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Statement to the Subcommittee on the Courts of the Judiciary Committee of the Pennsylvania House of Representatives

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I would like to begin by saying that I was able to watch the hearings of the Subcommittee televised by PCN from York. Thank God for PCN. We need more of it.

This committee must consider the nature of certain questions. Specifically, the nature of questions concerning the limits of the Supreme Court's rulemaking authority, and the limits of its power of judicial review. Are these technical professional questions, which only members of the legal profession can answer, are they questions of Constitutional interpretation, which only the Supreme Court can answer, or are they political questions that bear on "the inalienable and indefeasible right [of the people] to alter, reform, or abolish their government in such manner as they think proper" (Article I, Section 2)?

Ultimately, they are the latter. The Pennsylvania Constitution recognizes, "All power is inherent in the people, and all free governments are founded on their authority (Article I, Section 2)," Therefore, the authority to decide whether the Supreme Court has overstepped its bounds is an authority that belongs to the people, not to the Supreme Court. Likewise, if the people are sovereign, then the Court, to which they ***have delegated*** the authority to decide whether a particular law is unconstitutional, ***has not been***

delegated the authority to pass ultimate judgment on whether it has overstepped its bounds. Similarly, if the Legislature and the Supreme Court are in dispute as to the limits of the Court's rulemaking authority, the ultimate arbiter is not the Court, it is the people.

To define these foundational questions bearing on the sovereignty of the people as technical legal questions to be resolved by members of the legal profession is to transfer sovereignty from the people to a particular group. When the legal profession holds that these are technical legal questions that ***it*** should resolve rather than foundational questions that only a ***sovereign people*** can resolve, that profession is opposing the right of the people of the Commonwealth to govern themselves.

To say that these foundational questions are questions for the people to decide is to say that they belong in the political arena. The citizens need to know which justices believe that ***the Court*** has the last word in deciding how far its powers of rulemaking and judicial review extend. They also need to know who is responsible for bringing those justices to the Supreme Court. Bringing these questions into the political arena means politicizing retention elections. This is not "undue politicization" because unless the citizens use the retention elections to pass judgment on the scope of the Court's powers of rulemaking and judicial review, the Court will have the final word on these highly political, foundational questions, questions that only a sovereign body should answer.

Although the percentage of judges and justices who are defeated in retention elections is only about 1%, the campaign against Justice Rose Bird in California (which

focused on her resistance to the death penalty) indicates that when the voters are convinced that justices are usurping the sovereignty of the people, the voters will deny retention. Holding the governor and his party accountable for judicial appointments is another part of the political remedy available to the citizens.

The notion that the courts should have the last word in deciding the scope of its powers did not come about suddenly, and it is not limited to Pennsylvania. It has become part of the legal culture of our state and our nation. That legal culture is produced primarily by members of the legal profession. The predominant views in that profession are that "trailblazing" and "progressive" decisions are ones that block majorities of citizens and legislatures and that Brown v. Board proved that the wider the scope of judicial review, the better. While it is certainly true that the rights of minorities must be protected, it is also true that republican government is an essentially majoritarian institution. It is unfortunate that Article 4, Section 4 of U.S. Constitution, which guarantees a republican form of government to the states is one of the least-litigated clauses in that document. That speaks volumes about the culture of the legal profession.

I only single out the legal profession because an understanding of its culture informs us of the necessity of maintaining a close watch on the judicial branch and engenders a healthy skepticism toward claims that "judicial competence," a technical matter best decided by professionals, is all that should be at issue in the selection and retention of judges and justices. All professionals, even college professors, tend to forget that our ability to provide specialized, high quality services to the public does not give us

the right to decide what is good for the public. The public has to do that for itself. That requires information, and I commend the Subcommittee on holding these hearings around the state, because that is an effective way to provide information and a forum for debate.

On the question of a constitutional amendment, I am uncommitted. I agree that it could help to clarify the limits of the Court's rulemaking powers. However, I also believe that the justices will retain and should retain a good deal of discretion over the scope of their powers. The best ways to bring their use of that discretion into line with the requirements of popular sovereignty is to turn the retention elections into referenda on the scope of judicial power and to address the legal profession with friendly yet firm criticism about its very human failure to distinguish between the ability to assist people in certain areas and the right to make well-intentioned decisions for a sovereign people.