

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

Altoona Area Public Library Theatre
1600 Sixth Avenue
Altoona, Pennsylvania

Thursday, October 23, 1997 - 1:00 p.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson
Honorable Larry Sather

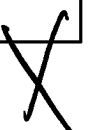
ALSO PRESENT:

Karen Dalton, Esquire
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1 CHAIRPERSON CLARK: Good afternoon. I
2 am State Representative Dan Clark and I'm from
3 the 82nd legislative district, which is just
4 about two hours east of here on Route 22.

5 I am the House of Representative's
6 Chairman of the Judiciary Committee's
7 Subcommittee on Courts, and we've been conducting
8 hearings in various parts of the state focusing
9 on the Supreme Court's actions in suspending
10 certain acts of the General Assembly.

11 We're here today and we'd like to thank
12 the Altoona Area Public Library for supplying us
13 with a place to conduct these hearings. And the
14 hearings have resulted primarily from a ground
15 swell of unhappiness, to say the least, in the
16 Legislature with our Supreme Court overruling and
17 nullifying certain elements of legislation which
18 the Legislature has passed.

19 They have gone into a number of arenas
20 such as our Medical Malpractice Tort Reform,
21 parts of our Landlord-Tenant Law, parts of the
22 review of our Death Penalty Appeals and the
23 Legislature's efforts to consolidate those
24 appeals and bring some finality to that appeal
25 process.

1 Additionally, as the Legislature reviews
2 issues such as the Commonwealth's right to a jury
3 trial, why we continually run into the prospect
4 that the Supreme Court will indicate or decide
5 that the legislation we have passed invades their
6 rule-making authority and strike that legislation
7 down as unconstitutional.

8 We've had problems with codifying our
9 Code of Evidence where we've received information
10 that the Supreme Court would likely strike that
11 down because it invaded their rule-making
12 authority.

13 And another item that has interested the
14 Legislature is the court order from the Supreme
15 Court that Pennsylvania should have a unified
16 court system and their efforts to begin to shape
17 that into what they feel ought to rule across the
18 Commonwealth of Pennsylvania.

19 So with that backdrop and with role
20 indication as to why we're here and what has
21 brought us here, why, I'd like to start today's
22 hearing.

23 But before we receive testimony, I'd
24 like the individuals up here at the table to
25 introduce themselves; and I'll start with

1 Representative Sather on my right.

2 REPRESENTATIVE SATHER: Thank you,
3 Representative. I am Larry Sather from the House
4 81st Legislative District, which is Huntington
5 and Northern Blair County. It's great to be here
6 and observe and witness the Subcommittee's
7 action.

8 I'd like to, as a member of the General
9 Assembly, anxiously await comments and
10 expressions of concerns that might be involved in
11 the length of the process that we have now in the
12 Common Pleas Court, Supreme Court.

13 Recently we just had, as Dan mentioned,
14 was Attorney General Mike Fisher advising us that
15 the U.S. district judge was attempting to strike
16 down a portion of our work that we did on the
17 Welfare Reform Law as dealing with residency
18 requirements and so on and so forth. So I'm
19 anxious to hear the testimony that's going to
20 begin today.

21 MS. DALTON: Karen Dalton, counsel to
22 the Committee.

23 MS. MILOHOV: Galina Milohov, research
24 analyst.

25 CHAIRPERSON CLARK: I thank you. The

1 first
2 individual who has already taken his seat and
3 will provide testimony to the Committee is
4 Dr. David DiLeo. He is assistant Professor of
5 Political Science for Pennsylvania State
6 University.

7 DR. DiLEO: It's Daniel.

8 CHAIRPERSON CLARK: Daniel?

9 DR. DiLEO: Yes, it is. I'd like to
10 begin by saying that I was able to watch the
11 hearings of the Subcommittee televised by PCN
12 from York. Thank God for PCN. We need more of
13 PCN and better equipment too for PCN, if that's
14 possible, so the faces don't break up when people
15 move. That would be great.

16 This Committee must consider the nature
17 of certain questions, specifically the nature of
18 questions concerning the limits of the Supreme
19 Court's rule-making authority and the limits of
20 its power of judicial review.

21 Are these technical, professional
22 questions which only members of the legal
23 profession can answer or are they questions of
24 constitutional interpretation which only the
25 Supreme Court can answer or are they political

1 questions that bear on the inalienable and
2 indefeasible right of the people to alter reform
3 or abolish their government in such manner as
4 they think proper -- Article 1, Section 2 of the
5 Pennsylvania Constitution?

6 Ultimately, they are the latter. The
7 Pennsylvania Constitution recognizes all powers
8 inherent in the people and all free governments
9 are founded on their authority, Article 1,
10 Section 2.

11 Therefore, the authority to decide
12 whether the Supreme Court as overstepped its
13 bounds is an authority that belongs to the
14 people, not to the Supreme Court.

15 Likewise, if the people are sovereign,
16 then the court to which they have delegated the
17 authority to decide whether a particular law is
18 unconstitutional has not been delegated the
19 authority to pass ultimate judgment on whether it
20 has overstepped its bounds.

21 Similarly, if the Legislature and the
22 Supreme Court are in dispute as to the limits of
23 the Court's rule-making authority, the ultimate
24 arbiter's not the Court; it is the people.

25 To define these foundational questions

1 bearing on the sovereignty of the people as
2 technical legal questions to be resolved by
3 members of the legal profession is to transfer
4 sovereignty from the people to a particular
5 group.

6 When the legal profession holds that
7 these are technical legal questions that it
8 should resolve rather than foundational questions
9 that only a sovereign people can resolve, that
10 profession is opposing the right of the people to
11 govern themselves.

12 To say that these foundational questions
13 are questions for the people to decide is to say
14 that they belong in the political arena.
15 Citizens need to know which justices believe that
16 the Court has the last word in deciding how far
17 its powers of rule making and judicial review
18 extend.

19 They also need to know who's responsible
20 for bringing these justices to the Supreme Court.
21 Bringing these questions into the political arena
22 means politicizing retention elections.

23 This is not undue politicization because
24 unless the citizens use the retention elections
25 to pass judgment on the scope of the Court's

1 powers of rule making and judicial review, the
2 Court will have the final word on these highly
3 political foundational questions, questions that
4 only a sovereign body should answer.

5 Although the percentage of judges and
6 justices who are defeated in retention elections
7 is only about 1 percent, the campaign against
8 Justice Rose Bird in California, which focused on
9 her resistance to the death penalty, indicates
10 that when the voters are convinced that justices
11 are usurping the authority of the people the
12 voters will deny retention.

13 Holding the governor and his party
14 accountable for judicial appointments is another
15 part of the political remedy available to the
16 citizens.

17 The notion that the Court should have
18 the last word in deciding the scope of its
19 powers did not come about suddenly and is not
20 limited to Pennsylvania. It has become part of
21 the legal culture of our state and our nation.
22 That legal culture is produced primarily by
23 members of the legal profession.

24 The predominant views in that profession
25 are that trailblazing and progressive decisions

1 are the ones that block majority of citizens and
2 legislatures and that Brown v. Board proved that
3 the wider the scope of judicial review the
4 better.

5 While it is certainly true that the
6 rights of minorities must be protected, it is
7 also true that republican government is
8 essentially a majoritarian institution.

9 It is unfortunate that Article 4,
10 Section 4 of the U.S. Constitution, which
11 guarantees a republican form of government to
12 the states, is one of the least litigated
13 clauses in that document. That speaks volumes
14 about the culture of the legal profession.

15 I only single out the legal profession
16 because an understanding of its culture informs
17 us of the necessity of maintaining a close watch
18 on the judicial branch and engenders a healthy
19 skepticism towards claims that judicial
20 competence, a technical matter best decided by
21 professionals, is all that should be at issue in
22 the selection and retention of judges and
23 justices.

24 All professionals, even college
25 professors, tend to forget that our ability to

1 provide specialized, high-quality services to
2 the public does not give us the right to decide
3 what is good for the public. The public has to
4 do that for itself.

5 That requires information, and I commend
6 the Subcommittee on holding these hearings
7 around the state because that is an effective
8 way to provide information and a forum for
9 debate.

10 On the question of a constitutional
11 amendment, I am uncommitted so far. I agree
12 that it could help to clarify the limits of the
13 Court's rule-making powers; however, I also
14 believe that the justices will retain and should
15 retain a good deal of discretion over the scope
16 of their powers.

17 The best way to bring their use of that
18 discretion into line with the requirements of
19 popular sovereignty is to turn the
20 election -- the retention elections into
21 referenda on the scope of judicial power and to
22 address the legal profession with friendly yet
23 firm criticism about its very human failure to
24 distinguish between the ability to assist people
25 in certain areas and the right to make

1 well-intentioned decisions for a sovereign
2 people.

3 CHAIRPERSON CLARK: Thank you, very
4 much, Doctor. And if I could follow-up on a few
5 things that you brought out, I guess ultimately
6 you indicate that it's the people who will
7 rectify any situation that may be out of bounds
8 or may be perceived as being out of bounds.

9 However, their ability to do that is
10 limited to retention elections, which are held
11 maybe every ten years or when vacancies appear.
12 Do you have any suggestions on a way to allow
13 them to be more active in exercising their
14 concerns about the Court?

15 DR. DiLEO: Yeah. I agree that the
16 retention elections doesn't allow very frequent
17 input and also it's very hard to defeat justices
18 that are running. I think more input would be
19 indirect.

20 All of these judges and justices are
21 appointed. And I think the party system gives
22 the voters a way of holding the people -- if not
23 the people that actually make the appointments,
24 of holding somebody accountable.

25 And I think if it reaches a level of

1 being a real concern to the public, I think this
2 could be a factor in political campaigns for
3 people -- for offices other than justice.

4 CHAIRPERSON CLARK: You also indicated
5 that if the people enter the political arena, et
6 cetera, when they should know how justices would
7 feel on certain areas.

8 And my understanding is that when you
9 have judicial elections that the judges generally
10 indicate that, well, we can't speak about that.
11 I can tell you that I am for law and order, but
12 I'm not going to tell you what that means.

13 DR. DiLEO: Right.

14 CHAIRPERSON CLARK: And is there
15 something that the Legislature can do to maybe
16 open up that process so that the people can
17 compare what candidates they're looking at?

18 DR. DiLEO: I think that's very
19 important. I think something needs to be done
20 about that. I definitely agree with that,
21 absolutely.

22 There's really no point in having these
23 retention elections if the justices are going to
24 say I can't say this, I can't say that,
25 especially if the issue is that the justices may

1 be arrogating powers to themselves that are not
2 appropriate. If you're going to have any kind of
3 accountability for that, that has to be brought
4 out into the open.

5 CHAIRPERSON CLARK: And you indicate
6 that
7 ultimately the political parties will need to
8 emphasize this or will put this out for public
9 information since, of course, that's probably the
10 only place that I can see where that
11 information's coming from.

12 And you also make an indication to the
13 judicial -- or not judicial -- but the legal
14 profession; and I'm trying to figure out how they
15 will come into play in those decisions.

16 DR. DiLEO: The way I think -- the way I
17 understand they come into play is that in the law
18 schools, even in undergraduate -- if I look at
19 textbooks and I see what people are learning
20 about in the law, the decisions that are brought
21 out are the decisions always where the justices
22 are overruling the elected branches.

23 And those are considered the great
24 decisions is when the justices are overruling the
25 elected branches. And you sort of get the

1 opinion that that's sort of the purpose and the
2 more they do that the better. And, you know, it
3 goes to the way we educate even undergraduates
4 but lawyers too, certainly, lawyers.

5 I mean, I've got friends and associates
6 that are lawyers and they've all soaked this up
7 that the more they overrule the elected branches
8 that's the way they are trailblazers and that's
9 sort of their role almost as much as possible to
10 do that. And so I think it's really embedded in
11 the culture and -- of that profession.

12 And if you see the Court acting
13 excessively in this matter, I think it does come
14 from the culture. And how to deal with that, I
15 think that just needs to be challenged in some
16 kind of ways.

17 But, you know, certainly all of the
18 professions have privileges that are granted by
19 the Commonwealth in exchange for promoting the
20 interests of the Commonwealth, as the
21 Commonwealth sees fit. That's really the
22 relationship between the professions.

23 All the professions generally have
24 monopolies on services that are provided in
25 exchange for their benefitting the Commonwealth.

1 That's the way that works.

2 And it's very natural to just sort of
3 assume that you have this monopoly because of how
4 hard you worked and how competent you are, and
5 it's just sort of natural; but there's one other
6 step to it.

7 You have that monopoly because the
8 Commonwealth feels that it's in the interest of
9 the Commonwealth for you to have that monopoly.
10 And it's something that needs to be looked at a
11 little bit.

12 I think -- you know, it's not restricted
13 to the legal profession. All the professions I
14 think have this natural tendency to just sort of
15 assume that these privileges are their birthright
16 or that they're earned strictly by virtue of
17 their competency.

18 But I think that that really needs to be
19 challenged that, you know, we're giving you this
20 monopoly. Are you working with us, you know?
21 Because there is a give-and-take there.

22 CHAIRPERSON CLARK: Do you have any
23 thoughts on having judges sit on our appellate
24 courts and our Supreme Court with merit selection
25 as opposed to elections?

1 DR. DiLEO: Well, okay, basically just
2 in light of what I said, I think that we need
3 more popular input and more avenues of popular
4 input into the selection and retention of judges.

5 And some of the merit selection boards
6 are moving away from that, actually. So what I
7 would consider, maybe, would be instead of the
8 elections -- I think the partisan elections are
9 better than nonpartisan elections because then
10 you can hold the parties accountable. So we're
11 not that bad off that way.

12 The only other possibility I would
13 consider would be gubernatorial appointment
14 perhaps because then the governor can be held
15 accountable. So that's one possibility.

16 But right -- I really don't see any
17 problem with partisan elections. I think it's
18 certainly better than ways that take the people
19 further out of it than they already are, which
20 most of these other plans would do.

21 CHAIRPERSON CLARK: So you prefer to
22 bring the people more into it --

23 DR. DiLEO: Yeah.

24 CHAIRPERSON CLARK: -- open up more
25 discussion of various issues by the candidates

1 and politicizing --

2 DR. DiLEO: Yeah, somewhat -- yeah. I
3 mean, of course there is a balance and it's not
4 supposed to be a political branch. I just feel
5 that the pendulum needs to be pushed a little bit
6 towards the accountability side of it right now.

7 You know, I mean, certainly there is a
8 need in our system for this independent
9 judiciary, and I see the need for that; but right
10 now I see a need for restoring the balance by
11 politicizing it a little bit more.

12 Politicizing is one word for it. The
13 other for it is accountability. Accountability's
14 another word for it. So we would be making them
15 accountable to the voters, at least more than
16 they are now.

17 I'm not saying that they should be
18 strictly worrying about public opinion all the
19 time and all that kind of thing. I do think it's
20 important to have an independent judiciary, but
21 independent doesn't have to mean totally
22 unaccountable either.

23 CHAIRPERSON CLARK: Absolutely --

24 DR. DiLEO: Right.

25 CHAIRPERSON CLARK: Do you have any

1 thoughts on the Supreme Court's idea or order, I
2 guess, that Pennsylvania be placed under a
3 unified court system?

4 DR. DiLEO: A whole lot of states have
5 been doing that. No, I don't have too much to
6 say about that, no.

7 CHAIRPERSON CLARK: And I guess the last
8 thing I'd like to touch on with you is -- an
9 example of where the Legislature has had problems
10 is we'll pass a piece of legislation -- the House
11 will pass it, the Senate will pass it, and it'll
12 be signed into law.

13 The Supreme Court then will indicate
14 that it's unconstitutional. The Legislature will
15 then try to amend the constitution and put that
16 to a vote of the people.

17 And then the Supreme Court will find a
18 way of indicating that the law we passed wasn't
19 passed constitutionally, the advertising of the
20 question on the ballot wasn't constitutional, or
21 the ballot question itself is unconstitutional.

22 And I guess our concern is that
23 we -- even when we recognize, okay, you know,
24 Supreme Court, you indicate your reading of the
25 constitution is different perhaps than the

1 legislative and the executive branch and we will
2 even go a step further to amend that constitution
3 to satisfy your desires and then to be frustrated
4 further by that.

5 DR. DiLEO: Oh, I think they're playing
6 with fire when they strike down these amendments
7 for this reason: I think it's a lot safer to
8 assume that your political system is somewhat
9 fragile and then be pleasantly surprised to see
10 how long it endured than to assume it'll
11 withstand anything and then wake up one day with
12 the world falling down around your feet.

13 And when the right of the people to
14 amend the constitution is taken away from them,
15 what do they have left? What do they have left?
16 What are they going to do?

17 At a certain point if they -- they
18 elected, you know, they voted for who they
19 wanted, okay. Okay. Fine. Who they wanted
20 passed the laws that they wanted, fine. They got
21 struck down, okay. They amended the
22 constitution, fine. Still didn't get it, okay.

23 You're playing with fire because you're
24 giving people no further avenue to pursue that's
25 legal. This isn't good. This isn't good. And

1 especially if this happens frequently, this is
2 not good.

3 And this is the kind of thing that makes
4 people that are dissatisfied instead of becoming
5 part of the system drives them out of the system,
6 against the system. And it might not happen now,
7 but there is certainly a situation where people
8 would not have to be crazy to say there's no
9 place else to go. There's nothing else we can
10 do.

11 So I'd say they're playing with fire.
12 It's better to assume -- we need to be flexible.
13 We need to adapt to what the people want, okay.
14 It's better to assume that because we need to
15 keep our institutions functioning, so we need to
16 listen to the people.

17 It's better to make that assumption than
18 to say things might be fragile so we better make
19 sure that the people are with us. It's better to
20 assume that than to assume the people won't do
21 anything and then one day find chaos, you know.

22 CHAIRPERSON CLARK: Um-hum.

23 DR. DiLEO: You know, this is America;
24 but it's still part of the human race. Things
25 could happen.

1 CHAIRPERSON CLARK: I thank you very
2 much.

3 DR. DiLEO: Okay.

4 CHAIRPERSON CLARK: We might have some
5 more.

6 REPRESENTATIVE SATHER: Just a comment
7 about retention. It does work effectively in
8 some areas of the Commonwealth. I mentioned,
9 coincidentally, before we started the meeting
10 that in Huntingdon County there are two judges,
11 two sitting judges who have lost on retention by
12 the electorate.

13 So whenever the electorate sees the
14 need, I believe and are adequately to their mind
15 informed, they make decisions, as long as they're
16 adequately informed.

17 DR. DiLEO: Um-hum. Right.

18 CHAIRPERSON CLARK: I think one of the
19 problems there is that on a local common pleas
20 level and you're familiar enough with what your
21 judge does, you see your judge, and basically,
22 you know, it is a true knowing what you're doing
23 type voting as opposed to sometimes in the
24 statewide elections where they're not allowed to
25 discuss issues; they're not allowed to do this;

1 they're not allowed to do that.

2 Even from retention to retention,
3 they're even limited in the activities that they
4 can engage in during that ten-year period that
5 people become removed --

6 DR. DiLEO: Yeah.

7 CHAIRPERSON CLARK: -- from knowing
8 nothing about them and they're not allowed to
9 educate the electorate with their views.

10 DR. DiLEO: Yeah.

11 CHAIRPERSON CLARK: And I think that's
12 why

13 people are sometimes frustrated with the system.

14 DR. DiLEO: Right.

15 CHAIRPERSON CLARK: Any questions?

16 (No audible response.)

17 CHAIRPERSON CLARK: We thank you very
18 much for spending some time with us today, and we
19 certainly enjoyed your testimony.

20 Next we have Mark Mitman, and he is the
21 President of the Landlords Association of
22 Pennsylvania. Mr. Mitman, nice to have you join
23 us today.

24 MR. MITMAN: I would like to start by
25 thanking the Committee for extending this

1 invitation to testify and by telling you a little
2 bit about myself and the organization that I
3 represent, Landlord Association of Pennsylvania.

4 I've worked in and around my family's
5 rental properties most of my adult life. And
6 when my father took ill and required a heart
7 transplant operation, I took over the direct
8 management of his rental investments.

9 Once I became active in the everyday
10 operations of dealing with tenants and the
11 landlord-tenant legal system, I quickly came to
12 realize that our laws in Pennsylvania are rather
13 hostile towards the small businessman known as
14 the landlord.

15 The problem for landlords is not only
16 the system, however. There are very few
17 resources available to landlords to assist them
18 in the self-management of their small businesses.
19 This is the reason why I founded the Landlord
20 Association in late 1995.

21 The Association's goal is to provide as
22 many free resources to Pennsylvania's landlords
23 as possible. We provide a wide variety of tenant
24 screening services to aid in the selection of
25 renters such as eviction searches, credit

1 reports, criminal checks, bad check scans, and
2 identity verification.

3 We also offer educational support for
4 Pennsylvania landlords in the form of
5 newsletters, seminars, and free telephone advice.
6 The more a landlord knows about his rights as
7 well as the rights of the tenant, the more
8 effective he will be at running a successful
9 rental business.

10 Lastly, we provide our members with
11 resources with which they will be able to better
12 manage their rentals. And I'm referring to such
13 things as leases, applications, legal notices and
14 so forth.

15 As I said previously, the Association
16 was founded in 1995. Since its conception
17 roughly two years ago, we've grown to over 700
18 members. Our membership reflects all segments of
19 the rental industry.

20 We have many small mom-and-pop landlords
21 with only one or two units; we have the
22 investment landlords who own possibly dozens of
23 units; we have real estate and management
24 companies as members; and we have several local
25 housing authorities, the largest of which is the

1 Housing Authority of the City of Pittsburgh with
2 its 10,000 units.

3 The Association has been growing
4 steadily adding dozens of new members each month.
5 We are readily becoming a major voice for rental
6 property owners in our state in two short years.

7 The overall legal climate that landlords
8 must cope with in Pennsylvania can best be
9 described as frustrating. If the landlord acts
10 professionally and businesslike, he can typically
11 count on winning at the local district justice's
12 office; however, while he may win the battle in
13 court, he will certainly lose the war.

14 The eviction process is still long and
15 costly to the landlord, particularly the average
16 landlord who owns only three or four units and
17 depends on every dime of every rental payment to
18 cover the bills.

19 Even after a victory in court, the
20 mom-and-pop landlord is held hostage by the fact
21 that the tenant can freely destroy the property
22 without any substantial repercussion, continue to
23 live rent free for weeks, and never be held
24 accountable for the judgment obtained at the
25 magistrate's court.

1 The bottom line is that the overwhelming
2 majority of landlords provide decent and safe
3 housing to tenants and must be held to that
4 standard; however, the reckless tenant who
5 inflicts financial chaos onto an owner of rental
6 property ultimately has no accountability under
7 the present system.

8 There have been some serious efforts to
9 rectify the inequities in the present
10 landlord-tenant law. Most notably are three
11 pieces of legislation that were introduced in
12 1995.

13 The State Legislature finally began to
14 move its wheels to remedy some of the most
15 disturbing areas of Pennsylvania's
16 landlord-tenant law.

17 I'm referring to Act 33 of 1995 which
18 requires a tenant pay to an escrow account during
19 an appeal, Act 36 of '95 which provides for a
20 more expeditious removal of tenants who have
21 breached the condition of their lease, and Act 5
22 of 1996 which provides for the garnishment of
23 wages to recover losses due to the physical
24 damage of a rental unit.

25 I would like to take this opportunity to

1 go over each law a little more specifically and
2 describe the Supreme Court of Pennsylvania's
3 treatment of this legislation.

4 Acts 33 and 36 of 1995 were signed into
5 law on June 6, 1995, and both were designed to
6 alleviate a common problem: The difficulty of
7 removing the nonpaying tenant.

8 If a tenant ceases his rental payments,
9 it used to take almost three months before that
10 tenant could be forced to surrender the
11 apartment. Act 33 shortened the waiting
12 requirements and reduced the overall time frame
13 to about 55 days for a landlord to effect an
14 eviction and subsequent ejection of a nonpaying
15 tenant.

16 Another common technique used by tenants
17 who desired to get over on the system was to
18 appeal the district justice's decision. While
19 I'm not advancing the notion that anyone should
20 be denied the possibility to appeal, frequently
21 many tenants used it only a stalling technique
22 that would postpone their removal from the
23 apartment by an additional month and in the
24 interim, obviously, permitting them to avoid
25 paying rent.

1 Act 36 sought to relieve this conflict.
2 It allows a tenant to appeal an eviction
3 judgment; however, in order to remain in
4 possession of the rental property, the tenant has
5 to place in escrow the amount of the judgment in
6 lieu of an outcome set by the higher court.

7 Tenants must also continue to make
8 rental payments in escrow during the appeal
9 process. This action has all but eliminated the
10 frivolous appeals filed by nonpaying tenants who
11 simply used the system to lengthen their stay in
12 an apartment before they were forced to move out.

13 Acts 33 and 36 were both suspended by
14 the State's Supreme Court in September, 1995.
15 The Supreme Court delayed implementation of
16 these laws because in their opinion they were
17 not consistent with the Minor Court Rules of
18 Civil Procedure.

19 In addition, the Court allowed a period
20 for public comment concerning the fate of the
21 legislation. Ultimately, the Court did adopt
22 the Rules of Civil Procedure concerning actions
23 before district justices as they relate to
24 Pennsylvania's Landlord-Tenant Act.

25 The new rules became effective at the

1 end of March, 1996. The Supreme Court held up
2 the implementation of this legislation for a
3 total of around six months.

4 In order to understand the impact this
5 has, one needs to examine the financial
6 ramifications a landlord endures during an
7 eviction. The mean rent in Pennsylvania as
8 determined by the Pennsylvania State Data Center
9 in 1990 is \$450 per month.

10 Under the older, three-month eviction
11 process, a landlord could expect to lose a
12 minimum of about \$1350, or three months times
13 450, in lost rent over the course of an eviction.

14 Compare that to the 55-day version which
15 nets a loss of around \$900 from beginning to end,
16 a difference of about one month's rent. That
17 means the cost of an average eviction that ran
18 its full course was reduced by about \$450.

19 On average during the six-month period
20 like that during which the Supreme Court
21 suspended this particular legislation, there are
22 approximately 25,000 evictions in Pennsylvania's
23 magistrate courts that run their course.

24 If each landlord was forced to wait out
25 that extra month during the eviction of a

1 nonpaying tenant, the total loss for him due to
2 the delaying in implementing Acts 33 and 36
3 totals about \$11.3 million.

4 One has to wonder if that \$11 million
5 would have been better put to use keeping rents
6 down and maintaining our communities' properties.

7 The third piece of legislation, Act 5 of
8 1996, was designed to put teeth into a district
9 justice's judgment. Act 5 allowed for the
10 garnishment of tenant's wages who have done
11 physical damage to a rental above and beyond
12 normal wear and tear.

13 While the legislation as passed by the
14 State Legislature and signed into law by the
15 Governor does not address the primary issue of
16 unpaid rent, it does attempt to hold a tenant
17 fiscally responsible for any damage or
18 destruction done to the property by attaching
19 wages.

20 This would permit the landlord to
21 mitigate some of his losses, also it would act
22 as a deterrent against a tenant seeking revenge
23 against a landlord by destroying the rental.
24 Such instances of revenge are unfortunately
25 rather common.

1 I've heard many a horror story, as I'm
2 sure members of the Committee have, of a tenant
3 willfully destroying a rental property to get
4 back at a landlord. I've heard of tenants who
5 have purposely flooded a basement with toilet
6 water.

7 I've heard of a tenant painting every
8 wall, ceiling, floor, and fixture -- to include
9 the inside of the refrigerator -- with black
10 lacquer paint. I've heard of man who removed an
11 entire wooden stairwell to prevent the landlord
12 access to his apartment.

13 I've heard of animals left locked in
14 apartments to urinate and defecate in the rental
15 for what was estimated at about a week. And
16 I've heard a story from a landlord whose tenants
17 boarded up every window and doorway from the
18 inside. To this day, the landlord still can't
19 figure out how the tenant got out of the unit.

20 This obviously goes above normal wear
21 and tear. The point is that when a landlord
22 evicts a tenant for a breach of the rental
23 agreement, there's little to protect the
24 property against outright vandalism.

25 Act 5 would allow a landlord to recover

1 normal losses from excessive damage and also
2 act as a deterrent against willful destruction.
3 Act 5 has run into some major difficulties at the
4 hands of the State's Supreme Court.

5 The Civil Procedural Rules Committee
6 refused to provide any guidelines for
7 implementing the legislation until substantial
8 changes are made to the legislation. Basically,
9 their stand is that the Legislature needs to take
10 another stab at it.

11 It would seem to me that the Legislature
12 spoke clearly enough enacting Act 5. In any
13 event, the Committee's objections were summarized
14 in a June 26, 1996, letter. There were four
15 problems identified as to why they were
16 unable to establish guidelines:

17 Number (1), What is the physical makeup
18 of a rental unit? Apparently, they were
19 confused as to whether or not such things as
20 carpeting and wallpapering counted as part of an
21 apartment's makeup; No. (2), Who was
22 responsible for the destruction of the unit; No.
23 (3), How has the security deposit been applied;
24 and lastly, No. (4), the method and the
25 amount of the wages to be attached?

1 For these reasons, the Committee opted
2 not to establish any guidelines. Without
3 guidelines to follow, most prothonotary offices
4 have been very reluctant to permit the
5 attachment of a tenant's wages.

6 It appears to me that the Committee
7 simply danced around the issue and found weak
8 excuses not to implement Act 5. Even someone
9 with the most limited intelligence could find
10 the answers to these four questions, let alone a
11 magistrate or a judge who deals with matters
12 more complex than these on a routine basis.

13 The difficulty again is that without
14 procedure most prothonotaries are not attaching
15 wages. The duty of the Court is to interpret
16 statutes as written so as to effect the
17 intention of the Legislature as faithfully as
18 possible.

19 Act 5's enforceability should not really
20 even be contingent upon the promulgation of new,
21 specific procedural rules for wage attachment
22 actions. To the contrary, our Legislature
23 plainly intended our courts to rely on existing
24 rules of civil procedure to implement the law.

25 However, the problem of implementation

1 has been clouded by the Rules Committee's
2 statement that the legislation needs to be
3 changed.

4 In closing, I would like to elaborate on
5 the issues that are important to landlords.
6 Acts 33, 36, and 5 all have been positively
7 received by the Pennsylvania landlords; but so
8 much more could be done to improve the
9 Landlord-Tenant Act.

10 This past session has seen numerous
11 pieces of legislation that require landlords to
12 live up to their end of a rental agreement.
13 The slumlord bills, as they're known, allow
14 punishments for landlords who take advantage of
15 the system and who disregard the health and
16 safety of their tenants.

17 Overall, I would say that that is a
18 proper expectation to have of a landlord;
19 however, I still find it more than a little
20 ironic that landlords can face steep penalties
21 for not playing by the rules while their tenant
22 counterparts are permitted to run reckless
23 through the system without any responsibility
24 for their actions.

25 First, if it's going to be criminal

1 action for a landlord to habitually avoid
2 complying with housing codes, it should likewise
3 be criminal for a tenant who willfully and
4 maliciously destroys a rental unit.

5 If someone were to spray paint the
6 outside of my rental building, it would be
7 viewed as vandalism. However, if that same
8 person were to spray the exact same wall except
9 from the inside on a rental unit, it would be
10 viewed as a civil matter.

11 Vandalism is still vandalism and
12 malicious destruction of property should be
13 criminal, regardless if it occurs in the street
14 or in an apartment.

15 Second, tenants must bear financial
16 responsibility for their actions and
17 commitments. Legislation permitting wage
18 attachment of a judgment-debtor must take high
19 priority both for damages and unpaid rent.

20 Most landlords are mom-and-pop landlords
21 with only three or four units. Without a steady
22 stream of income, property falls into disrepair
23 and tenants' rents tend to rise.

24 Additionally, a tenant's unpaid utility
25 bills should remain the responsibility of the

1 tenant. Too frequently, municipalities will
2 pursue the landlord for a tenant's unpaid water,
3 sewer, garbage, and even electric bills.

4 If the landlord refuses to pay the
5 tenant's outstanding debt, the municipality will
6 lien the landlord's property. Third, government
7 should pass landlord-friendly laws which impact
8 whole neighborhoods.

9 Laws such as tax credits to those who
10 rent to low-income tenants, income tax credits
11 for investing and rehabilitating investment
12 properties, placing more of a burden on a tenant
13 to prove uninhabitability and require written
14 notice of unsafe conditions, and also create
15 liability limits on conscientious landlords who
16 are sued for lead poisoning.

17 The problems Pennsylvania landlords face
18 affect everyone. They're more than just the
19 landlord's problem. If landlords can't collect
20 rent owed or protect their property from
21 destruction, rents rise affecting the poor,
22 property values decline, and our State's general
23 housing stock suffers.

24 Empowering landlords empowers whole
25 communities to improve themselves. Thank you

1 for your attention. I have greatly enjoyed this
2 opportunity to present my views on the Supreme
3 Court's effect on recent landlord legislation as
4 well as to speak about the problems still
5 confronting us.

6 If I can ever be of assistance to your
7 office or your constituents as they pertain to
8 landlord-tenant matters, I would welcome the
9 opportunity.

10 CHAIRPERSON CLARK: We thank you very
11 much. I had a question. Whenever we pass these
12 landlord tenant bills, then the courts, you know,
13 automatically convene the Civil Procedure Rules
14 Committee to review those bills and flush them
15 out sort of like a regulatory agency would; is
16 that correct?

17 MR. MITMAN: That is correct. I would
18 like to add to that, um, if we're talking about
19 the difficulties dealing with courts in general,
20 a lot of times there are magistrates in
21 Pennsylvania who take it upon themselves to
22 override the Legislature if they have a problem
23 with the extension -- or I'm sorry -- with the,
24 for instance, with the typing up the waiting
25 requirements to go through the eviction process,

1 to have a hearing, to have the appeal process and
2 go through the whole gamut.

3 Many, many magistrates I've heard have
4 granted continuances specifically designed to
5 extend the tenant's stay or at least extend the
6 eviction process back to the way it was before
7 the legislation was passed.

8 I don't know how common that is
9 currently; but beginning in '96 when the laws
10 went into effect, there is no --

11 CHAIRPERSON CLARK: Well, I think that
12 existed even prior to those laws. I mean, when
13 you talk about three or four months, you're
14 talking best case scenario where there weren't
15 any continuances and everything.

16 MR. MITMAN: Exactly.

17 CHAIRPERSON CLARK: But it just struck
18 me that when we pass another law -- any law in
19 Harrisburg, it's signed into law, we
20 have -- there's regulations that go with those;
21 but they're the departments that we basically
22 control through the Executive Branch or through
23 funding or they're departments that are directly
24 responsible to the Executive Branch.

25 REPRESENTATIVE SATHER: I can relate to

1 the issue. I am what was to be properly referred
2 to as one who previously owned and so very
3 joyfully referred to in that category.

4 MR. MITMAN: That's very common, and
5 it's a problem too. The flight of landlords -- I
6 don't know to the degree that the investments
7 that you had in rental properties --

8 REPRESENTATIVE SATHER: Four units.

9 MR. MITMAN: So basically you were the
10 norm. The problem is that the smaller
11 landlords -- three, four, five units -- tend to
12 take better care of their properties.

13 But the catch is they don't have the
14 resources to cover an unexpected loss in rent, as
15 I'm sure you're probably aware. And it's the
16 small lenders that really go in and take care and
17 maintain our urban centers.

18 REPRESENTATIVE SATHER: Do you know
19 -- and I don't know the law on this issue.
20 But many have ceased -- I did --
21 accepting the security deposit because you have
22 to keep it in a separate account,
23 interest-bearing.

24 MR. MITMAN: You say refused to accept
25 this --

1 REPRESENTATIVE SATHER: Right. And now
2 they're going to first and last payment. There's
3 always going to be a last month's rent.

4 MR. MITMAN: Well, the way the law's
5 written in Pennsylvania, you're only allowed for
6 the first year to hold two months' security
7 deposit.

8 You can call it whatever you want to
9 call it -- deposit, last month's rent, security
10 deposit; but the first year, you're only allowed
11 to keep two and after that you're required to
12 give one month's back. I guess the assumption is
13 the tenant's proved their worthiness to --

14 REPRESENTATIVE SATHER: After one year?

15 MR. MITMAN: Right, after one year.

16 REPRESENTATIVE SATHER: If you have two
17 month's of security or first and last month, you
18 have to return --

19 MR. MITMAN: You're only allowed to keep
20 one month's rent as security deposit after the
21 first year.

22 REPRESENTATIVE SATHER: Because
23 invariably, regretably, when the payments -- rent
24 payments get later and later you know something's
25 going to happen and then you get stuck with --

1 MR. MITMAN: There's usually a critical
2 mass that in those instances you can see. But,
3 again, the typical landlord is a mom-and-pop
4 landlord; and not being their primary business,
5 they tend to be decent people and to give breaks
6 and given extensions.

7 And then a lot of times it's -- the
8 stuff hits the fan and it's too late and they're
9 into it for a couple thousand dollars.

10 REPRESENTATIVE SATHER: I had a
11 situation as you mentioned where spackling -- I
12 just had it refurbished, all the walls, new
13 carpet put down.

14 And the first tenant we had in they put
15 spackling compound all over the picture holes and
16 so on and so forth and then made demands for the
17 security deposit. I just empathize with you.
18 That's all I'm saying.

19 MR. MITMAN: I think one of the largest
20 problems with the Landlord-Tenant Law is that
21 it's vague. It's very vague, and there are a lot
22 of rooms for interpretation and -- like, for the
23 security deposit for example, there's a lot of
24 room for interpretation.

25 And unfortunately, a lot of the

1 magistrates for whatever reason -- a good segment
2 of the magistrates take it upon themselves to act
3 as a tenant's advocate.

4 While I think they should look out for
5 both the tenant and the landlord, I don't think
6 it's their position in many instances to say I'm
7 going to extend the eviction process just
8 because, you know, because I think the tenant
9 deserves it or they deserve a break, I should
10 say. If there's actual merits involved, I could
11 understand that; but usually --

12 REPRESENTATIVE SATHER: Those numbers,
13 are they geographically --

14 MR. MITMAN: Yes, they're geographically
15 spread out over the state. For obvious reasons,
16 they're concentrated in the population centers.
17 We're rather sparse in this area other than
18 around State College and Harrisburg.

19 REPRESENTATIVE SATHER: Thank you.

20 MR. MITMAN: Thank you.

21 CHAIRPERSON CLARK: Let me -- the
22 vandalism that occurs inside the apartments --
23 and maybe you'll take one of our district
24 attorneys aside -- have you ever sought a
25 criminal prosecution on any kind of vandalism

1 inside?

2 MR. MITMAN: No. It's nothing that is
3 not really -- usually it's viewed as a civil
4 matter. While there are some instances where
5 there's some mechanisms that you can go and make
6 a criminal action, they're not that effective.

7 It's traditionally viewed as a civil
8 matter regardless of what happens in the
9 apartment. Whether it just be a couple of holes
10 in the walls or somebody being malicious about
11 it, there really isn't much recourse.

12 If there is recourse, it's something
13 that is not readily accessible; it's not
14 practical. It's not practical to hire an
15 attorney and spend \$3,000 possibly in attorney's
16 fees to litigate a thousand-dollar damage.

17 CHAIRPERSON CLARK: I think -- I want to
18 thank you very much for your testimony --

19 MR. MITMAN: Thank you.

20 CHAIRPERSON CLARK: -- and we hope you
21 continue to send us information so we consider
22 your views in crafting legislation in Harrisburg.

23 MR. MITMAN: Thank you.

24 CHAIRPERSON CLARK: Thank you. We're
25 running a little bit ahead of schedule; but

1 Robert Stewart, the District Attorney of
2 Huntingdon County, has indicated that he is ready
3 and would like to present us with some of their
4 views regarding the situation the Legislature has
5 found itself in.

6 MR. STEWART: Mr. Chairman, Members of
7 the Committee, thank you for this opportunity to
8 testify regarding the Supreme Court. By way of
9 background, I'm District Attorney of Huntingdon
10 County having served in that position for five
11 years.

12 Before that, I served for twelve years
13 in the Huntingdon County Public Defender's
14 office, the last ten years of which I was chief
15 public defender. Before that, I was in private
16 practice in Huntingdon County; and before that, I
17 served as an assistant district attorney in
18 Chester County. So I speak to you with
19 experience on both sides of the criminal justice
20 system.

21 You have previously heard testimony
22 about this Court's power to suspend statutes
23 under Article 5, Section 10 of the Pennsylvania
24 Constitution and you have heard about how this
25 power has been used to overturn the Evidence

1 Code; the Capitol Unitary Review Act, which
2 streamlined the appeal process in death penalty
3 matters; and the Child Videotaping Constitutional
4 Amendment.

5 The first focus of my testimony,
6 however, will be the Court's extension of Article
7 1, Section 8 of the Pennsylvania Constitution to
8 provide greater protection from police searches
9 and seizures than is provided by the Constitution
10 of the United States.

11 The exclusionary rule was a
12 judicially-created means of implementing the
13 United States Constitution's Fourth Amendment
14 protections against unreasonable searches and
15 seizures.

16 This means if the police unlawfully
17 search and get evidence, it is suppressed. They
18 may not use that evidence at trial. However, our
19 Supreme Court has decided that the parallel
20 provision in our state constitution, Article 1,
21 Section 8, provides this greater protection.

22 Let me cite some examples. In
23 Commonwealth versus Labron, evidence in the case
24 was excluded because the Court said the Fourth
25 Amendment was violated. The Commonwealth

1 appealed to the United States Supreme Court,
2 which overruled the PA Supreme Court and
3 sustained the search.

4 The Pennsylvania Supreme Court then
5 reinstated its order throwing out the search,
6 this time basing its holding on the Pennsylvania
7 Constitution. A by-product of this ruling is
8 that the automobile exception to the search
9 warrant requirement may very well be a thing of
10 the past.

11 That exception holds that vehicles,
12 because of their mobility, do not require a
13 warrant for search if there is probable cause to
14 search.

15 This Court has decided, contrary to
16 other courts in this nation, that the
17 automobile's inherent mobility is not enough to
18 exempt it from the warrant requirement.

19 Do any of you know how long it takes to
20 prepare a search warrant affidavit and get a
21 magistrate at night? Police officer's job of
22 protecting all of us has been made more
23 difficult.

24 The Pennsylvania District Attorney's
25 Association responded to this case and others by

1 asking for legislation requiring the Court to
2 follow federal standards in the search and
3 seizure area. That legislation did not pass.

4 This Court has also decided that
5 parolees, people who have been convicted of crime
6 and who are conditionally released on parole, now
7 have the same protections when parole agents wish
8 to search their houses.

9 In Scott versus the Pennsylvania Parole
10 Board at 695 Atlantic 2d 32, the Pennsylvania
11 Supreme Court applied the exclusionary rule to
12 throw out evidence from a search of a parolee's
13 residence where there had been found four
14 shotguns, a semi-automatic .22 rifle, a compound
15 bow and arrows.

16 Scott was on parole from a 10- to
17 20-year sentence for a third degree murder.
18 Pennsylvania Electronic Surveillance Control Act
19 provides that when a prosecuting attorney gives
20 approval and one party to a conversation
21 consents, that party's conversations may be
22 intercepted and recorded.

23 These consensual wires are one of the
24 ways in which we gather evidence to convict drug
25 dealers. We secure a tape recording of what is

1 said between the Commonwealth's informant and the
2 criminal accused as a way of verifying what takes
3 place in a drug sale.

4 The Supreme Court tells us that we
5 cannot use that taped conversation if the sale
6 takes place in the drug dealer's residence unless
7 we get a search warrant.

8 This Court has also decided cases
9 involving anonymous tips. A Philadelphia police
10 officer got a message over his radio that there
11 was a man with a gun at Sydenham and York
12 Streets. The person was described as a black
13 male wearing a blue cap, black jeans, and a gold
14 coat.

15 The man was found fitting the
16 description, and he had a .22 caliber revolver in
17 his belt with not permit for the gun. Despite
18 the dissent by Justices Newman and Castille, the
19 gun was excluded and the case was discharged.

20 As a result of these types of rulings,
21 the Pennsylvania Superior Court was required to
22 throw out the arrest of a drunk driver because
23 the State Trooper who arrested him was off duty
24 and not in uniform. That's Commonwealth versus
25 Kiner at 697 Atlantic 2d 262.

1 In Commonwealth versus Jackson, 698
2 Atlantic 2d 571, the Supreme Court struck down a
3 search on these facts: The Philadelphia police
4 got a radio report of a man wearing a green
5 jacket carrying a gun at Snyder Avenue and 7th
6 Street.

7 The police arrived within two minutes
8 and searched Jackson, who was wearing a green
9 jacket. As the police officer searched Jackson
10 for weapons, Jackson dropped a small box
11 containing fourteen packets of cocaine.

12 The Supreme Court excluded the evidence
13 in spite of the fact that Jackson had thrown it
14 away. Searches are not the only reason the Court
15 throws out convictions.

16 In Commonwealth versus Lawson, a 1997
17 case, the Supreme Court threw out a drug
18 conviction because the Cumberland County District
19 Attorney had appointed a deputy attorney general
20 to prosecute the case as an unpaid assistant
21 district attorney.

22 The reason that the conviction was
23 thrown out was that the Court did not believe the
24 appointment was proper even though both the
25 District Attorney's office and the Office of

1 Attorney General had agreed to it. Again, there
2 was a dissent by Justices Newman and Castille.

3 In Commonwealth versus McPhail, another
4 1997 case, the defendant sold cocaine to a police
5 officer in both Washington and Allegheny Counties
6 on multiple occasions.

7 He was charged in each county for the
8 respective sales occurring in that county, but
9 the Supreme Court ruled that he should only have
10 been charged in one jurisdiction.

11 That particular ruling eliminates the
12 traditional jurisdictional basis for criminal
13 prosecutions in a particular county court and now
14 requires police officers to decide when events
15 separated in time and space become a single
16 criminal episode and the police are now required
17 to guess in which county criminal charges should
18 be filed.

19 The exclusionary rule has been extended
20 beyond its original purpose of preventing police
21 misconduct. Now it is used not to protect the
22 innocent but shield the guilty in ways that I
23 would submit have gone beyond reason and common
24 sense.

25 In the cases that I cited to you, what

1 were the police to do -- ignore the radio
2 messages? Not search the man on the corner for
3 the gun? Not pick up the drugs dropped by the
4 other man? Was a state police officer supposed
5 to ignore the drunk driver?

6 At this time, there is no legal
7 mechanism to check the power of this Court. As
8 previously observed, a constitutional amendment
9 is a drastic measure, not one to be entered into
10 lightly. And even when that is done, the Courts
11 may strike it down as recently happened with the
12 Child Videotaping Amendment.

13 The first step in dealing with this
14 problem is exposing it to public scrutiny as
15 takes place during these hearings. Secondly, let
16 the public know what is going on. Publish the
17 results of these hearings to the popular media.

18 Even appellate judges do not sit in a
19 vacuum. Use the power that you do have. Our
20 system of government is based on checks and
21 balances so that no one branch of the government
22 can completely outstrip and take precedence over
23 the others.

24 Study other court systems both at the
25 state and federal levels. Find solutions to

1 these issues. Just as this situation with this
2 Court did not develop overnight, it will not be
3 cured overnight. The public must be more
4 informed about those persons it chooses to sit on
5 our appellate courts.

6 Perhaps it is time to reconsider whether
7 that process should be changed and whether the
8 limitations on what judicial candidates can say
9 should be altered.

10 I know that you as legislators share our
11 frustration. The cost of crime in our society is
12 tremendous both as to the human costs and the
13 economic costs. It takes resources from other
14 needed programs, adds to the costs of goods and
15 services, and makes our citizens fearful.

16 Police officers in this Commonwealth are
17 not the agents of an English king against whose
18 injustices the Fourth Amendment was written to
19 protect.

20 Courts which have interpreted that
21 amendment have managed to do so in a way that
22 balances the needs of 20th-century America with
23 the intent of the drafters of the United States
24 Constitution.

25 Unfortunately, in my judgment, in 1997,

1 the majority of the Pennsylvania Supreme Court
2 has fallen short of that standard of performance.
3 Again, I thank you for this opportunity and I
4 stand ready for your questions.

5 CHAIRPERSON CLARK: Thank you very much,
6 District Attorney Stewart. I guess as I got back
7 and noted your frustration as to what possible
8 remedies we might be able to find, the only thing
9 that I once talked about or broached was the way
10 that our federal system propounds their rules.

11 My understanding is that federal rules
12 are established by the federal courts and
13 developed by the federal courts but then they
14 must be approved by Congress.

15 But as with all the solutions with our
16 Supreme Court, I figure, well, you know, if we do
17 that and we would pass legislation that says that
18 they'll develop the rules and we'll approve them,
19 why, they could -- they'll end up saying that
20 that law is unconstitutional because it
21 violates --

22 MR. STEWART: Article 5, Section 10.

23 CHAIRPERSON CLARK: Yeah. And then we
24 get back in to, well, we'll amend the
25 Constitution and then have them strike down that

1 legislation on grounds that it wasn't properly
2 advertised, the wording wasn't adequate, or some
3 other basis.

4 MR. STEWART: Representative Clark, I
5 know that I have two colleagues here that I
6 suspect have things to say about that as well.
7 But right now the way our system is, in my
8 judgment and I suspect my colleagues' judgment,
9 the Supreme Court does have the upper hand
10 because of its rule-making power.

11 And I think that that rule-making power
12 is almost unparalleled in this nation. I think
13 that our Supreme Court has more of that power
14 than does any other court of any jurisdiction.
15 That's speculation on my part, but I think that's
16 right.

17 CHAIRPERSON CLARK: And I tend to agree
18 with you. And to take that one step further,
19 their willingness to use that. I was going to
20 say maybe after this question we'll take the
21 testimony from our other two district attorneys.
22 I know the one is Roger Germak, the District
23 Attorney from Juniata County.

24 MR. GERMAK: It's a pleasure to be here,
25 Mr. Clark.

1 CHAIRPERSON CLARK: And David Gorman, do
2 you want to come down?

3 MR. GORMAN: Sure.

4 CHAIRPERSON CLARK: He is the first
5 Assistant District Attorney from Blair County.
6 I guess the propensity of the Supreme Court to
7 basically do whatever they want to do was
8 outlined when you indicated that the Supreme
9 Court had overruled one of their decisions and
10 they came back and found a reason that they could
11 overrule what the -- their country's, I guess
12 Supreme Court indicated or passed.

13 MR. STEWART: That's absolutely correct.
14 I do know that Mr. Germak is going to be speaking
15 to that.

16 MR. GERMAK: I can address that in my
17 testimony.

18 CHAIRPERSON CLARK: Okay. What I think
19 we'll do then is welcome District Attorney Ralph
20 Germak from Juniata County and ask him to provide
21 his testimony to the Committee.

22 MR. GERMAK: Thank you. Good afternoon,
23 members of the Judiciary Committee. As
24 Vice-president of Pennsylvania District
25 Attorney's Association -- Mr. Ling has arrived.

1 He's the District Attorney in Bedford County.

2 CHAIRPERSON CLARK: Why don't you come
3 down? We should have another chair for you.
4 Thomas Ling.

5 MR. LING: Yes.

6 CHAIRPERSON CLARK: Come on down here.
7 The District Attorney of Bedford County?

8 MR. LING: Yes, sir.

9 MR. GERMAK: I appreciate the
10 opportunity to testify today on behalf of
11 Pennsylvania's prosecutors concerning the growing
12 trend of our Supreme Court to overreach into the
13 legislative arena, striking down many valid
14 statutes in the name of the State Constitution's
15 rule-making provision and search and seizure
16 provision.

17 I will address first the rule-making
18 issue and then the issue of search and seizure.
19 I have provide some written testimony and I may
20 paraphrase some, but I hope that the Members of
21 Judiciary have available to them the extent of
22 the written comments.

23 In the written comments, I do cite the
24 article, which has been mentioned here prior to
25 this, about the Pennsylvania Constitution

1 granting certain rule-making provisions to the
2 Pennsylvania Supreme Court.

3 That power really has been utilized to
4 weaken law enforcement's ability to protect
5 victims, witnesses, and all our citizens from the
6 ravages of crime.

7 The Supreme Court more and more is
8 asserting authority over matters historically
9 left to the Legislature in the name of its state
10 constitutional rule-making power.

11 If you take a look at some of the
12 legislation that the Court has overruled or
13 modified, it would include such things as laws of
14 evidence, capital punishment proceedings, child
15 videotape closed-circuit TV testimony, and the
16 Commonwealth's right to a jury trial just to name
17 a few.

18 The Supreme Court typically expands its
19 rule-making authority in such a fashion as to
20 reduce law enforcement's ability to protect
21 citizens from crime. I think some examples may
22 be in order.

23 For instance, the death penalty issue,
24 the collateral appeals area where the Legislature
25 moved to shorten the time period for death

1 penalty appeals by consolidating the direct and
2 the PCRA appeals by way of what was called the
3 Capitol Unitary Review Act.

4 Now the Court has thrown out that
5 legislation and reinstated the much lengthier,
6 double appeal process that has resulted in
7 extensive delays in the death penalty procedure.
8 Our citizens are outraged by the lengthy delay
9 between the death penalty verdict of a jury and
10 the carrying out of the penalty.

11 I've heard many people say, hey, if
12 you're not going to use it, why even bother
13 having this penalty? It's been on the books, the
14 death penalty, now for well over twelve years;
15 and there's only been two executions in that
16 period of time although we have over 200
17 individuals on death row.

18 Another area in which the Court has
19 struck down legislation which favored victims is
20 in the area of child videotaping and
21 closed-circuit testimony.

22 The General Assembly pursued the only
23 avenue available to it to address this matter,
24 and that was a Constitutional Amendment. That
25 Amendment was approved in two consecutive

1 sessions and presented to the public for a vote.
2 That's the way the Constitution works.

3 However, the Commonwealth Court held
4 that even this isn't good enough. It struck down
5 the amendment holding that because of the
6 Constitutional Rule-making Clause, the question
7 before the voters had actually two questions to
8 it and therefore felt that they would have to
9 overturn and disallow it.

10 But that's another area where the Courts
11 have utilized this rule-making power to the
12 detriment of innocent victims. Another area is
13 the Commonwealth's right to a jury trial.

14 Historically, the Commonwealth had the
15 right to a jury trial but it was thrown out in
16 the 1970's. Statutorily, it was reinstated in
17 the late 1970s. Never deterred, however, our
18 Supreme Court in a decision in 1982, Commonwealth
19 versus Sorrell, they held otherwise. They
20 stripped that power from the Legislature.

21 So therefore even though the General
22 Assembly wants victims to be on an even playing
23 field with criminal defendants, the Court has its
24 rule-making clause the power to say what the
25 public wants.

1 And nevertheless, what the General
2 Assembly determines what the public wants seem to
3 be overridden by virtue of those seven members of
4 the Supreme Court and that rule-making clause.

5 Another area which has prosecutors
6 concerned is the Evidence Code area. The General
7 Assembly has the power to promulgate evidentiary
8 rules and historically -- and this has never been
9 questioned. Prosecutors are going into court
10 relying on these rules to present their case.

11 When the General Assembly moved to
12 consolidate all of the evidentiary rules into a
13 comprehensive and organized evidence code -- I
14 believe that was Senate Bill 965 of 1995 -- the
15 Supreme Court decided to use the Rule-making
16 Clause as a means to take over this area of law
17 making as well.

18 Why this was not impermissible rule
19 making before but is today, no one has ventured
20 to explain or speculate. We don't know when it's
21 going to stop. The Court's usurpation of this
22 traditionally legislative function undermines the
23 fundamental principles of democracy.

24 Once the Court assumes an area of law
25 within its rule-making power, the process of

1 developing rules moves behind the cloak of
2 judicial secrecy, beyond the reach of the other
3 branches of the government, and beyond the power
4 of the citizenry.

5 Indeed, by founding their actions on the
6 State Constitution, the Supreme Court renders any
7 statutory provisions on the point of law it
8 assumed null and void.

9 Now, Mr. Clark, you had mentioned the
10 federal system. The federal system does not lend
11 itself to the problems that we see in the state,
12 neither do rule-making systems in the vast
13 majority of the states either have this problem.
14 Other jurisdictions recognize the danger of the
15 courts using rule making to become a
16 superlegislature.

17 Absent some kind of checks and balances,
18 rules of court can be expanded to regulate more
19 than technical housekeeping matters but instead
20 affect important social policy questions such as
21 the revelation of prior sexual conduct to attack
22 rape victims, the release of dangerous criminals
23 on bail, the availability of sanctions for
24 frivolous suits, and the right of victims of
25 crime to have their cases heard by a jury of

1 their peers.

2 In most of the country, court rules are
3 subject to a democratic process. The legislature
4 delegates to the courts the initial function of
5 developing proposed rules, usually through
6 advisory committees, and then the legislature
7 would approve the rules in particular cases.

8 In this way, the public benefits both in
9 the expertise of a judiciary and the perspective
10 of elected officials plus public input. This
11 hearing today is a significant step in the right
12 direction.

13 Prosecutors have unanimously endorsed
14 the concept of bringing Pennsylvania in line with
15 most other jurisdictions by assigning to the
16 court system the initial responsibility for
17 proposing rules while reserving to the
18 Legislature its proper power in approving or
19 disapproving of rules before they become law.

20 This rule-making power, although perhaps
21 esoteric in its particulars, has significant
22 impact on the many citizens who must at one time
23 or another have recourse through the court
24 system.

25 The Pennsylvania District Attorney's

1 Association urges you move forward with a
2 Constitutional amendment providing democratic
3 oversight of the rule-making power of the Court.

4 The other area that I would like to
5 address is the area of search and seizure, and
6 this has caused much consternation in the law
7 enforcement community.

8 Last session the General Assembly
9 considered Senate Bill 806, which proposed an
10 amendment to the Pennsylvania Constitution to
11 stop our Supreme Court from expanding criminal
12 rights beyond those provided by the United States
13 Constitution.

14 It would have done nothing more than
15 permit the voters to decide whether to grant
16 criminal defendants the same search and seizure
17 rights guaranteed by the Fourth Amendment of the
18 United States Constitution but no more.

19 Frequently, our State Supreme Court has
20 rejected the holdings of the United States
21 Supreme Court in this area. Our Supreme Court is
22 manipulating the Pennsylvania Constitution to
23 create new weapons to fortify the already bloated
24 arsenal that Pennsylvania criminals have who wish
25 to seek to avoid punishment for their crimes.

1 We are not aware of any other state
2 supreme court that has used its state
3 constitution so aggressively to handcuff its
4 police officers in their uphill fight to keep our
5 citizens safe from harm.

6 Pennsylvania's grant of numerous
7 state-based rights broader than federal rights
8 effectively frustrates the truth-determining
9 process and gives criminals an unfair advantage
10 at the expense of public safety.

11 These extra rights for criminals result
12 in dangerous offenders to be freed to commit more
13 crime as well as countless other criminals never
14 being apprehended because Pennsylvania police are
15 forced to fight crime with one hand tied behind
16 their backs.

17 All of this has occurred despite the
18 virtually identical language of the State and
19 Federal constitutions. In my written testimony,
20 I've provided for the benefit of the Judiciary
21 the exact language of the Fourth Amendment of the
22 United States Constitution and also Article 1,
23 Section 8 of the Pennsylvania Constitution.

24 If you take a look at those sections,
25 there is no substantive difference between the

1 two provisions; nevertheless, the State Supreme
2 Court has been utilizing Article 1, Section 8 of
3 the Pennsylvania Constitution and broadening the
4 rights of criminals.

5 Some examples may be in order. You can
6 see for yourself then how the ability of the law
7 enforcement community to fight crimes has been
8 weakened. Take the area when we have abandoned
9 property.

10 The Court broke truly new ground in
11 expanding criminals; rights by holding that
12 police are not even entitled to seize firearms,
13 drugs, or other contraband even after a criminal
14 has fled and discarded or dropped the contraband.

15 That would have been the cases
16 Commonwealth versus Matos, M-A-T-O-S, McFadden
17 and Carroll And I heard District Attorney
18 Stewart allude to that situation.

19 If you take a look at those cases, you
20 will see that where a criminal was confronted by
21 a police officer and the criminal either threw
22 down his firearms or drugs or other contraband
23 and then ran, the police officers gave chase and
24 arrested.

25 Subsequently, the Courts found that this

1 action on behalf of the police, which is their
2 normal duty, was improper. I echo what
3 Mr. Stewart has indicated: What is the police
4 officer to do in that kind of a situation?

5 If a suspect drops a gun, drugs, or
6 other evidence, the suspect can now, in fact,
7 theoretically sue the Commonwealth or the police
8 department if the police officer picks up that
9 contraband.

10 Another area is the area of allowing
11 criminals to make totally inconsistent claims on
12 seized property. If you take a look at some of
13 the cases that have come down in Pennsylvania,
14 if, in fact, someone wishes to assert a search
15 and seizure protection in that property, they no
16 longer have to claim it's their property.

17 Our courts, even though they have gone
18 contrary to the holdings of the United States
19 Supreme Court, allow criminals to say, That's not
20 my property; but even if it is my property, I
21 want to exercise my rights under the Constitution
22 for search and seizure protection. And our
23 courts and the courts in the case of Commonwealth
24 versus Sell has allowed that.

25 Another area would be where drug dealers

1 are now allowed, theoretically, to destroy
2 evidence of the crime before the police can
3 execute the warrant.

4 For instance, in Commonwealth versus
5 Chambers, our Supreme Court applied to police
6 executing a search warrant a stricter
7 interpretation of the so-called "knock and
8 announce rule" that is mandated by the Fourth
9 Amendment to the United States Constitution.

10 In the United States Constitution, the
11 only requirement is that the police act
12 reasonably. In Pennsylvania, according to the
13 Supreme Court, law enforcement officers must (A),
14 knock on the door; (B), announce that it's the
15 police; and (C), wait at the door for at least a
16 couple of minutes for a suspected drug dealer to
17 let them into the home to execute the search
18 warrant.

19 Obviously, it doesn't take a rocket
20 scientist of a drug dealer to realize that during
21 this period of time they can flush the drugs down
22 the toilet and get rid of them; and that's what
23 happens on many occasions.

24 Worse, drug dealers can now set up an
25 ambush for the police if they do not allow them

1 into the house and the police have to break the
2 door down.

3 Our state constitution, therefore, has
4 been interpreted by the State Supreme Court to
5 foolishly presume either that drug dealers will
6 respond to the "knock and announce rule" in a
7 law-abiding manner or that they are
8 extraordinarily dull.

9 Another area which has caused many
10 problems is in the area of where undercover
11 agents are wearing wires to protect themselves.
12 Recently in the case of Commonwealth versus
13 Brion, B-R-I-O-N, the Pennsylvania Supreme Court
14 held that if a wired, confidential informant is
15 invited by the defendant into the defendant's
16 home, the informant must excuse himself and go
17 get a search warrant if he wishes to go in with
18 the wire.

19 Now, let's think about this. When an
20 undercover officer is doing his duty, he
21 sometimes does not know where the criminal is
22 going to lead him. And consequently during that
23 episode if the criminal invites the defendant
24 (sic) into the defendant's home, basically then
25 the police officer's going to have to decide,

1 (1), either break off this engagement or else
2 call time-out somehow and go get a warrant and
3 come back. Now that is just totally foolish and
4 unreasonable.

5 In Pennsylvania -- I would like to also
6 address the good faith exception to the search
7 and seizure requirements. Of course, under the
8 United States Constitution, there is a good faith
9 exception to police officers who rely on probable
10 cause determination when executing a search
11 warrant.

12 That's the standard set forth in the
13 United States versus Leon. This reflects the
14 well-established policy that the purpose of the
15 exclusionary rule is to deter police misconduct.

16 There being no police misconduct where
17 police are executing a warrant in good faith,
18 application of the exclusionary rule -- which has
19 the high cost of compromising the truth
20 determining process -- simply makes no mistake.

21 But our Supreme Court has allowed
22 criminal defendants to successfully allow
23 evidence not to come into cases where there has
24 been a good faith but probably violation of the
25 rule.

1 For instance, in Commonwealth versus
2 Edmunds, in that particular case even if there
3 was a technical error, the evidence is not
4 allowed in the case. It's out. And therefore in
5 most cases, the criminal will go free since the
6 evidence that's suppressed is necessary for the
7 conviction.

8 In Edmunds, our State Supreme Court has
9 stretched the State Constitutional Search and
10 Seizure Provisions too far and in the process has
11 created rules that can only demoralize our police
12 force and jeopardize the safety and well-being of
13 the law-abiding public.

14 Another area is the drug dog sniff area
15 which is being utilized throughout the country
16 now to catch drug traffickers. The United States
17 Supreme Court over a decade ago resolved that a
18 dog sniff is not a search subject to
19 constitutional protection because it's not as
20 intrusive as a typical search.

21 In Pennsylvania, however, the State
22 Constitution was utilized to outlaw the use of
23 the dogs in investigatory stops of drug dealers.
24 A dog's mere sniff of a drug suspect in the
25 opinion of our State Supreme Court is

1 indistinguishable from a full-body strip search.
2 Full probable cause to arrest is necessary.

3 And that was the rule that was set down
4 in the case of Commonwealth versus Martin.
5 The State Supreme Court thus reduces the dog
6 sniff to a redundant exercise. Where there is
7 probable cause to arrest, a dog sniff really
8 isn't necessary.

9 Therefore, I know as a fact in
10 Montgomery County even though the State spent
11 thousand and thousands of dollars to train drug
12 dogs, these drug dogs are now useless; and
13 consequently, it's a waste of resources.

14 It may be obvious that when police
15 officers are engaged in the dangerous procedure
16 of a house search they need to protect
17 themselves by temporarily detaining occupants
18 during a search. That was okayed by the United
19 States Supreme Court.

20 But Pennsylvania police who put their
21 lives on the line every day in the fight against
22 crime are not permitted to take this simple,
23 common sense precaution.

24 The Pennsylvania Constitution won't
25 allow it, according to our court. And that's

1 the case of Commonwealth versus Rodriguez, which
2 is a 1992 decision.

3 There are more examples of our Supreme
4 Court utilizing this section of the law to
5 benefit drug dealers and criminals at the
6 expense of the public safety and safety of our
7 police officers.

8 In the 1993 case of Commonwealth versus
9 Mason, police officers are not permitted to
10 secure a residence while obtaining a warrant;
11 but instead, police must politely wait outside
12 even though they have credible, independent
13 evidence that crimes are being committed at that
14 time inside.

15 In Commonwealth versus White, even where
16 the police had probable cause to arrest a
17 criminal in his car and make an arrest, they may
18 for their own protection search the passenger
19 area of the car for weapons as a search incident
20 to an arrest -- under the U.S. Constitution, but
21 not under the Pennsylvania Constitution.

22 Now, what can be done? It's unfortunate
23 that there is no other solution to the problem
24 than a constitutional amendment. The State
25 Supreme Court is based on -- has based its

1 procriminal rulings on the State Constitution.

2 If the Legislature was to address the
3 situation by passing legislation by statute, it
4 would automatically be struck down by the State
5 Supreme Court.

6 The only way to stop the State Supreme
7 Court from using the State Constitution to help
8 criminals and for making our streets and homes
9 even more dangerous is by prohibiting them from
10 doing so in the state constitution itself.

11 Now, there are -- in fact, it is clear
12 that the founding fathers believed that the
13 State Constitution should be amended from time
14 to time when necessary. We don't feel that it
15 should be done willy-nilly; but obviously when
16 necessary, it can and should be done. There are
17 specific procedures for doing this.

18 Such efforts to repeal unwise state
19 cases is not without precedent in Pennsylvania
20 since in 1984 when Section 9 was amended in
21 response to the case of Commonwealth versus
22 Triplett dealing with the rights -- the right of
23 an individual to utilize the courts to squash
24 statements.

25 Unfortunately, what happened was that

1 even though there was a violation of Miranda
2 rights, the federal constitution allows the
3 Commonwealth who allows the police and
4 prosecutors to use a confession where the
5 defendant gets on the stand and lies.

6 In Commonwealth versus Triplett, our
7 Supreme Court said, no, we weren't going to
8 allow the confession under any circumstances.
9 The Legislature and people of Pennsylvania
10 stepped in and overturned that; and we see that,
11 therefore, there is a way to do it and it can be
12 done.

13 Similarly in 1995, the voters amended
14 the State Constitution to reverse the State
15 Supreme Court to make clear that closed-circuit
16 or videotaped child testimony could be used at
17 trial in child abuse cases.

18 Other states have utilized this
19 procedure, and I have set forth some in my
20 written comments as to what other states do in
21 order to change the constitution.

22 Our concern has been expressed -- there
23 has been some concern that if the United States
24 Supreme Court expands the rights of criminals
25 maybe a proposed amendment might lock

1 Pennsylvania into those decisions.

2 We would be locked into that U.S.
3 Supreme Court decision regardless of whether
4 there is an amendment or not because the United
5 States Constitution sets a minimum floor of
6 rights for criminal defendants which all states
7 must comply with.

8 The only thing a state supreme court
9 can do is expand the rights of criminals, and
10 that's exactly what our Court has been doing for
11 the past two decades.

12 A proposed constitutional amendment
13 would simply put a stop to the expansion of
14 criminal rights and bring it in line with
15 federal protections.

16 A constitutional amendment is necessary
17 also to protect federalism. And I have
18 indicated in my written comments why I feel that
19 federalism can be protected by use of the
20 amendment.

21 We are convinced the founding fathers
22 would approve an amendment to the state
23 constitution because the state Supreme Court has
24 thrown the constitutional structure of
25 government into an imbalance.

1 The Court has anointed itself as a
2 superlegislature and has used the State
3 Constitution Search and Seizure Provision to
4 legislate more sweeping rights for criminals at
5 the expense of law-abiding citizens.

6 We are certain that the founding fathers
7 would be shocked at the illogical and dangerous
8 rulings of our State Supreme Court. We believe
9 if they were alive today they would be leading
10 the charge for this constitutional amendment.

11 In summary, unless Pennsylvania acts to
12 limit its exclusionary rule, criminals of this
13 state will continue to be a specially-protected
14 class. Erosion of the ability of the State
15 Government to protect its citizens from crime
16 will continue to accelerate.

17 Our State Supreme Court recently has
18 granted allocatur on several defense appeals
19 seeking to further expand criminals' state
20 constitutional rights at the expense of the
21 public safety.

22 The Court appears bent on adopting even
23 more rules that are making Pennsylvania the
24 easiest state in the nation to commit crime and
25 get away with it.

1 The citizens, however, pay a high price
2 with their lives, their health, their property
3 and their piece of mind for this bloated arsenal
4 of state procedural protection for criminal
5 activity.

6 Our citizens deserve the chance to go to
7 the ballot box to decide in accordance with the
8 State's constitution's provisions for its own
9 amendment whether or not their constitution may
10 be abused in this way.

11 I thank the Judiciary Committee for
12 allowing us to be here today to present this
13 testimony, and I would like to point out
14 something that's not part of my written
15 comments.

16 But if you would look at the Monday,
17 October 20th issue of Pennsylvania Law Weekly,
18 there is an article -- and it's located on page
19 4 and it's the editorial page. And I read that
20 editorial page, and it's very appropriate to
21 what's happening here today.

22 And in there, the bar association has
23 basically taken a position that law makers
24 should be more cautious in criticizing the
25 courts and that the rhetoric surrounding the

1 recent Megan Laws decision has been overblown.

2 Well, I'm here to tell or at least to
3 suggest, we support what you were doing in this
4 effort that the courts are public officials just
5 as we are public officials and that as part of
6 that, if we do something, that we should open
7 ourselves up to public scrutiny.

8 This is the public's business. It
9 should be available for the public to review and
10 to criticize us when necessary. And in this
11 case, I feel that the criticism of the Supreme
12 Court and the courts is appropriate under the
13 circumstances. And thank you for allowing us
14 the opportunity to present this today.

15 CHAIRPERSON CLARK: I thank you,
16 District Attorney Germak. That article was from
17 the bar association. I'd like to check down over
18 the list of people that are on our Supreme Court
19 and see how many people they've highly
20 recommended over the past ten years.

21 MR. GERMAK: Well, I just want to
22 indicate that this is the editorial page of
23 Pennsylvania Law Weekly and I'm not positive that
24 it came from the bar association. Let me
25 just -- I'll put a footnote there.

1 But I should allow you all to read this
2 because, again, it's criticizing the Legislature
3 for basically criticizing the courts or at least
4 making an inquiry; and I thought that was very
5 ironic.

6 CHAIRPERSON CLARK: You weren't here
7 earlier, but we had a professor from -- an
8 assistant Professor of Political Science from
9 Penn State.

10 He indicated that now seems to be the
11 time for more popular input into selecting and
12 reviewing and electing judges and go -- maybe
13 move away very quickly and strongly from the, I
14 guess, the professional body of lawyers that
15 surrounded these judges for questions and try to
16 open up that process more for individuals, maybe
17 having the judges indicate where they stand and
18 why they stand because, you know, it's -- as I
19 hear your testimony, you know, I keep trying to
20 wonder, how did this happen and how did we get to
21 this point and why has it gone so out of whack?

22 MR. GERMAK: Because the public really
23 hasn't become aware of what has happened. This
24 is where the press can play an even more
25 important role in publicizing a lot of decisions

1 of the Supreme Court.

2 Because it doesn't only affect one
3 district attorney's office or it doesn't affect
4 just one police department. When they come down
5 with the rules and regulations or overturned
6 decisions basically changing the law and how we
7 go about doing our business, it affects
8 everybody.

9 And I think the more the public knows
10 exactly what happens with these decisions the
11 better off I think we will all be because the
12 public will become empowered and therefore use
13 that power at the ballot box to choose judges who
14 are more attune to what the public wants.

15 You have to realize that some of these
16 decisions -- the State Supreme Court expects our
17 law enforcement officers at times to be
18 constitutional experts in carrying out their
19 duties; and they are not constitutional experts.

20 They're following what the law is. And
21 when the courts change the law midstream, how can
22 they expect anybody to comply and how can they
23 expect the law enforcement officers to do their
24 job?

25 And like I said, when they come out with

1 these decisions, that's the time for the press to
2 really publicize these things and let the people
3 know the impact of these decisions.

4 CHAIRPERSON CLARK: And the precedent
5 has been effective with some federal judicial
6 decisions that have come out where if the press
7 gets on it right away, why, they can drive some
8 of those decisions and appointments and direct
9 the flow of how things were going in the federal
10 judiciary. And maybe the media in Pennsylvania
11 should be as vigilant in that process.

12 I guess the follow-up to that would be
13 if we want to get the public involved and we want
14 them to know of these decisions and how they may
15 not make sense, et cetera, why then we're going
16 to have to determine how to open up the process
17 so the candidates for these judicial positions
18 will be able to talk about them and discuss them
19 within some parameters that they feel comfortable
20 with.

21 But then I guess we get back to the
22 chicken and the egg. If we try to do that, will
23 the Supreme Court tell us that we're interfering
24 with their process and procedures and strike that
25 down?

1 I think as I look at the one clause in
2 the constitution, you know, practice, procedure,
3 and conduct of courts, you know, I look at that
4 as where to file your papers, how many copies to
5 have, how to conduct yourself or whatever in the
6 courtroom as opposed to setting up remedies and
7 et cetera.

8 But, you know, can I have any or all of
9 your comment on that and open up the floor and
10 let us know what each of you think?

11 MR. LING: I was just going to say in
12 response to or in accordance with what District
13 Attorney Germak is saying, I think one of the
14 things, perhaps a radical suggestion, but one
15 suggestion that should be considered by the
16 Judiciary Committee is -- and we're talking about
17 access and response of the courts -- I don't
18 believe there's any other office in the -- first
19 and foremost, the fact that judges are public
20 officials.

21 But unfortunately, I think what occurs
22 is that once judges get elected they are somewhat
23 insulated that they are prevented from putting
24 their stance in terms of policy; they are
25 precluded by statute from doing that; the voters

1 do not have an idea where these judges are going
2 to vote with regards to various issues; and that
3 once they're elected, I don't believe there's any
4 other term of public office as lengthy as that
5 of a judge and that when their term is up, they
6 don't run for reelection.

7 They run for retention, which is
8 essentially a "yes" or "no" vote from the voters
9 as to whether to keep the judge or not to keep
10 the judge.

11 And even if the voters vote no, that
12 judge now has an opportunity to run for election.
13 So I think what's occurred here is that we have
14 effectively insulated the judges from public
15 comment, from public criticism in terms of their
16 responsiveness to the electorate and what the
17 electorate deems appropriate.

18 And while understanding the judge's role
19 in terms of making unpopular decisions,
20 protecting the constitution, protecting the
21 rights of citizens, at the same time, in my mind,
22 this seems to speak to the ability of a judge to
23 have almost unlimited power in that we therefore
24 then say, well, we're going to insulate you from
25 the electoral process in one sense such that, you

1 know, if a judge is elected, essentially, that
2 judge is elected for an entire lifetime.

3 I believe if you look at the number of
4 retention elections, I would say it is -- it has
5 not happened that a judge has not been retained;
6 but it is a highly unlikely, unusual occurrence.

7 And that, consequently, you have a
8 situation and a scenario where once a judge is
9 elected he's particularly immune from public
10 criticism.

11 Whether he chooses to respond to what
12 the media does, what the media says, what the
13 public says is purely a matter of his own
14 conscious. There is no way to reach that judge
15 and to reach what that judge is doing.

16 You know, he has to basically, you know,
17 go through eight years of ruling however that
18 judge wishes and then after two years of time
19 come to the time of retention, perhaps be aware
20 of what the public is saying.

21 But essentially, he can run roughshod
22 and the Supreme Court certainly can by virtue of
23 their rule-making ability in determining whether
24 or not, you know, how the constitution's going to
25 read, what constitutional provisions are

1 appropriate, what constitutional provisions are
2 not appropriate despite what the legislature and
3 what the electorate has said.

4 And I think one of the things that could
5 be proposed, could be looked at is the question
6 of limiting -- well, three things: One, the
7 length of term of sentences of judges; two, the
8 question of retention as opposed to an election;
9 and also the question of term limits.

10 If you have a judge who is elected when
11 they're 40, they can basically extend thirty
12 years of being a judge without response, without
13 criticism, or without really responding to what
14 the public believes is appropriate, what the
15 public believes should be done.

16 It's not to say that a judge should be
17 tied to the public in terms of the decision in
18 terms of a particular case, but there needs to be
19 I think a little more awareness and a little more
20 responsiveness on the judicial branch with
21 regards to the decisions that they make.

22 So I think that's -- that's something
23 that should be looked at in those three areas in
24 terms of election, length of term, and term
25 limits with regards to the judicial candidates

1 and judges.

2 You know, all the other elected
3 officials, ourselves here, are subject to the
4 public. Why should judges be so different and so
5 insulated such as to be almost unapproachable?

6 I mean, if you had a judge in a
7 county -- and perhaps Mike can speak to it a
8 little bit better -- in a one-judge county, that
9 judge basically rules that county.

10 That judge can basically dictate,
11 depending on the disposition of the judge, what
12 occurs and how it occurs in that county and that
13 he is essentially -- he or she is essentially
14 insulated in a way that we are not from what the
15 electorate wishes to do with criticisms and how
16 they want to see the changes.

17 CHAIRPERSON CLARK: What about also
18 opening up their views? Could you see having the
19 judicial candidates running this fall to enter a
20 forum and discuss some of these cases and why
21 they decided and, you know, can we justify those
22 in your mind and how you would decide?

23 Do you envision something like that or
24 is there getting --

25 MR. LING: I don't believe that that's

1 necessarily -- I believe there's always matters,
2 you know, a judge decides a matter many times
3 such as we do; but those reasons, you know, if
4 they're going to have a decision potentially
5 would have an opinion and that opinion is public
6 knowledge, why shouldn't their opinion -- why
7 shouldn't they be able to have to defend their
8 opinion?

9 We have to defend the decisions that we
10 make. In terms of prosecuting individuals, we
11 have the process of filing criminal complaints
12 that if the police don't file something, a
13 private citizen can file a complaint and they can
14 proceed with regards to that.

15 While judges -- there's no other, you
16 know, no other availability, no other option
17 available to the public. So I think certainly
18 that they can -- need to defend their decisions.
19 I mean, you know, they made a decision for
20 whatever reason.

21 But the opinion's out there. It's going
22 to be subject to criticism. There's no reason
23 why they shouldn't be required to face the media
24 or face the public with regards to that.

25 CHAIRPERSON CLARK: Were you going to

1 add

2 something, Bob?

3 MR. STEWART: Yes. In this state and in
4 this nation, we give judges certain special
5 powers. In my opinion, with those special powers
6 come special responsibilities which I have not
7 always seen exercised by judges both in the
8 Common Pleas and at the appellate levels.

9 In this part of Pennsylvania, I'm aware
10 of four judges who were not retained because in
11 Huntingdon, Mifflin, and Blair Counties the
12 populous was sufficiently educated to vote no on
13 judges they believed should not be retained.

14 I -- other than one in the western part
15 of Pennsylvania, I'm not aware of any judges that
16 weren't retained; although, there very well could
17 have been.

18 About a month ago, I was in the Supreme
19 Court of Pennsylvania arguing a case involving an
20 anonymous tip and I was confronted by the
21 question from one of the justices which goes like
22 this:

23 Suppose, Mr. Stewart, you know or you
24 get a tip that I am going to be in a certain
25 location, my car, my license number, and my

1 person is described and the tip will say that I
2 am delivering drugs. Do you have the right to
3 stop me?

4 The questioner was obviously wanting me
5 to answer that question "no," that I would not
6 stop this particular Supreme Court justice or the
7 police officers would not stop this particular
8 Supreme Court justice because of who he was.

9 Well, the answer to that question is if
10 that tip is sufficiently reliable because of the
11 informer, because of his reliability in the past
12 and if that particular supreme court justice is
13 in that location, he at least needs to be asked
14 who he is and what he is doing.

15 In my opinion, the Supreme Court has set
16 themselves up as almost a superpolice review
17 board. Because what it seems to me that they
18 were trying to do in this case is formulate rules
19 for the police in dealing with informants.

20 The fact is, there are all kinds of
21 rules for police. The United States Supreme
22 Court does a good job writing those rules. And I
23 think what we are saying at this table is that we
24 don't need to reinvent the wheel as our Supreme
25 Court thinks they must.

1 I think that's one of the messages that
2 you need to understand. We all understand what
3 it means to have restraints on the conduct of
4 police, especially in a society where rights of
5 the individual are guarded as well as the rights
6 of individuals in this country are.

7 We don't quarrel with that. What we
8 quarrel with is the nonsensical decisions that
9 say when the guy throws down the guns or the
10 drugs, you can't use it. That's not common
11 sense.

12 When a guy's on parole for murder, you
13 ought to have the right to search his house for
14 guns any time. And when you find those four
15 shotguns and that .22 rifle and that compound bow
16 and the parole regs say you're not supposed to
17 possess weapons or be in areas where there are
18 weapons and you sign a condition of parole that
19 says that, you ought to go back to jail.

20 What was the guy going to do with four
21 shotguns, a .22 rifle, and a compound bow? He
22 sure wasn't opening up a sporting goods store.
23 Those are the kinds of decisions that don't make
24 any sense; and that is why there is no respect
25 for law, law enforcement, or lawyers.

1 Look at the kind of decisions we're
2 making. It's ludicrous. Seven
3 people -- 'actually, six now -- six people in this
4 Commonwealth are frustrating the will of
5 thousands of police officers, 67 district
6 attorneys, numerous common pleas judges, the
7 superior court, and all of our citizens.

8 What other society gives six people that
9 much power? When you boil it down to the
10 simplest part of this, that's what we're talking
11 about.

12 Now, a couple of hundred years ago, one
13 person had that much power. As a result of that
14 person's abuse of power, a whole revolution got
15 started.

16 Some guys threw some tea overboard in
17 the Boston Harbor. Some guys met in Philadelphia
18 and signed the Declaration of Independence. We
19 fought a war against the greatest power in the
20 world at that time and we beat them.

21 Now, instead of a king and an army,
22 there's a court who sits in Harrisburg,
23 Philadelphia, and Pittsburgh. And what we have
24 on our side is a good legislature, an awful good
25 bunch of cops, some of the best prosecutors I've

1 ever been able to work with. We ought to be able
2 to beat these guys.

3 You have the power of the press. Larry
4 Sather calls a press conference, people want to
5 know what he has to say. Dan Clark calls a press
6 conference, people want to know what he has to
7 say. The Legislature also has the power of the
8 purse string.

9 These branches of government work
10 together. The Supreme Court has to understand
11 that we're talking about common sense. You know,
12 I really can't imagine Washington or Jefferson or
13 Madison saying, Oh, no, if a guy throws down a
14 gun or drugs, you can't use it. I find that
15 personally very hard too believe and morally
16 offensive.

17 In the long run, in the great scheme of
18 things, it doesn't matter if Mr. Jackson's case
19 got dismissed; but that principle, that principle
20 that says if the police violate this, if they
21 don't cross an "i" or dot a "t" -- I said that
22 intentionally -- the search warrant's no good.

23 If they don't seal it three places, it's
24 no good. That's just not common sense because as
25 all of us sitting at this table have done and as

1 you have done, we've all written search warrants.
2 We've all called magistrates out in the middle of
3 the night to do things like that.

4 It's not easy. And we have done it to
5 protect our citizens. We haven't done it to
6 satisfy the abstract academic dictates of six
7 people sitting in Harrisburg. When you get right
8 down to it -- and I'll quit -- that's what it's
9 all about.

10 Who's going to control -- the people
11 through their elected Representatives or these
12 six guys on this bench? We have to decide that.
13 And I apologize for length of my remarks, but I
14 think that's the bottom line.

15 CHAIRPERSON CLARK: Now, and I think we
16 have tried to do what we can; but we have run
17 into this frustrating roadblock with every time
18 we try to change or try to do or begin
19 discussing, why, we violate this clause of the
20 Constitution.

21 And as we ran into with other
22 amendments, whenever we've tried to -- it wasn't
23 advertised properly, the question needed to be
24 two instead of one; and we're extremely
25 frustrated in Harrisburg and, you know, to the

1 point that we're trying to find answers. And I
2 guess maybe we're not alone in our frustration.

3 That might help us to bring that out
4 more publicly. I'd like to say in a press
5 conference or something you can bring attention
6 to it and hopefully do something that way.

7 Representative --

8 REPRESENTATIVE SATHER: Just briefly,
9 District Attorney Stewart -- Bob, who I've known
10 for many years and I've known Mr. Ling and Mr.
11 Gorman and this gentleman here I've touched base
12 with only slightly in Luzerne County Commission.

13 But I believe an electorate will make
14 the right choices; but how we allow these things
15 to happen, I'm not quite sure. Bob, you
16 mentioned -- Mr. Stewart, you mentioned the purse
17 string. Well, I know one commissioner -- this is
18 common pleas court.

19 I know one commissioner, it
20 was -- warrant case where he refused to fund what
21 the courts felt was adequately and was thrown in
22 jail. So I don't know -- I don't know what the
23 Supreme Court will do. We may find out with the
24 acts of our judicial system if we may, because
25 I'm not sure where that's going to end up or how

1 it will play up.

2 I guess we should be certain of what we
3 ask for; we may just get it. I believe from what
4 I observed here an informed electorate means we
5 need to open this process up and allow and
6 require -- it's not here today -- but allow the
7 electorate to be more informed and change the
8 process that says can they not discuss how they
9 react to a given situation?

10 I think at the local level we meet on
11 the street. We've passed you in every day
12 society. But that person that serves on the
13 Supreme Court who got there, I would assume, by
14 serving in some other Common Pleas or Superior
15 Court, District Attorney, public defender's
16 office, or whatever and then as they become
17 isolated and serve in that capacity for at least
18 ten years, I really do believe they lose sight of
19 what the people and the citizenry want and are
20 asking for.

21 So I'm not sure the purse string's the
22 answer, but we may find out with what we're about
23 to proceed with the unified judicial system. So
24 I look to more so -- and people don't want us
25 tampering with the constitution.

1 But I believe really there are times we
2 must absolutely -- we must absolutely do this.
3 So I tend to look to the issue Mr. Ling brought
4 up that in prohibiting from doing so by the state
5 constitution itself. So I guess we're going to
6 have to look to that area more so than the purse
7 strings. I'm open to any response there.

8 MR. LING: I think what's being
9 attempted with the constitution amendments, you
10 know, the videotaping of children and things of
11 that nature, they've attempted and the
12 Legislature's attempted to respond to the need of
13 what the public wants and have been repeatedly
14 struck down by the State Supreme Court and that,
15 therefore, we tried the way that it's been set
16 out.

17 That doesn't seem to be working. So I
18 think we need to change or in some way modify the
19 responsiveness of the courts to the electorate;
20 and that's the reason I think, you know, changing
21 how they get elected and that process is what's
22 needed so that there is more of a direct impact
23 on the judiciary and the judicial branch because
24 we'd tried to make those changes, tried through
25 the legislature and the public and elections and

1 constitutional amendments to change those things
2 and we have been frustrated by the very court
3 which sets out the rules.

4 We tried to change those rules, and
5 we've come up against it and not being able to do
6 what the electorate wants.

7 MR. STEWART: The bad part about this is
8 that all of these responses are usually reactive
9 to some kind of awful result: A murderer goes
10 free because his statement that was voluntarily
11 suppressed and it can't be used when he lies.
12 That's the case that Mr. Germak was talking
13 about.

14 As a result of which, the Legislature
15 passes an amendment which says, okay, now you can
16 do this. Nobody is going to get excited about
17 some guy with a gun charge who gets 21 month's
18 probation where the case is dismissed. Nobody's
19 going to get outraged about that because nobody
20 got hurt.

21 But should that same person have killed
22 somebody and the case gets thrown out, yeah,
23 everybody gets alarmed. The problem is from our
24 prospective, we see these cases coming down every
25 day and we see this court chipping away at our

1 ability to do our jobs, whether we're police
2 officers or whether we're prosecutors.

3 And there are many fine Pennsylvania
4 trial judges who feel the same way. You know,
5 don't get the idea that the judiciary is all
6 lined up behind the Superior Court because I know
7 that it's not so -- Supreme Court, excuse me.

8 REPRESENTATIVE SATHER: Many refused to
9 express themselves for fear of --

10 MR. STEWART: No. They're not allowed
11 to. They're not allowed to make public comments.
12 We're not stuck with that rule; they are. But
13 they're not allowed to make public comments. But
14 when in private in their chambers, you'll hear
15 them say things that aren't said in polite
16 company.

17 And I think you'll hear appellate
18 judges -- I think you'll hear good appellate
19 judges say the same kinds of things. I do not
20 want to get involved in personal attacks. I
21 don't think that's appropriate here.

22 But I have to say that in the last five
23 years I have seen a substantial decline in the
24 performance of Pennsylvania's highest court. I
25 said so in my comments.

1 CHAIRPERSON CLARK: That's essentially
2 the same court that's been here ten years. The
3 question is, What has -- why are we keeping this
4 last three, four year --

5 MR. STEWART: The balance of power
6 within the Court I think has changed. And that
7 is -- and as new justices come on, that's a fluid
8 thing. People who watch that court will be able
9 to tell you where balance of power is. But that
10 balance of power does change as justices go off
11 and justices come on.

12 CHAIRPERSON CLARK: I'm trying to think
13 of the last Supreme Court justice that had run on
14 the platform that he was in favor of law and
15 order.

16 MR. STEWART: You couldn't do that.
17 That's like being against motherhood and apple
18 pie. Nobody's going to say that. And you'll
19 hear judges say we can't tell you how we're going
20 to decide particular cases because we don't get
21 to see them until we see them.

22 And judges are not going to make
23 contracts with you to decide cases this way or
24 that way. But there does -- my colleagues and
25 the Professor is right about one thing: There

1 does need to be more accountability.

2 The Supreme Court is not above
3 criticism; however, in popular media it would
4 appear so. And in the paper which is distributed
5 to lawyers, the Supreme Court is not apparently
6 to be criticized. And I don't think that's so.

7 We're not above criticism, the
8 Legislature isn't above criticism, and neither
9 are those six people on the Supreme Court.

10 CHAIRPERSON CLARK: And that's what
11 concerns me a little bit about the unified court
12 system. I'm afraid that that would give those
13 gentlemen and maybe those six gentlemen in
14 particular even more authority, more insulation.

15 And if they can sign a court order to
16 the Legislature that says this is the funding we
17 need for this year, why, then that is taking that
18 out of the realm of any influence that we could
19 have over them when it comes to spending money,
20 rightfully or wrongfully.

21 I'll just say we'll take a look at
22 what they've spent on their computerization
23 system and what they told the Legislature they
24 were going to pay and what cap the Legislature
25 put on it and what went from there. I'm afraid

1 that that's another step to insulate them and to
2 provide them with even more and more authority.

3 MR. LING: Essentially, they've been
4 able to dictate what the Legislature does in
5 terms of rule-making policy and how the money's
6 to be spent, what's left that they can't touch or
7 reach to.

8 MR. GERMAK: I think that those folks
9 that say, and rightfully so, that the
10 constitution should not be easily tinkered with,
11 I think we all agree with. That process is so
12 difficult.

13 I think folks also have to understand
14 that no constitution's static and the current
15 evolution of our court system in Pennsylvania, I
16 personally believe it is beginning to throw in
17 jeopardy the balance of the political branches of
18 government.

19 Our court system isn't static, our
20 legislature isn't static, and the current trend
21 in the Court is not healthy for democratic
22 government.

23 And I think that folks that don't like
24 amendments to the constitution will have to
25 recognize just what the founding fathers -- we

1 have ten amendments to the original founding
2 constitution originally planned by the founders.

3 The folks wanted to size that Bill of
4 Rights so our court system is evolving -- it's an
5 evolving process. I think it's currently getting
6 out of kilter and it's in violation of the
7 principle of co-equal branches of government.

8 And I feel strongly and I'm here to
9 speak in support of my prosecutors that people
10 need to express themselves more. The
11 Constitution of Pennsylvania does not belong to
12 the prosecutors. It doesn't belong to the
13 police. It doesn't belong to the Supreme Court.
14 It doesn't belong to the Legislature.

15 It belongs to the people of
16 Pennsylvania. We feel strongly
17 that -- prosecutors do, that a change must be
18 had. All we're asking for is a chance to take
19 that case to the people of Pennsylvania. It is
20 to them that the Constitution belongs.

21 CHAIRPERSON CLARK: Mrs. Dalton, do you
22 have any questions?

23 MS. DALTON: Actually, I just have a
24 couple brief ones. Thank you very much for
25 giving us an awful but impressive list of acts by

1 our Supreme Court that no one really except them
2 can explain.

3 Prosecutors are not the only lawyers
4 that are frustrated by the process. I as a
5 drafting attorney have been frustrated at a
6 number of turns, and I would like to just focus
7 on one specific act; and that was the child
8 witness law.

9 I suppose I'm emotionally connected to
10 that because I was the person that wrote that
11 legislation. I'm also the attorney that drafted
12 then Representative Piccola's package. So I do
13 have some familiarity with what the Court has
14 done.

15 But with regard to the child witness
16 legislation, as you know, the Supreme Court and
17 Legislature has had a ten-year battle on this
18 subject. And finally in 1995 during a special
19 session on crime, the child witness amendment was
20 adopted.

21 And the reason why that had to be
22 adopted was because the Supreme Court had this
23 literalist interpretation of those words in the
24 constitution -- the Pennsylvania Constitution
25 that the defendant had the right to meet his

1 accuser face-to-face; and that to them meant
2 eyeball to eyeball.

3 And that was despite the fact that the
4 U.S. Supreme Court had said that states have a
5 legitimate interest in protecting child witnesses
6 from the further trauma of testifying in front of
7 their perpetrators.

8 So my question to you is for the -- and
9 I'm not sure whether this is working now. But
10 what is the status of that statute now since the
11 amendment itself has been overturned?

12 And what I personally see is a pure
13 technicality. This is my personal view of that.
14 If we had gone ahead and asked two questions,
15 they would have had found another reason to do
16 it. Just in my view, the Court's protecting its
17 own prerogative.

18 And there are a whole class of lawyers
19 out there that believe that the Supreme Court
20 instead of the Legislature should set procedure
21 and they're willing to find a number of ways to
22 slice the ham to try to make that the case.

23 So if it wasn't two questions, it would
24 be something else. But my question is, In the
25 brief period in which that amendment stood, how

1 is that statute working and is it able to be used
2 now?

3 MR. STEWART: It isn't.

4 MR. LING: It isn't.

5 MS. DALTON: Did you get a chance to use
6 it at all?

7 MR. LING: I think the technicality
8 for getting that set up in terms of -- the short
9 time it was here didn't allow us to use it; and
10 then when the Supreme Court made the decision it
11 did, it killed it.

12 MS. DALTON: I just --

13 MR. LING: I was just indicating, yeah,
14 it does -- I agree with you and I think the Court
15 had a certain agenda and a certain prerogative;
16 and I think that's also indicated by not only
17 that amendment but also to the fact that we can't
18 use experts in regards to child abuse cases but
19 the defense bar in -- where they're alleging
20 battered women syndrome can use experts.

21 And that dichotomy in my mind is
22 contradictory in and of itself. We can't use
23 psychologists or psychiatrists to testify as to
24 why a child is reacting as a child is reacting
25 while the defense bar can use in Battered Women

1 Syndrome to support the assertion -- let's say a
2 homicide case where the woman had shot the
3 husband to death.

4 This is, you know, the reaction of this
5 woman that I think parallels what you're
6 indicating in terms of why -- how they're going
7 to go about and find something wrong with it even
8 when nothing is wrong with it.

9 MR. STEWART: This is a tool that
10 prosecutors ought to have in their arsenal and
11 which the Court has denied us. And worse than
12 that, it's denied those victims. You know, we
13 have all put 4-year-olds on the stand to testify
14 that Daddy did thus and so or Uncle Pete did thus
15 and so. That's not easy. That's not fun.

16 And it's worse for that child to have to
17 face Daddy or Uncle Pete eyeball-to-eyeball and
18 say so. I can't tell you that I would use that
19 tool because I don't know that people in
20 Huntingdon County are necessarily going to
21 convict based on that.

22 But I also know that it's certainly
23 something that I would like to have in my toolbox
24 and don't have. And thank those six people in
25 Harrisburg and those folks on the Commonwealth

1 Court for that.

2 MS. DALTON: Um-hum. And it's
3 especially frustrating for me because as a
4 drafting lawyer, you take the time to do the
5 research and you make sure the constitutional
6 parameters are respected and then something like
7 this happens.

8 But I just have one more question. You
9 talked about the Matos case. How do you train
10 the police officers when the law is in such a
11 state of flux?

12 What do you tell them -- and this is not
13 a question -- I literally mean what do you tell
14 them when you say you're chasing a suspect and he
15 throws his drugs and his guns away? Do they have
16 to break off and go get a warrant? Do they have
17 police stand there? How do you train police
18 officers to handle these kinds of situations?

19 MR. GERMAK: The difficulty is, as was
20 alluded to earlier, you can't try to beat them
21 when you change the rules in the middle of the
22 stream. You train them to follow the laws as you
23 know it.

24 And when the law is reversed after the
25 arrest, after the trial, it's impossible to train

1 people for it. So you do the best you can and
2 hope that the rules don't change on this
3 particular case. There's no way to train for it.

4 MS. DALTON: Well, the police officer
5 can't just let them stay there until kids come
6 around and pick them.

7 MR. STEWART: The bottom line is that in
8 my county if the police officer asks me that, I'm
9 going to tell him, You pick up the gun anyway.
10 At least there's that much more dope and that one
11 more gun that we get off the street. We're not
12 going to let those things lay there.

13 We'll worry about the evidence battles
14 later and we'll battle; but, no, we're not going to
15 do that.

16 MR. GERMAK: I agree with Mr. Stewart.
17 I've told the police that you always err on
18 the -- for safety purposes. If there's a gun, I
19 don't know of any police officer who's going to
20 let it there. They're going to pick it up or,
21 obviously, get help as soon as possible to secure
22 it.

23 The other areas I agree with Mr. Stewart
24 and Mr. Ling that police officers, when we've
25 trained them what the law is and if the law

1 changes and the cases get thrown out, that's bad.

2 But what I've been telling my police
3 officers that expect that a case is going to get
4 challenged, expect that evidence is going to be
5 challenge; so in all cases, go overboard as much
6 as possible to get a warrant.

7 And even if we lose the case, if we have
8 to lose the case, so be it; but we'll try to do
9 whatever we can. And they're being overly
10 cautious now and going out and getting a warrant.
11 That's basically what we tell them. Yes, get the
12 warrant, if you can.

13 If you can't, go ahead and make the
14 arrest or make the stop and gather the evidence
15 and then we'll worry about it later on. And if
16 we lose that case, that's just part -- it's sad.

17 It's sad because what happens is that
18 the cases are not decided on the basis of truth
19 or falsity but rather on legal technicalities.
20 And I know a lot of people say, Well, that's the
21 Constitution. It's there for protection. But
22 that's baloney.

23 A lot of cases are getting thrown out
24 that have nothing to do with the truth process,
25 and that's the sad part.

1 MR. STEWART: We need to face this too.
2 If you have a case where a person does possess a
3 firearm or does possess drugs and does get
4 arrested, does go through the system, one of two
5 things is going to happen to that person if the
6 case gets tossed out:

7 Either that person is going to say, hey,
8 it's not worth it. I'm not going to be involved
9 in this anymore. I've learned something. Or
10 else, he'll go back to doing it. In which case,
11 we'll still be there. We'll get him again and
12 next time do it better. That's what the cops in,
13 I think, all our jurisdictions would tell you if
14 they were here.

15 MS. DALTON: But I would think that this
16 has to have a demoralizing effect on law
17 enforcement officers. You're trained in law
18 school that there's some -- that gives you
19 consent to enter and that's all you need.

20 I don't -- it's just struck me
21 that -- another example is the case of
22 Commonwealth versus Leahman (phonetic) in which
23 Justice Flaherty decided to Robinhood the legal
24 proposition that sheriffs can make DUI stops.

25 Now, we can argue whether that's a good

1 idea or not, but at least cite to a legal
2 proposition that has some cogency. If I tried to
3 argue that in court when I was in law school, I
4 would have gotten an "F."

5 And that's the thing that makes me so
6 angry, again, personally as a lawyer. Where the
7 heck are they coming from? How do you make sense
8 of the cases that they've handed down? When you
9 go ahead and try to draft a statute, you can't
10 follow it.

11 MR. GERMAK: What the interesting thing
12 is, if you were able to read the Supreme Court
13 cases when they come down every month as they are
14 issued and you read through them, you go away
15 just shaking your head and scratching your head
16 and saying exactly what you said, Where are they
17 coming from? And what's scary is, Where are they
18 going?

19 And we have analyzed many of their
20 decisions and their procedures and policies and
21 their philosophies. Fortunately so far, they
22 have pretty much upheld the statute when it comes
23 to the death penalty and the aggravating
24 circumstances.

25 We fear that this Court in the future is

1 going to drop a bombshell on the citizens of the
2 Commonwealth of Pennsylvania, and it may happen
3 sooner than we hoped. If, in fact, the Court rules
4 that the death penalty is unconstitutional, the
5 one avenue and the one area that they're going to
6 do it on is this proportionality.

7 It's scary to think that we have so many
8 cases in the pipeline right now that will be null
9 and void, so to speak, in the death penalty area
10 because six or seven people decide that this
11 proportionality argument to them makes sense when,
12 in fact, as presented to the population, to the
13 public as a whole it makes absolutely no sense or
14 little sense.

15 And the only ones who will be screaming
16 and yelling for it are the 200 and some people
17 who are on death row and their lawyers who get
18 paid to represent them.

19 To the majority of people, the argument
20 is silly. It has no basis at all in common sense
21 or the law; but it may be the basis for throwing
22 out all of the work of all the prosecutors, the
23 police, the witnesses, and the juries convicting
24 and sentencing to death all these people who
25 deserve to be there.

1 That's what the scary part is right now
2 is to see if, in fact, the Court is going to
3 address this issue of proportionality and use
4 that as the vehicle to overturn these death
5 penalty cases.

6 MS. DALTON: Thank you, Mr. Chairman.

7 CHAIRPERSON CLARK: Anything further?

8 MR. STEWART: You can tell your folks in
9 the Legislature that regardless of what this
10 Court does, that Pennsylvania's police and
11 Pennsylvania's prosecutors will be there. We
12 will continue to fight the fight.

13 CHAIRPERSON CLARK: Thank you. With
14 that, I think we'll conclude today's hearing and
15 taking of testimony. We certainly thank everyone
16 for coming up and spending your afternoon with
17 us.

18 (At or about 3:32 p.m., the hearing was
19 adjourned.)

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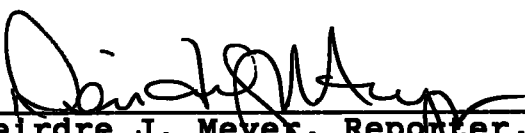
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C E R T I F I C A T E

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

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Deirdre J. Meyer, Reporter,
Notary Public. My commission
expires August 10, 1998.