 anticipate that and make sure that any proposed
15 amendment unambiguously satisfied the
16 procedural requisites.

17 Also anticipate any subsequent
18 attacks as to ambiguity in the language just as
19 any good lawyer would, any good counsel to the
20 legislature, any good legislator is well
21 equipped. It's no different than what you do
22 on a daily basis with legislation. I think the
23 answer is, be careful in advance so that
24 there's no ambiguity as into the language as to
25 your intent; no defect as to the procedures

1 that you followed. I would hope that would
2 happen even without that risk occurring.

3 CHAIRPERSON CLARK: Okay. Let me ask
4 you one more question. Do you have an opinion
5 or any thoughts on the Supreme Court's order
6 with regard to unified court system?

7 MR. GILDEN: No.

8 CHAIRPERSON CLARK: That was simple
9 enough. Representative Masland.

10 REPRESENTATIVE MASLAND: Thank you.
11 It's a pleasure to have my former professor on
12 the other side as I get to ask him questions.
13 My first question is, is all that going to be
14 on the test?

15 MR. GILDEN: Well, I think you're
16 giving the test here, so I guess not.

17 REPRESENTATIVE MASLAND: Seriously, I
18 do appreciate the way you framed the issue
19 because I think it is important for us to know
20 what we are talking about in terms of Supreme
21 Court, maybe expanding its rule-making power on
22 the one hand versus the Supreme Court
23 performing its constitutional function of
24 looking at the laws that we create to determine
25 if they have offended the Constitution. So, I

1 think that has been very helpful.

2 One comment, though, that comes up as
3 you talk about federalism is that, probably one
4 of the problems we have with respect to things
5 being different under the U.S. Supreme Court's
6 interpretation of their Constitution and the
7 Pennsylvania Supreme Court's interpretation of
8 our Constitution is that, we are frequently
9 told by Congress what to do and how to
10 legislate, and if we don't do that, then we're
11 going to lose funding. So, we do things like
12 pass legislation to tell school boards to expel
13 everybody that brings anything close to a
14 weapon onto school property; when, if you look
15 back at the federalist papers, and I'm sure you
16 are familiar with, you look at the issue of
17 criminal justice and criminal laws, they would
18 have said quite plainly and simply that that's
19 all the matter for the states. The federal
20 government, the U.S. government is not going to
21 tell the states what is and is not a crime. We
22 have that tension at our level. I think that's
23 part of the problem when we look at things from
24 a judicial perspective.

25 MR. GILDEN: I think you have

1 identified the source of the problem, the
2 source of the confusion; that is, the
3 legislation is so accustomed to finding -- the
4 state legislature is so accustomed finding
5 itself eventually stuck with the federal rule.
6 It then looks across the hallway to the court
7 that somehow is liberated from it and saying,
8 well, wait a minute. If we're stuck, why
9 aren't they? I think it's important, again, to
10 narrow the issue.

11 First of all, I think it's quite
12 clear that states are litigating their power
13 vis-a-vis the federal government, the criminal
14 justice area. Recent Supreme Court decisions
15 finding that the federal government's commerce
16 power does not extend in certain areas because
17 they are the areas of criminal justice where it
18 belongs to the states.

19 In the past two or three years there
20 have been a handful of cases on that point,
21 where the U.S. Supreme Court has said,
22 Congress, you have been acting under the
23 commerce power, but actually you are passing
24 legislation that properly goes to the states.
25 So that's happening. Some of your power is

1 being restored under the same principle.

2 On the other hand, Congress has
3 certain powers, far beyond the powers of -- The
4 Federal Congress has certain powers, express
5 powers, that go well beyond the powers assigned
6 to the federal courts. In other words, there
7 are enumerated powers of Congress where they do
8 have the power to preempt the legislature.

9 The United States Supreme Court has
10 the limited power to decide cases in
11 controversies, about federal law and no power
12 to talk about state law. So, if we just simply
13 laid out the system, quite frankly, if we
14 compare the federal government and the state
15 government, you have less power as the
16 legislature compared to your federal
17 counterparts than the courts do compared to
18 their federal counterparts. That's just the
19 way the system is doled out.

20 There are expressed powers of the
21 legislative branch in the federal government
22 that go far beyond any powers that are assigned
23 to the United States Supreme Court. I think
24 you have to understand that it's not parity.
25 You don't somehow get the same power that the

1 state courts do as compared to the federal
2 government. That's just the lay of the land.

3 Back to the preliminary point, I
4 believe state legislatures have been successful
5 recently in asserting or reasserting their
6 sovereignty in the area of criminal justice. I
7 think the Brady Bill was one example. I think
8 it was the drug-free school zone was another
9 example where federal legislation under the
10 commerce power was struck down because under
11 federalism and principles that said that's matter
12 for the state legislature.

13 But, I think you have to not confuse
14 the two issues. The powers of the judiciary
15 compared to the federal judiciary are different
16 than the power of your legislature compared to
17 the federal legislature.

18 REPRESENTATIVE MASLAND: Thank you.
19 Although the issue we're dealing with today is
20 not directly involved with some of your
21 comments, I think it was Senate Bill 981,
22 Senator Hart's bill, that dealt with the extent
23 that the Pennsylvania Supreme Court could
24 exceed the rights given, granted by the U.S.
25 Supreme Court. I think that there was a lot of

1 conflict and concern. I think you are probably
2 are correct in saying that short-term
3 expediency did drive that issue as much as
4 anything else. It's something I'm sure we'll
5 have to take another look at again eventually.

6 I do thank you for your time here.
7 Thank you for your comments. Although I did
8 not have you for constitutional law, I had you
9 for remedies. You did a fine job and I'll tell
10 Professor Kelly that.

11 CHAIRPERSON CLARK: We thank you very
12 much. There's no further questions for you.

13 The next individuals testifying is
14 Suzanne Eng and Jeff Gunnet. We would like you
15 to come up here and give your testimony one at
16 a time. What we'll do, Mr. Gunnet is, have
17 Susan give her testimony followed by your
18 testimony and then questions from the panel.

19 MS. ENG: Mr. Chairman, and members
20 of the Committee on Courts: I thank you for
21 taking time to listen to the voice of a victim
22 of capital crime, in your efforts to again
23 limit the number of appeals granted to
24 murderers of mothers' children.

25 The death of a child by murder is not

1 something you get over. The affect on your
2 life does change as time goes by, as the years
3 pass. You learn to bear the absence of your
4 child because that's what you have to do;
5 either that, or lose sight of the needs of your
6 remaining children at home. She's not coming
7 back and you know it. But sometimes you think,
8 it wasn't really she who died. What proof did
9 they have but her perfect teeth? Many children
10 nowadays have perfect teeth. Yes, you admit to
11 yourself, yes, but how many were missing and
12 wearing their work uniform as your child would
13 have been?

14 You go to bed at night and say a
15 prayer, please come to me tonight in a dream,
16 my dear, so you can seem real to me again. You
17 are so afraid that the memory that you hold
18 dear of your child is going to fade and that
19 there's nothing you can do about it. Just as
20 the pain eases, you're afraid that that memory
21 might ease also.

22 I don't have enough memories of
23 Trista Elizabeth Eng. She was only 16 years
24 old when she was murdered. I don't have the
25 memories of her high school graduation or the

1 memories of special college moments; of seeing
2 her strive to succeed in what ever career she
3 would have eventually chosen for herself. At
4 16 she had her sights set on architecture. But
5 had she decided to be an assembly line worker,
6 a computer operator, or waitress, I would have
7 been equally as proud of her, and I wish she
8 would be here for me to be proud of her.

9 What I do have are 16 years of
10 memories captured in not enough pictures and
11 some videotapes. I have some of her precious
12 belongings such as diaries, favorite clothes,
13 school art projects, knickknacks and I have her
14 flute, but these aren't enough. These few
15 special belongings fit in a single chest. A
16 box I jealously guard because Trista will never
17 be here again to draw more sketches, to write
18 or to model clothes.

19 My youngest daughter Kate asked me
20 the other day for the key to this box. I
21 panicked for a second. Would the scrap books
22 be returned? Does Kate know the importance of
23 these objects? I bought the cedar chest a few
24 months after Trista was murdered. It's
25 supposed to be a symbol of hope for young

1 ladies. Instead of holding a future, it holds
2 well-loved things of an all too brief past, and
3 it has plenty of spare room that will never be
4 filled.

5 If you don't mind, I'd like to tell
6 you a little bit about my Trista. Growing up
7 she was either best friends or mortal enemies
8 of her younger brother Morgan. She always held
9 her little sister as precious. She was a
10 joiner, a doer, a scout, a library volunteer, a
11 church Sunday School helper; my helper at home.
12 She loved performing for an audience in band
13 concerts, dance recitals, school plays. I can
14 picture her clearly as a fourth grader standing
15 in the kitchen with her flute in perfect
16 position, her posture and shoulders straight,
17 reading sheet music that I still can't read.

18 Later, she learned to play saxophone
19 and piccolo, and she played in the high school
20 marching band, and she played lots of softball
21 with a youth group in Dillsburg.

22 Trista's favorite color was red. As
23 soon as she could wear lipstick, bright red
24 lipstick highlighted her beautiful ever-ready
25 smile. It really looked right on her. The

1 last coat she would ever own was red wool.
2 Sometimes I get this coat out and I grab it and
3 I hold on to it tight just to feel Trista
4 there. Morning after morning I would reach
5 over to her in the car and squeeze her arm
6 encased in this red coat and kiss her good-bye
7 as she went off to start her school day. Red
8 roses were her favorite flowers.

9 Trista was a loving caring person who
10 often put aside her own problems to help her
11 friends deal with theirs. She was insightful,
12 realistic and strong with character. I was
13 always able to talk to her as a mother
14 imparting words of wisdom as a friend sharing
15 dreams. I learned after her death that she
16 thought my wisdom was a little bit off. Good
17 grades and study would never be as important as
18 her friends. But, she would have never wanted
19 me to know just what she thought of my advice;
20 my feelings mattered to her.

21 She liked to try to beautify me,
22 carefully applying eye makeup and blush. If
23 you could have met Trista, you would agree with
24 me, she was a very beautiful girl. She was
25 tall with fixed straight dark brown hair, a

1 wide beautiful smile showing those perfect
2 white teeth that I mentioned earlier, exotic
3 eyes and golden soft skin that flaunted her
4 Eurasian ancestry. I was very proud of her and
5 I still miss her so very much.

6 My daughter was murdered Monday, July
7 12, 1993. It's over four years ago; yet, it
8 often seems like yesterday. I was at work; her
9 sister at a friend's and her brother out
10 camping. Trista was at home getting ready for
11 work. A man came to the door in response to an
12 ad I had placed to sell a recliner that we
13 didn't use anymore. That man offered her a
14 ride to work. He was nice looking, clean cut.
15 Trista needed a ride. She couldn't get in
16 touch with her friends for a ride. Trista
17 accepted his offer of a ride.

18 At some point he drew out a gun,
19 drove Trista miles away to isolated state game
20 lands in York County, in the northern part;
21 raped her and shot her to death. The reason
22 given: He was angry with women. He was up on
23 rape charges in another county and he was very,
24 very angry with women.

25 After six weeks of hoping and praying

1 for a word from Trista, of contacting the
2 authorities, of hanging missing child posters
3 around town and in the paper, after her 17th
4 birthday came and went, and I was sure she
5 would be home for her birthday. I was positive
6 if anything happened she would be there for
7 that 17th birthday. After a thrilling morning
8 when I found her flute in the front seat of my
9 car and I knew she was safe, I later found out
10 that her girlfriend had had her flute and she
11 was returning it and no one was home so she put
12 it in my car.

13 After six weeks of being sick at
14 heart, my Trista was found. It was I, her
15 mother after hearing a radio news cast on my
16 way to work that Thursday morning, August 26th,
17 1993, who called the police from work to ask if
18 the body found on the game lands might be that
19 of my Trista. Where I got the courage to do
20 that, I will never know. I, to this day, don't
21 know how I could do that.

22 It was I who coolly gave the state
23 police the phone number of Trista's dentist. I
24 could do it coolly because, you see, it wasn't
25 really Trista that they found; but it really

1 was. The authorities came shortly after I got
2 home from work. The beaded necklace they
3 found, well, at the time the kids all over the
4 place were making these little beaded
5 necklaces. It wasn't necessarily Trista's.
6 Then they showed me an earring that took my
7 breath away. It wasn't especially extravagant
8 or costly looking, but it was especially
9 Trista's; one of a pair that she wore almost
10 all the time.

11 After killing Trista on July 12,
12 1993, and leaving her dear body open to the
13 elements in a cornfield in the July and August
14 heat, Hubert Michael fled the state. He jumped
15 bail on his rape case but was returned from
16 Utah on July 27 after being arrested in a
17 stolen car. Brought back to county prison, he
18 told his brother what he had done to Trista,
19 shooting her three times; not once or twice,
20 but three times. Then he told a different
21 story. It was not he who committed this crime
22 and he knew nothing about it.

23 Nevertheless, he was arrested for my
24 daughter's murder on August 27, 1993. He
25 escaped from Lancaster County prison on

1 November 14, 1993, by switching ID with his
2 cell mate. It wasn't until March 26th of the
3 next year that Michael was apprehended in New
4 Orleans.

5 Hubert Michael was tried for the
6 Lancaster rape and found guilty; brought to
7 York County, he agreed to plead guilty in
8 return for a life sentence. But when it came
9 time to plead in court, Michael changed his
10 mind. He pled not guilty. He wanted a jury
11 trial. Then he wanted a change of venue.

12 Up in Berks County, after a couple of
13 potential jurors were interviewed, court
14 recessed. During the recess Michael decided to
15 again plead guilty, whether or not the death
16 penalty would be requested. Back in court he
17 recited the litany. Yes, he knew what he was
18 doing. Yes, he was happy with the competency
19 of his attorney. Yes, yes, yes, everything.
20 Yes, he killed my Trista.

21 Back in York County he wanted a jury
22 to decide his fate, but a jury from a different
23 county. This was denied. When the jurors
24 lined up in the hallway for interviews in York
25 County, Michael again changed his mind. He

1 wanted the judge now to decide his fate. The
2 jurors were sent away. Again, he was satisfied
3 with his attorney. The judge sentenced him to
4 death. He was not going to fight. He wanted
5 to get his automatic appeal over with. Then he
6 wanted a new attorney. Things were not done
7 right. A hearing took place depicting a crazy
8 or sane, a poor young man from a bad home life
9 or from a good home life. Appeals are still
10 being scheduled.

11 Hubert Michael has played games with
12 my family, with the people of York and Berks
13 Counties, with the people of the Commonwealth
14 of Pennsylvania. He has had my family and me
15 on an emotional roller-coaster ride ever since
16 he killed my Trista. He, the murderer, the
17 criminal has been in control every step of the
18 way with little respect for his victim, my
19 family, and the Pennsylvania judicial system.
20 Every time he changed his mind and made an
21 abrupt about-face, he was playing games,
22 enjoying control over those he devastated with
23 his ungodly actions. And believe it, he
24 exercised control over the judicial system.

25 Hubert Michael, if not exercised

1 control, he took full advantage of every little
2 turn. Hubert Michael is typical of the
3 individuals on whom the State Supreme Court
4 wants to endow unlimited appeals. With each
5 appeal there will be the hurting, the
6 heartache, the despair for the victims, for us,
7 Trista's family and friends, and the family and
8 friends of the victims of all capital case
9 inmates.

10 These criminals have been found to be
11 cold-blooded killers who have little or no
12 remorse for their crimes, for taking our loved
13 ones from us. I do not want them to have the
14 right to this many appeals. They are entitled
15 to their day in court, to trial by jury of
16 their peers, and yes, to an appeal, but no
17 more. I was glad for the legislative action
18 limiting the number of appeals and appreciate
19 the time and effort that it took to enact such
20 a law as the Capital Unitary Review Act.

21 I am fearful and resentful of a
22 judiciary branch of our state government that
23 seems to be trying to assume power to take
24 carefully thought-out laws, legislation that
25 has been enacted by and for the people of this

1 Commonwealth in the body of our elected
2 legislature, and throw them out without just
3 cause. Thank you.

4 CHAIRPERSON CLARK: I thank you. Do
5 you have any questions?

6 (No response)

7 CHAIRPERSON CLARK: Go ahead, Mr.
8 Gunnet.

9 MR. GUNNET: I originally came -- I
10 heard of this hearing yesterday afternoon. I
11 originally came here to support the testimony
12 of the District Attorneys Association, but
13 after the last couple minutes my support is
14 with Mrs. Eng. I lived in that world. I live
15 in that world. Victims in a homicide case have
16 no rights because they're not there to exercise
17 rights, but certainly family members do.
18 Through the proceedings leading up to the
19 trial, as Mrs. Eng pointed out, the emotional
20 roller-coaster ride with so many stalls in
21 between, you ask why, and you're always told
22 that is the accused right.

23 Well, the accused right is to have a
24 trial by jury. Then if found guilty, which in
25 my case and Mrs. Eng's case was the case, we

1 feel, I feel and I'm sure all victims of family
2 members of people that have people on death row
3 feel that the rights now cease. We have rights
4 too. That was my question the whole way
5 through, when does our rights kick in? Up to
6 this point we have none.

7 The legislation to speed up the
8 appeal process was a good one. At least it
9 brings some closure to the ordeal; never total
10 closure, but through the judicial system of our
11 situations. So I support wholeheartedly
12 everything that Mrs. Eng has spoken to you
13 about. I live in that world, especially the
14 last couple pages. We go through it every day
15 of the week, every morning. I still wake up
16 thinking that it's just a dream, but folks,
17 it's not. That's all I have.

18 CHAIRPERSON CLARK: I thank you.
19 Representative Waugh.

20 REPRESENTATIVE WAUGH: Thank you, Mr.
21 Chairman. I think I should maybe explain on
22 behalf of Mr. Gunnet, and just make a comment
23 also for the other members of the committee who
24 are not from York County. Like Mrs. Eng, Mr.
25 Gunnet was a victim of crime. Just two and a

1 half years ago his wife was murdered just
2 outside the City of York. I can tell you as a
3 member of the General Assembly from York County
4 that both of your cases are cases, of course
5 I'm not intimately involved in, but certainly I
6 have been watching and listening as the media
7 and other information is passed here in the
8 county. They both weigh heavily on my mind as
9 deliberations over these matters continue.

10 My heart goes out to both of you and
11 I wish you the best. I just thought it was
12 important for members of the committee to
13 understand before us now sit two members of
14 families of some of the most heinous crimes
15 committed in our county just in the last
16 several years. I know it was hard for both of
17 you to be here today. I thank both of you for
18 testifying. It was very important to our work
19 in the House of Representatives. Thank you,
20 Mr. Chairman.

21 CHAIRPERSON CLARK: Thank you.

22 Representative Masland.

23 REPRESENTATIVE MASLAND: Just one
24 brief comment. The legislature has tried on
25 occasion to clarify and expand the rights of

1 victims' families, certainly not to the extent
2 that we probably should, but to give you a
3 voice at the time of sentencing to make sure
4 that the court does hear from you and that you
5 have as much of a right to say your piece as
6 the defendants do. There's certainly more that
7 we can do, and I do thank you for taking the
8 time to come here and share some very difficult
9 experiences. Thank you.

10 CHAIRPERSON CLARK: I thank you. I
11 believe that will conclude our Subcommittee on
12 Courts hearing for today. We'd like to thank
13 everyone who brought testimony forward, and
14 also thank the individuals who came and were
15 interested in listening to this testimony.
16 Thank you very much.

17 (At or about 3:00 p.m., hearing was
18 concluded)

19 * * * * *

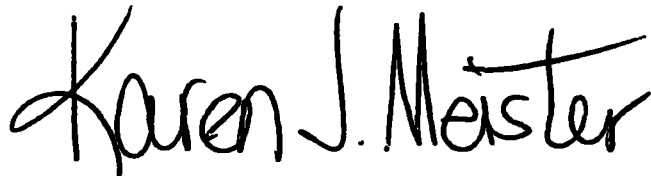
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C E R T I F I C A T E

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2
3 I, Karen J. Meister, Reporter, Notary
4 Public, duly commissioned and qualified in and
5 for the County of York, Commonwealth of
6 Pennsylvania, hereby certify that the foregoing
7 is a true and accurate transcript of my
8 stenotype notes taken by me and subsequently
9 reduced to computer printout under my
10 supervision, and that this copy is a correct
11 record of the same.

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

16 Dated this 2nd day of November, 1997.
17
18
19

20 

21
22 Karen J. Meister - Reporter
Notary Public

23 My commission
24 expires 10/19/00
25