

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Judicial Campaign Expenditures

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House Judiciary Committee Task Force
on Judicial Campaign Financing

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

Monday, August 31, 1998 - 10:10 a.m.

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BEFORE:

Honorable Brett Feese, Majority Chairperson
Honorable J. Scot Chadwick

IN ATTENDANCE:

Honorable Jerry Birmelin
Honorable Timothy Hennessey
Honorable Al Masland
Honorable Robert Reber
Honorable Kathy Manderino
Honorable Thomas Caltagirone

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ALSO PRESENT:

Brian Preski, Esquire
Majority Chief Counsel

David L. Krantz
Minority Executive Director

John Ryan, Esquire
Minority Chief Counsel

Judy Sedesse
Majority Administrative Assistant

Galina Milohov
Minority Research Analyst

C O N T E N T S

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1 CHAIRPERSON FEESE: Good morning.
2 I'd like to begin this meeting of the House
3 Judiciary Task Force on Judicial Campaign
4 Financing. First, I would like to welcome all
5 those who are here today, both our presenters,
6 and members of the media, as well as the public.

7 The focus of this committee hearing
8 will be on the report which was rendered by the
9 Special Commission to Limit Campaign
10 Expenditures, that Special Commission being
11 appointed by the Pennsylvania Supreme Court in
12 1997. The first hearings were held throughout
13 the Commonwealth of Pennsylvania by that
14 Commission, and subsequently a report was issued
15 in April of 1988, making recommendations not
16 only to the Pennsylvania Supreme Court, but to
17 the General Assembly as well.

18 We have a number of presenters today,
19 but we also have several organizations that will
20 be submitting written testimony. To my
21 understanding the Pennsylvania Bar Association
22 will be submitting written testimony,
23 Pennsylvanians for Modern Courts, as well as
24 Philadelphia Bar Association will be presenting
25 written testimony. We thank those organizations

1 for their input as well.

2 Before we begin our testimony, I'd
3 like to have the members of the committee
4 introduce themselves to the public, as well as
5 for the record, starting to my far right.

6 REPRESENTATIVE BIRMELIN: I usually
7 am on the far right. Representative Birmelin,
8 Wayne County.

9 REPRESENTATIVE CHADWICK: I'm usually
10 not quite as far to the right as Jerry. I'm
11 Representative Scot Chadwick from Bradford and
12 Susquehanna Counties.

13 CHAIRPERSON FEESE: And on my far
14 left, Representative Manderino.

15 REPRESENTATIVE MANDERINO: Good
16 morning; Kathy Manderino, Philadelphia County.

17 REPRESENTATIVE MASLAND: Al Masland,
18 Cumberland and York Counties.

19 REPRESENTATIVE HENNESSEY: Tim
20 Hennessey from Chester County.

21 REPRESENTATIVE REBER: Bob Reber,
22 from Montgomery County.

23 REPRESENTATIVE CALTAGIRONE: Tom
24 Caltagirone from Berks County.

25 CHAIRPERSON FEESE: All right. Thank

1 you, ladies and gentlemen. Our first presenter
2 this morning will be James Mundy, who is the
3 Chairman of the Special Commission to Limit
4 Campaign Expenditures. Mr. Mundy, welcome.
5 Thank you for attending the hearing before the
6 task force.

7 MR. MUNDY: Thank you, Mr. Chairman.
8 I'd like to thank all of you for taking the time
9 to learn something of the subject that was the
10 subject of the Special Commission's efforts from
11 last -- September of 1997, when the Supreme
12 Court of Pennsylvania appointed this Commission,
13 right up through April of 1988 when the
14 Commission reported to the Supreme Court the
15 results of its findings.

16 My name is Jim Mundy. I chaired the
17 Commission. With me on the Commission were six
18 other individuals: Tom Cooper and Vince Grogan
19 who are lawyers, former presidents of the Bar
20 Association from Allegheny County; Art Baconi
21 from Luzerne County; Paul Stevens from Bucks
22 County; and Bob Feelack and Leslie Miller who
23 are from Philadelphia.

24 The task which we were given is to
25 look into the way the judicial campaigns are

1 conducted and particularly in the way in which
2 they are financed in Pennsylvania to determine
3 where or not there is anything that the Supreme
4 Court can do to try to remedy any problem which
5 may exist.

6 There is precedent for the Court
7 itself to take action to try to remedy problems
8 in judicial elections. In fact, Canon 7, for
9 example, is a canon that prohibits a judicial
10 candidate from speaking out on any issue which
11 may appear before him or her, should they be
12 elected as a judge. Other states have used
13 those canons to further regulate judicial
14 elections and our court wanted to find out why,
15 what the problems were, and what, if anything,
16 should be done about them.

17 The Commission, which I chaired, the
18 Canon 7 individuals which I mentioned, held
19 public hearings here in Harrisburg, Pittsburgh,
20 Erie, Wilkes-Barre and in Philadelphia. We
21 heard from leaders of the academic community,
22 the judiciary itself, political leaders and from
23 just plain common folk who wanted to come in
24 front of us and tell us what it was they
25 perceived to be the problems with our judiciary

1 in terms of elections in Pennsylvania.

2 Most importantly, the Commission
3 traveled to Columbus, Ohio, where we met not
4 only the leaders of the Ohio Bar, but with Chief
5 Justice Moyer of the Supreme Court of Ohio, and
6 an individual by the name of Dick McQuade who
7 chaired a commission similar to ours that
8 operated in Ohio two years ago.

9 Ohio is very much like Pennsylvania.
10 In Ohio, like in Pennsylvania, they elect
11 judges. In Ohio, like in Pennsylvania, they
12 perceived that there was a problem with the way
13 these campaigns are financed and with the amount
14 of money that's being raised and spent. Unlike
15 Pennsylvania, Ohio was able to get merit
16 selection on its ballot in 1994.

17 I spoke with the leadership of the
18 Bar Association about that, and they told me how
19 they were the main organization being involved
20 in getting this proposition accepted by the
21 people, they spent \$500,000. They assigned two
22 staff members full time for the year to do
23 nothing more than promote merit selection.

24 They told me that there was very
25 little opposition at first, and then late in the

1 campaign a few ads began to appear and those ads
2 were a voting booth with a padlock on it and
3 said, don't vote for this proposition. It's
4 about your right to both. The merit selection
5 lost in Ohio 79 to 21. The polls that I have
6 seen for over a decade in Pennsylvania showed
7 that if Pennsylvania were to put merit selection
8 on the ballot, the results would be almost
9 precisely the same.

10 If there is a problem in judicial
11 elections and if you agree with the proposition
12 that there may be; just simply reach for merit
13 selection is the answer, and consider nothing in
14 between, may be to reach for something that's
15 not within our potential to do in the near term.

16 When we were in Ohio, Chairman
17 McQuade told us of their experience in holding
18 public hearings and gathering information from
19 everywhere they could, including other states as
20 we have done, mentioned to us that whatever you
21 do, you take a poll. Because it was the poll
22 that people's commission of Ohio did that
23 galvanized that commission and focused them on
24 what they had to do; find out what the people
25 think about the way we elect our judges in

1 Pennsylvania as they did in Ohio.

2 When the Pennsylvania Bar Association
3 had its midwinter convention in Bermuda, we had
4 a panel program on Saturday morning on this
5 subject. Members of the General Assembly and
6 the Executive Branch of government participated
7 in that, including Senators Jubelier, Senator
8 Fumo, your colleague Representative O'Brien,
9 Counsel of Government Paul Tufano and Attorney
10 General Mike Fisher. One thing that they said,
11 that we all remembered when it came time to do a
12 poll of Pennsylvania, whatever you do, you get a
13 pollster that is Republican and Democratic.
14 Don't go to one party or the other.

15 When I first heard that I thought,
16 you know, that's like telling Dorothy to get the
17 Wicked Witch of the West a broom stick and I'll
18 send you back to Kansas. Where do you find a
19 pollster that's both R and a D? And pollsters
20 really resent being called a Republican pollster
21 or a Democratic pollster. They don't consider
22 themselves to be any more than pollsters.

23 But, we did find John Deardourff and
24 Associates, a well-known pollster that has
25 worked for Republicans and the Lake Sosin Group

1 which has been known to work on the Democratic
2 side of the aisle. And without saying which is
3 which, is actually the head of Lake Sosin told
4 me she's a Republican. We did ask them to
5 combine forces and we did a poll in
6 Pennsylvania.

7 If you don't read anything else
8 that's been submitted to you this morning, you
9 have to read that poll. The pollsters
10 themselves, both Miss Lake and Mr. Deardourff,
11 said it's the most amazing poll that they can
12 ever remember doing.

13 To characterize this poll, maybe to
14 understate it, but it condemns the way we elect
15 judges. It gives you reason to know why the
16 turnout in Pennsylvania on those so-called
17 off-year elections, where judicial elections
18 take place is so visibly low and it seems to set
19 a record each time for how low you can go. This
20 last time we did not have a proposition on the
21 ballot. In 13 western counties, we may well
22 have seen a turnout of less than 20 percent
23 statewide. We did in the east.

24 The poll told us that the people of
25 Pennsylvania not only believe that the elective

1 system itself in the raising of monies by
2 candidates who wish to be judges is corruptive;
3 what the pollsters found to be worse is that the
4 people of Pennsylvania overwhelmingly believe
5 that that corruptive influence continues to
6 exists after the candidate is elected to
7 judicial office. Ninety percent felt that
8 judicial decision are affected all the time,
9 most of the time, or some of the time by
10 political contributions.

11 That statistic alone gives you an
12 idea of the extent to which the system has been
13 undermined by a belief that there's far too
14 much money being raised and spent by candidates
15 for judicial office. People, overwhelmingly, do
16 not believe that those contributions are given
17 without an expectation of favorable treatment.
18 They just don't believe that. Where it's true
19 or not, they don't believe it.

20 We learned what other states,
21 including Ohio, have recommended in order to try
22 to clean up the system. We studied what they
23 had done. We found out there are really two
24 major areas of reform that are being done by
25 courts in other jurisdictions; not just Ohio and

1 Pennsylvania. And that is to restrict campaign
2 contributions and/or to restrict campaign
3 expenditures. And the only state that tried the
4 latter is Ohio, and I'll get to that in a
5 minute.

6 There are a number of other reforms
7 that other states have put in, as well as those
8 two major ones. We were struck by the fact that
9 so many states that elect judges are in the
10 process of considering what should be done, and
11 in fact, the American Bar Association this July
12 submitted a report. It's Part 2 of the Report
13 and Recommendations of the Task Force on
14 Lawyer's Political Contributions that deals
15 exclusively with judicial elections and what
16 should be done.

17 In Pennsylvania, we have recommended
18 to our court four major reforms. The A.B.A. has
19 recommended three, and they are three of the
20 four that we recommended. The only one the
21 A.B.A. has not recommended is restriction on
22 campaign expenditures. Let me explain what our
23 recommendations are. In the beginning of our
24 report there's an Executive Summary that
25 explains each of them.

1 We recommended first the judicial
2 contributions be limited to a thousand dollars
3 per individual and \$5,000 dollars per legal
4 entity for statewide races; 500 per individual
5 and 2,500 for legal entity of PAC for Common
6 Pleas races.

7 We found it necessary that we look at
8 Common Pleas races because, in two of our
9 counties they are raising five, six, \$700,000 a
10 candidate for a Common Pleas judgeship. Those
11 two are Luzerne and Lackawanna. They are well
12 documented, and that's gone now on for three
13 consecutive election cycles; that they have done
14 well over a million dollars in expenditures.
15 These are the Common Pleas judgeships.

16 I can remember the day when Judge
17 Cirillo held the statewide record in
18 Pennsylvania for the most money every raised and
19 it was \$350,000. We had an individual come
20 before us from Scranton who had recently been
21 elected to be a judge, and she said, I almost
22 didn't get into the race because I knew at a
23 minimum I needed \$350,000 to win this race in
24 Lackawanna County. So, Judge Cirillo's
25 statewide record had now become the Bar to run.

1 He won the county in Pennsylvania.

2 The second recommendation is that the
3 judicial campaign expenditures be limited to a
4 million dollars for the Supreme Court, \$500,000
5 for the Superior and Commonwealth Court, and
6 250,000 for the Court of Common Pleas. Let me
7 talk about that because that is by far the most
8 controversial part of this report, I believe.

9 First, you should know it's one of
10 Canon 7 recommendations, and it's one of four
11 major recommendations. None of these are hooked
12 to the other so you have to buy it all. We
13 thought that unless we got at the source of the
14 problem -- The source of the problem is, as all
15 of you know because you're in the political
16 world, these have become media races. These
17 races are won and lost on television, or at
18 least that's the belief that's invoked.

19 You all know what it cost to run a
20 statewide campaign and have statewide television
21 advertising. You need millions of dollars.
22 These candidates from the time they become
23 anointed by either party or before, are told by
24 their political guru, that in order for them to
25 win they must raise lots and lots of money

1 because they don't have name recognition and
2 that's something they have to buy on radio or
3 TV, or both.

4 You see, it's not their fault.
5 That's as true as my sitting here and all of you
6 know that. That's how you win statewide races.
7 Unless you do something to curve that tendency
8 to spend that kind of money, it will go on.

9 Now, Ohio attempted to do that and it
10 was challenged in the case of Shuster versus
11 Marshall. The challenge was based on Supreme
12 Court case called Buckley versus Valeo. I know
13 you have Professor Gildin from Dickinson who
14 will do the marvelous job that he can do
15 explaining to you the rationale of Buckley. I
16 really do congratulate Professor Gildin because
17 he's the only person I know of who can really
18 say they understand Buckley versus Valeo. But,
19 he does and I congratulate him for it.

20 Shuster is a challenge that says
21 simply what Buckley said, and may apply to
22 federal congressional races and that was a
23 federal congressional race should not apply to
24 judicial races. The stakes are different; the
25 office is different; the campaigning is

1 different, and the restrictions as I said before
2 in Canon 7 already exists in distinguished
3 judicial races.

4 In fact, there is one section of
5 Buckley that leaves that door directly open.
6 And we'll see whether -- how it's eventually
7 closed, because I understand from information I
8 got last week, that although the Sixth Circuit
9 has struck down -- It's accurate to say that the
10 Sixth Circuit has struck down expenditure limits
11 in Ohio. That what they actually did was remand
12 it to the District Court to have a full hearing
13 on it. But, I don't think it's inaccurate to
14 say they were struck down.

15 Attorney General of Ohio has applied
16 for CERT, or it's about to, in the United States
17 Supreme Court. So the Court, they gave us
18 Buckley versus Valeo can answer the questions
19 and will answer the question as to where or not
20 judicial campaign expenditure reform is
21 legitimately constitutional.

22 The third recommendation we have made
23 is that candidates for judicial office will
24 file, in addition to the reports that the state
25 require, electronic reports to the office of the

1 M.P.C. which will be then fed on a web page so
2 that there will be instantaneous reporting of
3 campaign contributions and judicial elections.
4 We believe the people of Pennsylvania, at the
5 minimum, deserve to know who is putting those
6 big bucks into the campaigns. And they should
7 know with plenty of time to make their decision
8 on Election Day. This would be in addition to,
9 not in place of, the state requiring filing.

10 The fourth is a recommendation that
11 really came from two sources and were exactly
12 almost word for word, the same, even though I
13 don't think the two know each other: former
14 Supreme Court Justice of Ohio, Herbert Brown,
15 and former Superior Court Judge Ned Spade of
16 Pennsylvania. So that, the real answers to this
17 is to go after the contributor in the way that
18 it would have occurred if, indeed, he or she was
19 seeking to get favorable treatment.

20 In any case in which a litigant or
21 the lawyer representing the litigant has made a
22 contribution in excess of, whatever the limit is
23 set, his or her opponent will have an automatic
24 right of recusal against the judge to whom the
25 contribution was made; not the giver, but the

1 opponent of the giver can say to that judge, we
2 want you to recuse yourself, and that judge must
3 do so, if indeed, the judge received a campaign
4 contribution beyond whatever limit is set from
5 the litigant or the lawyer representing the
6 litigant.

7 What are we trying to do? We're
8 trying to reinstill some faith in the system
9 that people have lost faith in. If they don't
10 believe that the judges are sincere in their
11 decisions, how are they ever going to accept
12 those judgments? If people fail to have
13 confidence in their justice system, where can
14 they have confidence in government?

15 To me, it's all a related
16 configuration of executive, legislative and
17 judicial. The judicial is supposed to be the
18 one that is blind, looking only at justice. The
19 Lady of Justice is blind with two scales, as you
20 all know. And the people begin to think that
21 that's not really how it operates and our
22 polling says that's how they think now. Then
23 they can't have confidence in that. If they
24 don't have confidence in that, when will they
25 have confidence?

1 One of the most intriguing
2 recommendations to the pollsters was the fact
3 that in Pennsylvania when it came to judicial
4 elections, people, overwhelmingly two-thirds,
5 favored public finance. They don't favor public
6 financing in the political elections. In fact,
7 they're against it. But, in traditional
8 elections, trying to clear up this problem, they
9 are overwhelmingly in favor of even putting a
10 little of their tax dollars into a pot so that
11 judges will have a source of money other than
12 lawyers and litigants.

13 Also, amazing to them was that this
14 support for public financing was almost even
15 across the board. In fact, slightly more
16 Republicans favored it than Democrats, and men
17 favored it as heavily as women did, all of which
18 were surprising in comparing those results to
19 other polls they had done on this subject in
20 other jurisdictions, particularly with political
21 races.

22 In fact, demographically, the one
23 thing about this poll that sets it apart is,
24 there are no close calls. This is a four-point
25 plus or minus poll. Everything is overwhelming.

1 If you look at this poll, the least anything
2 gets is 60 or 65 percent. So, it's well beyond
3 any margins variable. This is a mandate.
4 Ladies and gentlemen, this is a mandate. Change
5 the system. We don't believe in it and we don't
6 believe in the product of it.

7 That's what the Commission found and
8 that's why we have made the recommendations we
9 have made. I would be happy to answer any
10 questions that you might have concerning any of
11 them.

12 CHAIRPERSON FEESE: Thank you, Mr.
13 Mundy, for your testimony and willingness to
14 answer questions. Do you know what the status
15 is right now of your recommendations to the
16 Supreme Court; what the Court is doing or not
17 doing with those recommendations?

18 MR. MUNDY: I know two things.
19 First, I'm not sure I have the name correct, but
20 the Administrative Committee made up of
21 legislators and judicial members that has been
22 reconstituted. A subcommittee of that, I know
23 Senator Jubilier is on it, has been asked by
24 Chief Justice Flaherty to look at these
25 recommendations and bring back a report.

1 In addition to that, we have earlier
2 appeared before the Senate Judiciary Committee,
3 Senator Lemmond, and he and I too have expressed
4 an interest in looking at this area and making a
5 report.

6 I think the Court is really out there
7 waiting for two things to happen. One is that,
8 they were very interested in finding out where
9 Shuster went before they made a decision on one
10 of our recommendations. But, I think they're
11 also interested in hearing it from the
12 legislature, from the House and from the Senate
13 as to what, if anything, they believe should be
14 done to try to correct this problem. I was told
15 by one of the members that they had set aside
16 some time this fall to review this report and to
17 begin to decide what they want to do about
18 judicial elections.

19 CHAIRPERSON FEESE: Your reference to
20 the Shuster case brings up an interesting
21 question and one that has troubled me in reading
22 all these materials; and that is, there seems to
23 be, because of the decision Buckley versus Valeo
24 and now Sixth Circuit decision of Shuster, at
25 least, a substantial question of where limiting

1 the total amount of expenditures is
2 constitutional.

3 With that, at least to me leaves a
4 substantial question, is the fact that I had a
5 concern that our Pennsylvania Supreme Court
6 would impose any rule limiting campaign
7 expenditures when, in fact, it may be
8 unconstitutional. During the next judicial
9 elections, like in 1999, constituents of mine
10 have their constitutional rights violated by the
11 Pennsylvania Supreme Court. I would appreciate
12 your insight and your comment if you have any.

13 MR. MUNDY: Let me just say that the
14 challenge to Buckley versus Valeo issued by
15 Shuster has been joined in by 24 state Attorney
16 Generals, 21 Secretaries of State, and the
17 Department of Justice. There's a considerable
18 body of opinion. And I have an opinion here by
19 Professor Miller of Harvard; and I have another
20 opinion expressed by Professor Schotlard of
21 Georgetown Law School, that Buckley does not,
22 never did, never intended to apply to judicial
23 elections because they are completely different
24 and they are recognized to be different. But,
25 we won't know that until the Supreme Court acts.

1 Were I myself asked by a member of
2 the Supreme Court what should be done, I would
3 say, don't enact this reform, that is campaign
4 expenditures reform until the dust is settled.
5 Hold that one back and enact whatever other of
6 these we recommend that you think worthy, and
7 hold back on the one that has constitutional
8 challenge to it.

9 We were urged during our public
10 hearings to urge our court to issue the
11 expenditures reform so that we could be the test
12 case, because our polling data, apparently, is
13 better than any polling data anybody else has on
14 the subject. One of the two grounds that
15 distinguished, or are believed to distinguish
16 judicial reform from elected reform is that it
17 has undermined the confidence that people have
18 in the selection of their judges in our poll
19 booths.

20 CHAIRPERSON FEESE: Just following
21 that train of thought about polling data. I
22 noticed in the one poll question which focused
23 on why voter turnout was low, it was question
24 number 5 in the report of the pollsters, asking
25 the respondents why they thought their turnout

1 was low.

2 If I read this data correctly, the
3 top response was, 30 percent of the people felt
4 that turnout was low because others did not care
5 about judicial elections. Twenty-eight percent
6 felt that voters did not know enough about the
7 candidates. Fifteen percent felt voters did not
8 know enough about the jobs and the functions
9 that the statewide judges perform. And the
10 fourth most frequent response was that voters
11 were turned off by the amount of special
12 interest money that goes into campaigns, 11
13 percent.

14 But, that issue, expenditures running
15 fourth and only 11 percent, my concern is we
16 limit expenditures, but we have these other
17 issues: People don't know what judges do;
18 people don't know enough about the candidates,
19 eight percent of the people felt news media did
20 not inform them enough. So, we're talking about
21 limiting expenditures on the one hand, but voter
22 perception wide turnout is the lowest because
23 they don't have enough information. I don't
24 know how you balance the need for information
25 and -- with limiting expenditures.

1 MR. MUNDY: No. Two things. The
2 first thing is, people were then asked whether
3 they felt that the TV ads helped them to learn
4 anything. They overwhelmingly said, all they do
5 is confuse them.

6 The second thing is, that when they
7 found out on the next question, which is bit of
8 a push question, just how much money we're
9 talking about, they were overwhelmingly against
10 having this kind of money spent in judicial
11 elections. They had no idea it was as high as
12 it is.

13 But, most importantly, I think we all
14 recognize, and one of our recommendations is,
15 there are two things that people do not
16 understand. One is what judges do. And two is,
17 what assets these candidates bring to that task?
18 One of our recommendations to the court is that
19 a public education program joined in by the
20 Court and the Bar be undertaken so when we go to
21 the high schools and we go to the civic groups,
22 and we vote everywhere, not only on behalf of
23 the candidate, but on behalf of teaching them
24 what the job entails, what kind of qualities are
25 the qualities that are sought for this kind of a

1 job, and what you should be looking for in the
2 candidate.

3 And, most importantly, how important
4 it is to them that they understand that these
5 decisions impact the lives of everyone; not just
6 the litigants, because as you know, it becomes a
7 precedent, and you don't have to be a litigant
8 to be affected by a decision of the judge. And
9 once that educational program is undertaken, the
10 benefits of that I know are long-term, but I
11 think there will be more scrutiny of these
12 candidates and some of these questions people
13 will find out the answers to themselves.

14 We all know there's an awful lot of
15 information published about judicial candidates
16 in the newspapers, probably this time more than
17 any other time I can remember. In addition to
18 that, the League of Women Voters publishes a
19 biographical information guide on judicial
20 candidates. People don't read it and they don't
21 have the interest. And that's the issue we have
22 to overcome. That's one of our recommendations.

23 CHAIRPERSON FEESE: One more question
24 and then I'll turn it over to other members of
25 the committee. Much narrower focus, the legal

1 recommendation that a lawyer-litigant has
2 exceeded the maximum contribution that is a
3 recusal. In your report, I think it was a
4 ten-year recusal, ten years, that time frame.
5 The report also said--here's the troubling
6 part--that if a lawyer-litigant contributed in
7 excess of the limits to a third-party that
8 actively supported the judge, that the recusal
9 provision would also apply.

10 So I thought, well, if I contribute
11 \$2,500, which is in excess of the limits, to the
12 Pennsylvania Republican party and they go out
13 and support numerous candidates and somehow some
14 of my money filters through that party and
15 supports one of the judges, say, for example, in
16 Sullivan County where there is one Common Pleas
17 Court judge, I'm recused for ten years from
18 appearing before that judge. That's the way the
19 recommendation in the report would read. Am I
20 correct?

21 MR. MUNDY: Yes. Let me tell you
22 what we did. In Ohio, the problem has been
23 since they enacted these reforms that advocacy
24 groups have sprung up on behalf of the
25 candidates who are separate and apart from the

1 candidates and we're really -- and they become
2 third-party players. They do everything. They
3 advertise for the candidate. They do everything
4 for the candidate except meet with the candidate
5 and plan strategy together. If we don't do
6 something about that in Pennsylvania, we'll have
7 the same problem where the candidate doesn't get
8 the money. The money will come in at the
9 election through third parties. You know, even
10 if that happens, it's really not so bad, because
11 at least the candidate, the judicial candidate
12 himself or herself, if they're true, are not
13 participants in that money raising or in that
14 money spending.

15 However, one of the other things we
16 recommended on the same side that I think is
17 very important is the change in disciplinary
18 rules, so that if a lawyer tries to circumvent
19 the limitations by knowingly giving to a third
20 party that's an advocacy group, that's a
21 disciplinary violation. I really believe that
22 there are very few, if any lawyers, any lawyers,
23 that will ever take that risk. So, if you dried
24 up lawyer money; if lawyers are not available to
25 be the conduit of excess money getting into a

1 campaign, I don't know where you're going to
2 find it, because lawyers do contribute largely
3 to these campaigns.

4 CHAIRPERSON FEESE: I understand
5 addressing the issue of lawyers, knowingly
6 trying to circumvent the limits. But, I have a
7 serious concern, because I'm a lawyer-politician
8 with the situation where I contribute to my
9 political party and they can use the money for
10 anything from bricks to mortar, to campaign
11 activities. And, somehow, I'm recused from
12 appearing before numerous judges and justices.
13 I think that goes way too far is my point.

14 MR. MUNDY: That's a good point.
15 We've debated that point and the decision was,
16 we'll put it out there for the court to
17 scrutinize. I would think that if you are
18 getting to an anionic state committee of either
19 party who does many, many things other than
20 support a candidate, it would be very difficult
21 to show that you gave that money on behalf of a
22 candidate.

23 But, if an entity sprung up, Citizens
24 for Mundy, and you gave it to that, it would be
25 pretty easy to say you're giving it on behalf of

1 the money for a judge. So, we're really looking
2 at it from that perspective.

3 That's what happened in Ohio. Front
4 groups spring up in the elections. They have
5 the name of the candidate; they were totally for
6 the candidate, and yet, the money doesn't go to
7 the candidate. That way people try to
8 circumvent the campaign contribution curves now
9 in effect in Ohio.

10 CHAIRPERSON FEESE: Representative
11 Chadwick.

12 REPRESENTATIVE CHADWICK: Thank you,
13 Mr. Chairman. Good morning, Mr. Mundy.

14 MR. MUNDY: Good morning,
15 Representative.

16 REPRESENTATIVE CHADWICK: Thank you
17 for meeting with us this morning. First, as a
18 point of information, that task force of the
19 Chief Justice is called the Judicial Council of
20 Pennsylvania.

21 MR. MUNDY: Yes.

22 REPRESENTATIVE CHADWICK: I do serve
23 on it, but on a different subcommittee.

24 The point that I wanted to raise with
25 you is similar to the one raised by

1 Representative Feese, in that, I share the
2 concern with the ambivalence of this poll
3 between respondents who, I think to the tune of
4 59 percent, said they thought too much money was
5 being spent on judicial elections, question 11;
6 and the 81 percent who, question 5, either
7 didn't know enough or didn't care about judicial
8 elections.

9 If you added those who didn't know
10 enough about the candidates, is question 5; for
11 those who don't care about judicial elections;
12 those don't know enough about the jobs and
13 functions statewide judges perform; and those
14 who said the media didn't do enough to get the
15 message out, 81 percent.

16 I'm not sure I understand how
17 limiting the amount of money for judicial
18 candidates can spend is going to help solve that
19 problem. And I think anecdotically, you can
20 easily confirm these kinds of numbers. Just go
21 out on the street any place and ask anybody that
22 walks by you who ran for the judge in the
23 election last year, where they were from, what
24 they stood for and even the most fundamental
25 question and none of them will know a thing

1 about it.

2 While these voters express a concern
3 about the amount of money they have spent, it's
4 still only a fraction of what candidates spend
5 to run for Governor or the U.S. Senate. Those
6 who run these elections will tell you that you
7 have to spend a very great deal of money and hit
8 a voter over and over and over again just to get
9 through the threshold awareness of that voter,
10 which is something that I don't believe
11 statewide judicial candidates are even coming
12 close to it; not because they're spending
13 enough, but because they're spending too much.

14 Now, I understand that part of your
15 answer might be some sort of funding that's not
16 from the candidates themselves. But, from what
17 threshold would be necessary to actually get
18 through to the voters? How are you going to do
19 that?

20 MR. MUNDY: I have never been one to
21 believe, Representative Chadwick, that the
22 ten-thirty second sound bite where the candidate
23 is surrounded by state police and have a stern
24 look on his or her face and they're already
25 appointed judge, they've got a robe on, and

1 there's a jail door slamming in the background,
2 which I think encapsulates about 99 percent of
3 all the ads that I have ever seen on the judges,
4 tell people very much. These candidates lately
5 sell law and order because they believe that's
6 what the people want to hear, and that's what
7 the polls tell them and that's what their
8 political guru tells them and that's what they
9 do.

10 I don't think people are educated by
11 that. In fact, what the people are saying is,
12 they're wise to that and pay no attention to
13 that and they don't buy into those ads at all.
14 And yet, almost conversely, these candidates are
15 advised by their political advisors that that's
16 what they have to do in order to win these
17 races. And that's what we see over and over
18 again at every election site.

19 This time, probably because of the
20 controversial Pennsylvania Judicial Evaluation
21 Commission, there was more publicity in the
22 print media than I have ever seen about this
23 judicial election. But yet, the turnout was
24 just as -- was worse than it was two years
25 before. I can't get at the source of that

1 problem, but I do believe this poll is
2 convincing on the fact that people believe the
3 judges are bought and paid for and that's one of
4 the turnoffs that our report is aimed at trying
5 to reverse.

6 It's disturbing to me that 90 percent
7 of the people believed that when they go into
8 that courtroom that decision is going to be as a
9 result of some money somebody gave to that
10 person when they were a candidate--90 percent.
11 And there are other findings in here that are
12 just as radical as that. I just keep going back
13 to that one because it happens to be same exact
14 percentage that Ohio had. They asked the same
15 question word for word, and they got the same
16 answer and the same percentage.

17 If we can't do something about the
18 money in these elections, then it's going to be
19 a very hard sale to get people to care about
20 these elections.

21 We have to show, and one of the most
22 encouraging things in this report is, that
23 people really believe that this is a correctable
24 problem. If you look at this report they
25 believe overwhelmingly, Republicans and

1 Democrats, that these problems of money can be
2 solved. They are ready to buy-in, in a big way,
3 to a reform movement. Why that doesn't
4 translate into merit selection, I don't pretend
5 to be smart enough to know. But, they do want
6 to see their elective system of judges cleaned
7 up and they believe it's possible to do it,
8 which is in contrast according to the pollsters
9 to what people believe when it comes to
10 political reform. They don't believe they'll
11 work. Overwhelmingly, they don't believe
12 they'll work. They always believe that there
13 will be some way to get around them.

14 But, they still have enough hope in
15 judicial selection that they believe that he can
16 reform this system and have a better one.
17 That's the motivation behind the commission
18 making these recommendations, because these are
19 an amalgamation of what have been suggested in
20 other jurisdictions. And like I said, of the
21 major ones, three of the four, are the ones that
22 A.B.A. adopted, were nationwide recommendation.

23 REPRESENTATIVE CHADWICK: I suspect
24 that part of the problem with the public may
25 relate to limitations of candidates for judicial

1 races, talked about as compared to candidates
2 for Governor or U.S. Senate. In fact, there's
3 an old joke in Bradford County, you put two
4 candidates running for judge, one of them will
5 have a campaign slogan, firm but fair, and the
6 other one will be, fair but firm.

7 But, I don't want to take up your
8 time unnecessarily, but let me ask if you would
9 address--this will be my last question--why you
10 don't think that regional election would be
11 helpful in solving some of these problems,
12 because many people think it would?

13 MR. MUNDY: Regional election would
14 have one advantage; and that is, there would be
15 a better chance that the public would know the
16 particular lawyer or judge that was running.
17 The downside is that, there's not an even
18 distribution of lawyers in the regions of
19 Pennsylvania, which means that in some regions
20 there would be much smaller poll to try to find
21 the right person than there would be in others.

22 I don't think that geographics should
23 be the basis upon which is selective court. I
24 really believe it should be in the quality of
25 the individual who is the candidate, wherever

1 they come from. All you really want them to do
2 is hear the evidence and decide fairly, he or
3 she. I just don't think designating geography
4 is the basis for selection is going aid in that
5 process, as difficult as it is.

6 REPRESENTATIVE CHADWICK: Thank you,
7 Mr. Mundy. Thank you, Mr. Chairman.

8 CHAIRPERSON FEESE: Representative
9 Hennessey.

10 REPRESENTATIVE HENNESSEY: Thank you,
11 Mr. Chairman. Mr. Mundy, if I could follow-up a
12 little bit on the question of Representative
13 Chadwick, Canon 7, which you referenced, is the
14 limiting judicial candidate really shouldn't
15 speak about any issue that come before them.
16 When you think about that, in an absolute sense,
17 it essentially precludes a judicial candidate
18 from saying anything about any issue and really
19 tends to lead into the dissatisfaction that
20 voters have and not knowing enough about the
21 judicial candidate.

22 Aside from the poll, I think the poll
23 specifically dealt with it. But, the people
24 that came before your commission, was there
25 generally support or dissatisfaction expressed

1 with that limitation? Because frankly, on the
2 street you hear it all the time. How can we
3 vote for somebody if we don't know what they
4 stand for?

5 MR. MUNDY: I know. We have heard
6 people, particularly non-lawyers, non-judicial
7 people say, why can't we open up? Why can't
8 candidates tell us what they're for or against?
9 And that works so well when it comes to electing
10 legislators, governors and senators.

11 But, if you had a judge up there who
12 you knew before you ever got before them how he
13 or she is going to decide an issue, you can
14 hardly say you're going in there to get justice.
15 You're going there knowing what you're going to
16 get, no matter what the evidence was.

17 That's not the concept of justice
18 that our forefathers had in mind when they
19 created an independent judiciary. It's very
20 difficult for me to make that balance, but when
21 you think about having to choose between a judge
22 who's already announced how he's gonna decide
23 six or seven major issues, and having that kind
24 of judicial race; and having another where a
25 person says, I'm gonna to do the right thing

1 based on the evidence and I'm not permitted nor
2 would I ever make a pre-decision on a case, we
3 want the latter.

4 And those who are difficult to sell
5 the public on the need have the latter. Those
6 of us who are trained in this area know that's
7 the only kind of judgeship you should have.
8 Otherwise, the system of justice is a mockery.

9 REPRESENTATIVE HENNESSEY: Isn't
10 there some middle ground that you can allow the
11 judicial candidates to discuss the issues in
12 general sense and still preserve the possibility
13 when specifics is used? Specific items of
14 evidence or specific fact patterns come before
15 them, that those facts may well tend to make the
16 decision go some way that you wouldn't have
17 otherwise predicted?

18 To simply, maybe not blindfold the
19 public, but put a gag in the mouth of the
20 candidate so that he or she can't talk about any
21 of the issue, it really doesn't help our
22 judicial system. It doesn't help the public
23 perception of our judicial system because people
24 feel we tend to.

25 MR. MUNDY: I --

1 REPRESENTATIVE HENNESSEY: -- the
2 issues. I don't know that we can't loosen them
3 somewhat to allow people -- candidates to at
4 least give generalized ideas where they might be
5 leaning, or lenient, before we ask people to put
6 them on the bench.

7 MR. MUNDY: Representative Hennessey,
8 I believe that today when you see an ad with
9 law and order draped all over a candidate, you
10 are seeing the effort that candidates are making
11 to try to convey that message and not cross the
12 line.

13 It's a very delicate balance. I've
14 seen them in a number of subjects where
15 candidates come close to crossing the line about
16 how they feel on the issue of pro-life,
17 pro-choice, law and order, the death penalty.
18 It is -- That's already out there. I've seen
19 that played, and it's difficult for the
20 candidate to leave that door open far enough
21 that people can say they didn't cross the line,
22 but they're still not sure where they would go.
23 But, I've seen them come awfully close.

24 So to an extent candidates are trying
25 to convey those kinds of messages and not cross

1 the line of Canon 7. It's very difficult.

2 REPRESENTATIVE HENNESSEY: Thank you.

3 CHAIRPERSON FEESE: Representative
4 Reber.

5 REPRESENTATIVE REBER: No questions.

6 CHAIRPERSON FEESE: Representative
7 Caltagirone.

8 REPRESENTATIVE CALTAGIRONE: Thank
9 you, Mr. Chairman. Just a couple of questions
10 here. Good to see you.

11 CHAIRPERSON FEESE: Good to see you,
12 too.

13 REPRESENTATIVE CALTAGIRONE: You
14 didn't speak about district justices that they
15 were in fact incorporated in the polling
16 information that this report speaks to.

17 MR. MUNDY: Actually, this report was
18 really aimed at judicial offices that are -- To
19 me, district justices are a whole different
20 ballgame. I mean, they are elected locally;
21 people know them very well. They're people from
22 that area, and I don't know if they have the
23 same kinds of demands upon them to raise money
24 that candidates for Court of Common Pleas, at
25 least countywide do.

1 REPRESENTATIVE CALTAGIRONE: Would
2 the same rules apply to the District Justices
3 that you're recommending in this report as for
4 all judicial candidates?

5 MR. MUNDY: We didn't make that
6 distinction in the report and I don't know why
7 we didn't. That would be up to the Supreme
8 Court to decide. We really did not make the
9 distinction between the judicial races and
10 district justice races.

11 REPRESENTATIVE CALTAGIRONE: The
12 reason why I say that, we're all familiar with
13 district justices' basic campaigns. Some of
14 those campaigns are getting very expensive,
15 almost -- in some cases as expensive as the
16 legislative races; not on the scale, of course,
17 as statewide. But, when you're looking at
18 judicial justice at that level, it certainly
19 does impact on the system.

20 MR. MUNDY: I agree with you. As a
21 matter of fact, the number of cases that are
22 decided, once and for all, are never appealed by
23 our district justices is many, many, many times
24 the number of decisions that are rendered by all
25 the other courts combined. They do a tremendous

1 service in the Commonwealth of Pennsylvania.

2 To the extent that their problems are
3 the same as the problems that other candidates
4 of judicial office are facing, I would certainly
5 recommend the Court look at that and make the
6 right decision with respect to that. We didn't
7 get separate testimony on district justices'
8 races, so it was not a part of our -- We didn't
9 make a separate recommendation with respect to
10 that.

11 REPRESENTATIVE CALTAGIRONE: I only
12 have one other question, Mr. Chairman. The
13 General Assembly does not act. Does the Supreme
14 Court act?

15 REPRESENTATIVE MUNDY: Well, the one
16 thing the court cannot do is public funding for
17 judicial elections. Only the legislature can do
18 that. I would believe, based on other areas
19 that are of contention that exists between the
20 courts and the legislature, that the Court would
21 love to have active input in the legislature on
22 these changes. I think that's why they're
23 waiting, in a sense, for what the Senate
24 Judiciary Committee may recommend and what this
25 Special Committee may recommend before they take

1 action.

2 That's also why they asked the
3 Judicial Council to form a subcommittee, and
4 thank you, Representative Chadwick, I had
5 forgotten the name, to also look at this. They
6 want input on this. They don't want to go out
7 and create some kind of dispute over what should
8 be done or not be done. They would like to have
9 a consensus.

10 These recommendations, though, they
11 are new to Pennsylvania, are in effect in some
12 other jurisdictions, all except the expenditures
13 one, and so, it's not like we are inventing the
14 wheel. But, there is a need, I think, as this
15 poll points out to do something.

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

18 CHAIRPERSON FEESE: Chief Counsel
19 Preski.

20 MR. PRESKI: Mr. Mundy, I guess my
21 question is this: Do your recommendations
22 attach to both the regular election for judges
23 and the retention elections?

24 MR. MUNDY: For the money part of it,
25 yes.

1 MR. PRESKI: Okay. Then I guess my
2 question is: If in a retention election a judge
3 is raising money basically to answer a question,
4 should he be retained? Yes or no. Who is the
5 candidate, or is the Commission looking who is
6 going to speak out against the judge with the
7 money that they raised?

8 MR. MUNDY: Interesting. Senator
9 Fumo had an interesting comment when he appeared
10 before us on that. What he said was, that based
11 on, and some of you may know he does get time to
12 time active in these races; based on his
13 information it would take about \$400,000 for
14 someone to knock out a sitting judge, if only to
15 create a vacancy to put in someone else that
16 they would rather have.

17 It's only a matter of time before
18 somebody says, well, this is him talking; not
19 me. There's not going to be another vacancy on
20 this court for another 10 or 15 years. We need
21 somebody that we want in there. Let's knock out
22 this guy going for a retention and create a
23 vacancy and then we would elect our own.

24 In California, as you may know a few
25 years ago, ten years ago, they spent \$11 million

1 to knock out three justices who were seeking
2 retention on the Supreme Court in California, so
3 the precedent to what Senator Fumo spoke of. We
4 haven't had that yet in Pennsylvania. There's a
5 lot of things that we haven't had yet in
6 Pennsylvania.

7 In Mississippi they spent.
8 \$4.3 million electing the Supreme Court Justice
9 two years ago. In Texas, they spent \$11 million
10 electing Supreme Court Justices. We haven't had
11 that kind of wholesale, let's take the money and
12 use it to make the courts the way we want it,
13 happen in Pennsylvania. Part of the reason this
14 Commission was formed, is, we see it happening
15 in other places. We want to reform this system
16 before it can happen in Pennsylvania.

17 MR. PRESKI: Okay. I guess then my
18 next question is that the reason that you spoke
19 of why this Commission was formed to restore the
20 confidence back in the election, to have judges
21 who aren't for sale or perception that are not
22 for sale.

23 Did the Commission look into the
24 distinction between a retention elections and
25 basically re-elections for judges, to have them

1 basically go up on their records before the
2 voters?

3 MR. MUNDY: Not per se. But, we
4 believe the same problems exists in retention
5 elections. That is to say, if it is perceived
6 as corruptive by the public for a candidate for
7 judicial office to be raising lots of money,
8 then certainly it's going to be perceived even
9 worse for a sitting judge to be out raising
10 money.

11 And I might say to you, that our
12 system is not as bad as Texas or Ohio where they
13 don't have retention elections and they have to
14 run against an opponent every six years and they
15 are raising money from the day they are elected
16 for six years like a governor would or like a
17 legislator might or a senator might. They are
18 having fundraisers their entire term in office.

19 At least we have every it ten years,
20 so far, because there has not been an organized
21 effort to unseat a sitting statewide judge that
22 I'm aware of. The pressure to raise the kinds
23 of money in those elections has not yet been.
24 That's not to say it won't happen.

25 MR. PRESKI: Okay. I guess then my

1 next question is: If we go to the publicly-
2 funded campaigns that you spoke of and
3 recommended, who gets the no money in retention
4 elections? I mean, if there's going to be equal
5 money out there, who would get the no money?

6 MR. MUNDY: Well, the legislature
7 would devise a scheme, so you would have to
8 answer that one yourselves. That would come
9 from the Court, and that's not part of our
10 report, but it is something to think about.

11 MR. PRESKI: Okay. And my next -- I
12 guess a request from you, Mr. Mundy, is that you
13 spoke of the Arthur Miller opinion that you had
14 and Georgetown and the A.B.A. report. Could you
15 provide the committee with copies of those?

16 MR. MUNDY: The Arthur Miller opinion
17 is in writing, and I can. Professor Schotland
18 gave it to us orally when he was the counsel for
19 the task force that did this study. I was on
20 it. So, I don't have a written opinion from
21 him, but I can do the -- What was the third one?

22 MR. PRESKI: Arthur Miller, the
23 A.B.A. and Professor Schotland.

24 MR. MUNDY: Okay. I can do Arthur
25 Miller.

1 MR. PRESKI: Okay. Thank you, Mr.
2 Mundy.

3 CHAIRPERSON FEESE: Representative
4 Reber.

5 REPRESENTATIVE REBER: Just one quick
6 question came to mind and something that I
7 always find rather repugnant from the standpoint
8 on this particular discussion every time it
9 comes up. Many times we've had similar
10 discussions on the floor of the House relative
11 to contributions to the Executive Branch through
12 various law firms for solicitation, or for
13 appearance of solicitations I should say, of
14 bond work, and what have you.

15 The thing I always find very
16 interesting is, I as of today am unaware of any
17 kind of prosecutions or any kind of criminal
18 misconduct, corruption if you will, arising out
19 of that process.

20 My question, Mr. Mundy, is, is there
21 or has there been any prosecutions of judges?
22 Has there been any removal of judges for any of
23 the kind of so-called perceived corruption
24 issues we're talking about to date in the
25 Commonwealth of Pennsylvania?

1 MR. MUNDY: Yes, I'm aware of one
2 Common Pleas judge in Philadelphia who was
3 removed and prosecuted for -- As part of the
4 roofers thing, he was on tape as offering to go
5 soft on somebody on the next case in return for
6 a contribution, which was different from any of
7 the others. And that's the only one I'm aware
8 of.

9 I think the point is, this perception
10 that people have is a perception they have
11 without ever seeing the reality brought to the
12 public. I don't know of any conviction of a
13 sitting judge for having taken a bribe, for
14 example, other than this one I just mentioned.

15 REPRESENTATIVE REBER: And that was
16 my understanding too. That was somewhat, as you
17 say, unrelated to the general roofers
18 contribution.

19 MR. MUNDY: Right. None of the other
20 judges were involved in that, to that level at
21 all.

22 REPRESENTATIVE REBER: Now, let me
23 ask you a question now going from a different
24 direction. Are you aware of any disbarment
25 proceedings or any other disciplinary

1 proceedings brought against any attorneys in the
2 Commonwealth of Pennsylvania for making a
3 contribution based upon some form of quid pro
4 quo type of concept behind the passage of that
5 contribution?

6 MR. MUNDY: There is a situation that
7 might be similar to that that developed in a
8 county that's adjoining Representative
9 Chadwick's area up there. Potter County I think
10 had a situation up there. There was a problem
11 with the lawyers and judges, and I'm not sure
12 without looking it up to what extent it involved
13 money. The judge was removed.

14 REPRESENTATIVE REBER: Let me
15 conclude by saying. Assuming for sake of
16 argument that there are these only two areas
17 highlighted that we're aware of, don't we have,
18 in fact, in place in the Commonwealth of
19 Pennsylvania appropriate disciplinary
20 proceedings, both for the lawyers as well as for
21 the judges, as well as sufficient criminal
22 statutes that can be enacted through the local
23 district attorney, or for that matter with the
24 Attorney General, if there would be a plethora
25 of these types of concerns, these types of

1 corruptions that would continue to -- seemed to
2 be waved in front of people?

3 I'm always somewhat concerned about a
4 hysteria that factually isn't there when you sit
5 down and really start to run the hard facts
6 relative to the issue that we're talking about.
7 That's the only reason I bring it up, because, I
8 have often heard that and it's very easy to cry
9 wolf, as so often goes on with certain people
10 that have a persuasion.

11 Or, I think advancing own personal
12 agenda in many instances and not really having a
13 sincere desire to deal with the court issue
14 we're talking about, which is what you and your
15 commission and the people on the vanguard are
16 trying to move some of the positive direction to
17 dispel this so-called notion.

18 I'm not so sure that the cancer is
19 out there that everyone seems to think that is
20 out there. And I guess it really always does,
21 you know, bother me when we're talking about the
22 judicial side of elections; that an election
23 candidate does not really forego his First
24 Amendment right when he runs for judge. Just
25 because he's running for judge as opposed to

1 other protections that Buckley perceived or what
2 talking about in another arena. That's why I
3 always like to look and really see if the true
4 cancer in the Commonwealth in this particular
5 issue really exists. I appreciate --

6 MR. MUNDY: I think you are a hundred
7 percent right. In fact, this General Assembly
8 just revised the judicial discipline system in a
9 way to make it more stringent than it's ever
10 been before and in a way exactly exemplar. I
11 think that the reaction of the people is,
12 they're afraid of what might be coming more than
13 they are citing something that has already
14 happened.

15 You have to know, this is a geometric
16 increase. In 1981, the great Justice James
17 Thomas McDermott's entire campaign cost \$81,000.
18 Excuse me, he says it's ninety-seven. That's a
19 statewide campaign for Supreme Court was under a
20 hundred. And that's the way campaigns went all
21 the way through the '80's. It wasn't until
22 1989, and our report really cites this, that
23 this explosion of money began.

24 So, we're in the infancy of the
25 million dollar judicial campaign. We're in the

1 infancy of the million dollar Common Pleas
2 judicial campaign. People see that and they're
3 afraid of where it's going, or they're
4 concerned; not afraid. They're concerned about
5 where it's going.

6 And we have a golden opportunity
7 here, the court, the legislature, the Governor
8 to say, we're not going to let that happen in
9 Pennsylvania. We only have to look in other
10 states and see that it does happen. Money
11 talks. And if you allow this kind of money into
12 a system that's supposed to be as pure as the
13 judicial appointment system is, sooner or later
14 we are going to have a problem. We haven't had
15 it yet.

16 REPRESENTATIVE REBER: Thank you.

17 CHAIRPERSON FEESE: Mr. Mundy, thank
18 you very much for appearing before the committee
19 and your work on the Special Commission.

20 MR. MUNDY: Thank you, Mr. Chairman.
21 Appreciate it.

22 CHAIRPERSON FEESE: Our next
23 presenters will be Stewart Eisenberg, President
24 of the Pennsylvania Trial Lawyers Association;
25 and Mark Phenicie, Esquire, Pennsylvania Trial

1 Lawyers Association.

2 MR. PHENICIE: Thank you very much,
3 Representative Feese. With me today is Stewart
4 J. Eisenberg, President of the Pennsylvania
5 Trial Lawyers Association who will give you our
6 association's views.

7 CHAIRPERSON FEESE: Mr. Eisenberg.

8 MR. EISENBERG: Good morning, Mr.
9 Chairman. Thank you for allowing us to come
10 before you and express our views about this very
11 important issue.

12 As you know, much controversy
13 continues to surround the fact of why and how
14 judicial campaigns are conducted in
15 Pennsylvania. Specifically, this issue has been
16 refocused due to what Mr. Mundy has already
17 testified to, which is the Supreme Court's
18 report of a Special Commission to Limit Campaign
19 Expenditures.

20 As you may know, the Pennsylvania
21 Trial Lawyers Association, as late as 1993,
22 unanimously adopted a board resolution
23 indicating that we continue to support the
24 concept of judicial elections, feeling that in
25 spite of controversy and problems popular

1 election by the people is preferable to the
2 political appointment and confirmation of our
3 Appellate judges.

4 In that spirit we have made some
5 specific suggestions in the past that we feel
6 would improve the election process, although we
7 have never taken any formal position
8 specifically on limiting campaign expenditures.
9 These election laws that we have long supported
10 include: One, a rotation of the ballot position
11 of candidates by Senate or House district,
12 thereby eliminating the perceived advantage of
13 drawing first ballot position in such low
14 visibility races.

15 Two, deleting the county name of the
16 candidate, thereby, eliminating the advantage or
17 disadvantage from coming from a certain county.

18 Three, allowing candidates for
19 judicial office to address basic policy issues,
20 without prejudging individual controversies and
21 legal issues that may present themselves in
22 future cases, similar to what was discussed
23 earlier. And we believe that that expansion is
24 good for judicial races and good for the public
25 in general.

1 Additionally, PATLA has also passed a
2 board resolution where we supported public
3 financing for Appellate judges. To date, the
4 legislature has not acted upon such a proposal.

5 During the testimony before the
6 Supreme Court Special Committee to study
7 campaign expenditures, many suggestions were
8 offered. One suggestion was, due to the obvious
9 fact that attorneys disproportionately contribute
10 to judicial campaigns, that there should be some
11 limit or cap on contributions that attorneys can
12 make to judicial candidates. We wholeheartedly
13 oppose such a plan for two specific reasons.

14 One, we believe there is a
15 constitutional problem of equal protection which
16 would inevitably arise, since attorneys, by
17 virtue of their profession would have fewer
18 First Amendment rights of free speech in not
19 being able to contribute to the same degree that
20 non-attorneys would have, and that there would
21 be no such limitation on non-attorneys.

22 Two, a more pragmatic political
23 reason, is that attorneys would have a potential
24 disadvantage relative to corporate and
25 individual PAC's, who would have no such

1 restrictions or limits.

2 I think it's also important to note
3 for the record that the Pennsylvania Trial
4 Lawyers Association, Political Action Committee,
5 known as LAW PAC, contains a specific prohibition
6 in the deed of trust forbidding LAW PAC to make
7 contributions to judicial candidates at all
8 levels. Therefore, individual attorneys need to
9 make those contributions and can't make them
10 through PAC's, particularly LAW PAC.

11 A second suggestion offered during
12 the testimony indicated that there should be
13 some limit, perhaps set at what is allowed to be
14 contributed by individuals and political action
15 committees in congressional races. Mr. Mundy
16 indicated that these limits are \$1,000 per
17 person for both the primary and the general
18 elections and \$5,000 for Political Action
19 Committee.

20 While, indeed, that would be
21 preferable to what we have discussed earlier on
22 singling out and uniquely disqualifying
23 attorneys, we feel that such a suggestion would
24 also significantly reduce opportunities for
25 candidates from less populous areas of the

1 state, in the event that our election reforms of
2 rotation of ballot and county names were not
3 addressed.

4 Additionally, any limitations on
5 individual participation would give a unique
6 advantage to a wealthy attorney, who could
7 essentially finance his or her own campaign.
8 Indeed, if there is a perception that justice is
9 for sale, as some have indicated, the fact that
10 a wealthy individual could spend more on a race
11 than an opponent could raise by limited
12 contributions would seem to us to appear equally
13 unfair to the general public.

14 The fact that multimillionaire Steve
15 Forbes refused public financing for his
16 presidential race, proved to be unpopular and
17 viewed as unfair by a majority of voting
18 citizens, who questioned the basic fairness that
19 by accident or birth, an individual such as he
20 would have an enormous advantage over other less
21 wealthy candidates of both political parties.

22 In conclusion, therefore, we urge
23 this task force and the legislature to adopt our
24 recommendations to improve the electoral process
25 before adopting any specific limits or caps on

1 spending for these important elections.

2 I would be happy to answer any
3 questions that the task force has, as well as
4 Mr. Phenicie as well.

5 CHAIRPERSON FEESE: Thank you, Mr.
6 Eisenberg. You raised something that is of
7 interest to me as a representative of a rural
8 area. I represent a district in Lycoming
9 County, Pennsylvania. That northern tier
10 district for the most part is rural.

11 I often wondered what it would take
12 if a lawyer from that northern tier area, my
13 district or Representative Chadwick's district
14 to run for statewide judicial office to overcome
15 the lack of a large voting base, even though
16 that lawyer may be the most qualified.

17 I think you mentioned that in your
18 report. It significantly reduces the
19 opportunities to candidates from that area; that
20 is in limits, campaign expenditure limits as
21 well as contribution limits to make up for that
22 geographic disadvantage. It has nothing to do
23 with quality of a candidate, but everything to
24 do with geography. And the only way you can
25 make that up is with increased funding. So, I

1 appreciate the fact you pointed that out for
2 those of us in rural areas.

3 MR. EISENBERG: And I think that's
4 evident by the candidates that do run for
5 statewide judicial office, which generally, do
6 limit themselves to the major areas of the
7 state: Allegheny, Philadelphia, and perhaps
8 Scranton-Wilkes-Barre area.

9 CHAIRPERSON FEESE: Representative
10 Chadwick.

11 REPRESENTATIVE CHADWICK: Thank you,
12 Mr. Chairman. I would just like to comment
13 briefly on a couple of your suggestions and ask
14 two questions. With regard to the suggestions
15 contained on page 1 of your testimony, the first
16 one is rotation of ballot position of candidates
17 by Senate or House district. That sounds on its
18 face to be pretty innocuous, but I guess it's
19 the politician in me that has some reservations.

20 Depending on which House districts
21 where one candidate as opposed to another one on
22 the ballot, we are all aware that voter
23 registrations between Republican and Democratic
24 differ dramatically from one House district to
25 another, depending on the locations and

1 registrations of the district of one candidate
2 as opposed to another to be first on the ballot.
3 It might actually impact the results of that
4 election either for or against the two different
5 candidate.

6 While this sounds simple, I just
7 suspect the doing of it is going to be a lot
8 harder than you think it is.

9 MR. PHENICIE: Well, I think,
10 Representative Chadwick, because in the general
11 election, of course, the order of the ballot is
12 determined by the votes the candidates got in
13 the primary. This would be more of a primary
14 election and more of an impact.

15 REPRESENTATIVE CHADWICK: All right.
16 Number 2, deleting the county name of the
17 candidate. I suspect that this does no harm.
18 It may actually do a little bit of good, but I
19 just fear that given a little, voters know about
20 these election and what it will result in is
21 people voting for a particular candidate because
22 their last name sounds Irish or Italian or
23 instead of because they are from Philadelphia or
24 Pittsburgh.

25 It doesn't address the fundamental

1 be some -- using, for example, the gubernatorial
2 election in New Jersey public financed, dollar
3 for dollar; forgetting some sort of a
4 commissioner, legislative body, whatever, to
5 figure out what a fair figure would be. I don't
6 think we have those tools here today to address
7 that. But, I think you could probably find some
8 fair figure that would more adequately address
9 both fairness and knowledge and interest by the
10 individual voter.

11 MR. EISENBERG: If I can just comment
12 further, Representative Chadwick, is that, the
13 reason for public financing, I believe the
14 rationale of the board in supporting that
15 proposition was to make the elections much more
16 of an educational process as well. We believe
17 totally that there should be more open dialogue
18 and that the public should get to know who these
19 judges are and why they're running for office
20 and why they should vote for these particular
21 judges. I think public financing would go
22 further along the line of allowing the public to
23 have a better idea who these candidates are.

24 I think you can only draw your own
25 experience of going into a polling booth on

1 election day and having people at the polling
2 booth ask you or myself who to vote for judges
3 because they don't know. And a lot of times
4 they go in vote and they don't vote for judges.
5 They may go to the polls, but they don't even
6 vote for the judges. That's what we've had to
7 refocus our attention on; is getting the
8 education level up on why these are good
9 candidates and what they stand for.

10 REPRESENTATIVE CHADWICK: I don't
11 know that I disagree with anything that you have
12 said. I guess my concern, and we probably won't
13 get to it today, is just how much is it going to
14 cost to do that? I'm not sure.

15 MR. EISENBERG: I don't know either.

16 REPRESENTATIVE CHADWICK: Last
17 question. I'm going to ask you another question
18 I asked Mr. Mundy. Would you please address
19 your thoughts on whether or not a regional
20 election of Appellate judges would solve any of
21 these problems?

22 MR. EISENBERG: I believe that
23 regional elections would not solve these
24 problems. The North Carolina Supreme Court has
25 struck down regional elections as being

1 unconstitutional. I believe that if we get into
2 this area of regional elections, Pennsylvania
3 could face the same constitutional problems.

4 MR. PHENICIE: Yeah, I think we
5 pretty much agree with Mr. Mundy, Representative
6 Chadwick. One thing that's been interesting, is
7 this issue has been tossed about for years is
8 regional merit selection, and the regional
9 political appointment as opposed to regional
10 elections, or whatever.

11 I think we have seen recently in
12 Pennsylvania, largely due to the strength of the
13 state Republican party and the political wisdom
14 of trying to balance Appellate court candidates.
15 The last election I think there was one from
16 every corner of the state, one in the middle and
17 one from the northeast, and one from the
18 northwest, and one from Pittsburgh, and one from
19 Philadelphia, and one from in between, that you
20 had a de facto regional election system, I guess
21 because at least in this case the Republican
22 party has shown that the wisdom of trying to
23 track voters from all parts of the state. I
24 have not seen yet that today in the Democratic
25 party, however. But we have, and I think it

1 showed its political value by the success rate
2 of the Republican candidates.

3 REPRESENTATIVE CHADWICK: Thank you
4 all. Thank you, Mr. Chairman.

5 CHAIRPERSON FEESE: Representative
6 Masland.

7 REPRESENTATIVE MASLAND: Thank you,
8 Mr. Chairman. Representative Chadwick has
9 already covered a couple of points. I did want
10 to go over a few things for verification.

11 On your second selection, deleting
12 the county name, I would say that's probably
13 fair to do if you can ensure that number 3 comes
14 through; in other words, that candidates are
15 able to address basic policy issues. Because,
16 right now the county name is all most people
17 have to go on. That's really their only
18 information. It's not that it's a whole lot of
19 information just because you are from Cumberland
20 County and say, well, everybody from Cumberland
21 thinks the same way I do, but people are like
22 that. People would say, you know, you mentioned
23 one from Philadelphia, one from Pittsburgh, one
24 in between, a lot of people will look for that
25 county that is in between and will go with that

1 candidate.

2 So, I don't have any problem rotating
3 or taking those things out as long as we are
4 going to give them some other information, and
5 actually make sure that it gets to them.

6 MR. PHENICIE: I think this is a --
7 Excuse me, Representative Masland. I think this
8 was a larger concern maybe six or eight years
9 ago when it was -- when it appeared obvious
10 from the county name, not that this is
11 necessarily good or bad or a negative reflection
12 on the sitting judges, that virtually all the
13 elected people were from Allegheny County from
14 the highest court. Not passing anything
15 specifically on those individuals, but there was
16 kind of a perception that you had if you were
17 Democrat and Allegheny County and your name at
18 least gets you through the first running into
19 the general elections.

20 REPRESENTATIVE MASLAND: And probably
21 it doesn't hurt you in the general election,
22 because Central Pennsylvania, bias is, you see
23 somebody from Philadelphia or somebody from
24 Pittsburgh, Allegheny, you probably would go
25 with somebody from Allegheny. That's just the

1 plain fact, you know. I had a lot of fraternity
2 brothers from Philadelphia, and I did
3 occasionally root for the Sixers when I was the
4 only one in (drops voice). Other than that, I
5 would probably go with Penguins or somebody from
6 Pittsburgh.

7 My question, though, really is with
8 respect to the caps, you say that without those
9 other suggestions being present, what would --
10 that you would be opposed to the caps. But, if
11 we were able to rotate ballot positions; if we
12 were able to do away with the county designation
13 and if we are able to add the information on
14 basic policy issues, would you then be in favor
15 of caps on everyone; not just attorneys?

16 MR. PHENICIE: I think if we address
17 the basic electoral process, that would be
18 enough initially to see if we had more interest
19 as opposed to getting into the money. My
20 personal view, association is not --

21 REPRESENTATIVE MASLAND: So you're
22 saying --

23 MR. PHENICIE: If we were able to
24 take care of the election aspects of what we
25 consider the problem is, as well as allowing

1 candidates to address basic but not specific
2 policy issues, that that would probably be
3 sufficient at least in an interim period to see
4 if that had anymore of an impact.

5 MR. EISENBERG: So I think what we
6 are saying is that, we don't believe that the
7 caps can solve the problem and that our focus is
8 on pre-recommendations to improve the electoral
9 process rather than capping political
10 contributions. I don't think it's --

11 Somebody said earlier, I think it was
12 Representative Reber, about the cancer; whether
13 it's really there. I think we should try and
14 find out before we cut it out; before -- to find
15 out whether it is really there.

16 REPRESENTATIVE MASLAND: So what I
17 hear is that, you'd like to see your
18 recommendations pursued, if they are pursued
19 that will answer the problem or solve the
20 problem and you don't believe you need go to the
21 next step towards the caps?

22 MR. PHENICIE: I think we should at
23 least find out initially, Representative
24 Masland, by doing the electoral things. And if
25 that was not sufficient or this problem existed

1 down the road, then we revisit the cap.

2 REPRESENTATIVE MASLAND: I just want
3 to make sure this is not, as we have in the
4 political process, legislative process,
5 orchestrate an issue, you give us these three,
6 we'll give you the caps? You're not saying
7 that?

8 MR. EISENBERG: No, not at all.

9 REPRESENTATIVE MASLAND: Thank you
10 very much, Mr. Chairman. It looks like my good
11 friend from Philadelphia might have a question
12 here. So, I just want to mention, I really have
13 a good friend from Philadelphia here. I do pull
14 for Philadelphia.

15 CHAIRPERSON FEESE: Representative
16 Manderino.

17 REPRESENTATIVE MANDERINO: Thank you.
18 What is a basic issue that we can talk about
19 without getting into the specifics? I mean, let
20 me give you what I perceive as the threshold
21 questions in any political campaign whether or
22 not you're running for judge, state legislature
23 or city council: Abortion, the death penalty,
24 tort reform, crime and punishment. How do I, as
25 a candidate for judge, talk about those issues

1 in a general sense in order to educate the
2 electorate without talking about the
3 specifics -- in such a way that would either
4 have me follow a Canon 7 or have me show a
5 preconceived position as to how I would rule on
6 a case in front of me?

7 MR. EISENBERG: Well, I think that --
8 That's a good question, and it's not going to be
9 an easy job for the judge to do. But, for
10 instance, if you talk about the death penalty I
11 don't think that a judge is going to answer you
12 when he's running for a political campaign by
13 saying, I'm for the death penalty or I'm against
14 the death penalty because that's an unfair
15 question to ask of a judge.

16 The judge will more likely say, I
17 will follow the guidelines set forth by the
18 sentencing guidelines that are established by
19 the legislature. And, you know -- Or, they are
20 a strict constructions judge. They believe that
21 they will follow the rule of law without
22 broadening the interpretation of the law in
23 areas such as abortion.

24 But, to say that this candidate is
25 pro-choice or anti-choice is not really a

1 judicial issue. And I think that, you know, to
2 get specific is a little difficult, but I think
3 a judge can express his view that they are
4 either for protecting the rights of individuals
5 or they are not for protecting the rights of
6 individuals. That can certainly be an
7 expression and certainly, you know, be something
8 that a judicial candidate can say.

9 REPRESENTATIVE MANDERINO: I can say
10 that today if I'm running for a judge, can I
11 not, what you just said? I can say, I am a
12 strict constructionist and here's what strict
13 construction means and this my view of how the
14 law should be applied. I can say today as a
15 judicial candidate that -- you know, any of
16 those things that you just said, can I not, say
17 that?

18 MR. PHENICIE: I think what we're
19 trying to address here, Representative
20 Manderino, and anyone who belongs to a trade
21 association or knows anything about, for
22 example, the trial lawyers, that we have during
23 every election cycle for Appellate judicial
24 candidates, we have candidates, Common Pleas
25 Judge X is introduced at our meeting by one of

1 our leading members who will say, as Common
2 Pleas Judge Smith, we all know his record. We
3 know where he stands on the rights of
4 individuals. Therefore, I recommend him or her
5 to you. Then the judge will say, well, you know
6 where I stand philosophically, or we board
7 member Mundy would not have brought me around to
8 see you. That's both a stated and unstated
9 message.

10 I guess our view on this is that,
11 that's fine. There's some of you -- internally
12 somebody what is perceived to be their basic
13 philosophy and is not available to the voters in
14 general. We think there ought to be some more
15 of an educating process as electorate at large
16 as opposed to a particular group of individuals.

17 MR. EISENBERG: The judges can
18 express their views, as indicated, even if they
19 are a sitting judge in their opinions they've
20 written and that's widely known by attorneys
21 only. I don't even say widely known; only those
22 who consider it to be important to know.

23 Many attorneys have no idea what the
24 qualifications of judges are. That perception
25 certainly needs to be knocked down, as many

1 perceptions need to be knocked down as well.
2 But, if you are not a sitting judge and you have
3 no record, you can still discuss your views but
4 on a very limited basis.

5 MR. PHENICIE: I guess this is just
6 to address, you know, while we were working on
7 this testimony, in my previous lifetime when I
8 was a political party county chairman in Mifflin
9 County, and Judge Cirillo was campaigning. And
10 when he mentioned Judge Cirillo in the cornfield
11 out in Belville, Mifflin County, where we had
12 our dinner. Judge Cirillo came in and was
13 talking about what he would like to do,
14 reinitiate bread and water and the chain dance.
15 And, of course, that brought the house down. I
16 mean, people were, you know, they wanted more
17 red meat right then from Judge Cirillo.

18 I think the course said nothing other
19 than the fact, well, that he was obviously, as
20 Mr. Mundy indicated earlier, trying to make an
21 impression that he was the toughest of any of
22 the candidates on law and order. And I think
23 after awhile you might need to do better than
24 slamming a jail door, or an expression for bread
25 and water, something like that, so that the

1 people in general have some knowledge anyhow of
2 what they're voting for. I guess it's more of
3 the type of the education process.

4 REPRESENTATIVE MANDERINO: I don't
5 disagree with you about an education process. I
6 just -- I really am sincerely puzzled by
7 everything that I know that can and is said
8 today, and the notion that, well, we can let
9 people talk more; but yet, still this desire to
10 protect and not put people in positions as
11 candidates of talking about specifics about how
12 they would rule.

13 I guess I fundamentally agree with
14 the statement that Mr. Mundy said, and that is
15 capsuled in Canon 7 about not having -- judging
16 the facts in the law as they are before you and
17 applying to them. So, I guess I don't see this
18 window of opportunity to talk more that you
19 apparently see. So, I'm trying to see where's
20 our gap in understanding? What more do you want
21 people to be able to say that they can't already
22 say today? That's what I'm struggling with.

23 MR. EISENBERG: I think it's a number
24 of issues are involved in what you just said.
25 Canon 7 is clear that a judge can't talk about

1 specific factual instances and say what he or
2 she would rule on on those issues. That would
3 be pre-judging a case before it got before that
4 particular judge. So that, theory is not what
5 we're advocating.

6 What we are advocating is to address
7 other policy issues in the workers' compensation
8 area; for instance, in the automobile insurance
9 area; for instance, in any area that, perhaps,
10 would be of interest -- or whatever issue is on
11 the agenda, the political agenda at that
12 particular time so that you get to know more
13 about the candidate. You get to know more about
14 what that candidate is all about and be able to
15 judge that candidate and their judicial
16 temperament, their judicial experience.

17 I know experience can already be
18 discussed, but I think that there is more room
19 for discussion and more room for expressing
20 their ideas on issues that is now prohibited.

21 MR. PHENICIE: It's a tough area,
22 Representative. We don't mean to say it isn't,
23 but we think that it would certainly increase
24 the participation and the interest among
25 electorate if they, perhaps, knew a little bit

1 more about the candidate other than what county
2 you came from and whatever other surname they
3 happen to have.

4 REPRESENTATIVE MANDERINO: I don't
5 mean to be argumentative. Let's take auto
6 insurance, okay. If I'm a candidate for judge
7 today and someone asked me about auto insurance,
8 I think that we would agree that I could say
9 that I think that, you know, people who are
10 doing the right thing, who pay for their
11 automobile insurance, and you know, keep their
12 car insured as the law requires should have fair
13 access to what their poll requires. I could
14 probably make a statement like that if somebody
15 asked me and be okay by every canon set forth
16 today.

17 But, if I said I believe that people
18 are paying auto insurance, they are trying to do
19 the right thing, the law requires them to buy
20 this insurance. And isn't it a a shame that the
21 insurance is so darn expensive, and then when
22 they need to collect against that policy,
23 they're given a hard time. And if I was elected
24 judge, I would make sure that you got a fair
25 contributions to your policies? Have I crossed

1 the line?

2 MR. EISENBERG: I believe so.

3 REPRESENTATIVE MANDERINO: I believe
4 so too. So, what more do you want me to say
5 tomorrow that I can't say today?

6 MR. EISENBERG: I want you to say
7 more of it and I want you to say that you
8 understand the issue. You are sensitive to the
9 issue. Or that you just don't care about the
10 issue. That's not important to you. And I
11 think that people ought to know where you stand,
12 where your interests are; what is important to
13 you as a judge; where you believe that abortion
14 is an issue that's important to discuss with the
15 electorate or where it's not.

16 I think that kind of personal fact
17 finding is important for the electorate process.
18 And I agree with, you can't cross the line and
19 you can't express any bias or any prejudice
20 against any litigants one way or the other.
21 Certainly once you get on the court you can do
22 it by your opinions, and judges do it all the
23 time. We know that we would like to ask them
24 that, but under our current canons we can't.

25 REPRESENTATIVE MANDERINO: Thank you.

1 Thank you, Mr. Chairman.

2 CHAIRPERSON FEESE: Thank you. Thank
3 you, Mr. Eisenberg and Mr. Phenicie, for your
4 testimony here today. We appreciate your input
5 and input of the trial lawyers. Thank you.

6 MR. EISENBERG: Thank you.

7 CHAIRPERSON FEESE: Our next
8 presenter will be Larry Frankel, Executive
9 Director, the American Civil Liberties Union;
10 and Professor Gary Gildin, Dickinson School of
11 Law and who is also a board member of the
12 American Civil Liberties Union. Welcome,
13 gentlemen.

14 MR. FRANKEL: Thank you,
15 Representative Feese, and other members of the
16 committee. I am Larry Frankel and it's my
17 distinct honor to be able to introduce the
18 gentleman who is commonly referred as the one
19 person, at least that he knows, that can explain
20 Buckley versus Valleo. I'm glad that my
21 organization is able, in its own way, to
22 contribute his expertise today.

23 After Mr. Gildin, I will also have
24 testimony to present.

25 CHAIRPERSON FEESE: Thank you,

1 Professor. Please continue.

2 PROFESSOR GILDIN: Thank you. Good
3 morning, Mr. Chairman, and member of the
4 committee: My name is Gary Gildin, a Professor
5 at the Dickinson School of Law of the
6 Pennsylvania State University and a board member
7 of the American Civil Liberties Union of
8 Pennsylvania.

9 As we heard through out the morning,
10 the Supreme Court of Pennsylvania's Special
11 Commission to Limit Campaign Expenditures
12 adopted as one of its recommendations a
13 limitation on the amount of money that
14 candidates for judge could expend, be it Supreme
15 Court, Superior Court or Commonwealth, or Common
16 Pleas.

17 And as Mr. Mundy had mentioned this
18 morning, that was the one recommendation that
19 does not appear in the A.B.A.'s, American Bar
20 Association's, set of recommendations. And the
21 brief time I have to address the committee this
22 morning that I'd love to discuss and explain is
23 why any proposal to limit expenditures in
24 judicial elections would violate the First and
25 Fourteenth Amendments to the United States

1 Constitution, and therefore, the Pennsylvania
2 Constitution as well.

3 In its report, the Special Commission
4 did make a frank acknowledgement that its
5 proposal to limit campaign spending, using the
6 Commission's own words now, may be the most
7 controversial recommendation because of the
8 apparent conflict with the United States Supreme
9 Court decision in Buckley versus Valeo. And
10 Buckley was a case where the United States
11 Supreme Court had struck down as
12 unconstitutional restrictions on campaign
13 expenditures in federal election campaigns,
14 restrictions that had been imposed by the
15 Federal Election Campaign Act of 1971.

16 And what I'd like to do first today
17 is to report, and not opine, not to advocate,
18 but report on the reasoning process and the key
19 points of the reasoning process of the Supreme
20 Court's analysis in Buckley. In my written
21 testimony I have given you the citations to
22 where in the Buckley opinion this information
23 comes from. I'm not here to advocate or
24 interpret that opinion for you. Just simply
25 walk through what I see as the reasoning steps

1 in that opinion.

2 Well, the first thing that the
3 Buckley court addressed was where, in fact,
4 campaign expenditures limits affected speech at
5 all. And the court said, well certainly, we are
6 dealing with actually the most core sort of
7 speech when we're limiting campaign expenditures
8 because we're talking about campaigns involving
9 discussions of public issues, and we're talking
10 about campaigns that are debating the
11 qualifications of candidates.

12 Realizing that when we are limiting
13 campaign expenditures we were limiting an area,
14 in which, the First Amendment affords the
15 broadest protection. The courts debated whether
16 a commercial speech was entitled to the same
17 protection as other forms of the speech. But,
18 there's never been any question that at the core
19 of the First Amendment lies political speech.
20 And as the court in Buckley, and I here I quote,
21 stated in a republic where people are sovereign,
22 the ability of the citizenry to make informed
23 choices among candidates where office is
24 essential. So, there's no question that the
25 topics of these reforms in limitations with

1 speech, which will led us to the second step of
2 the analysis.

3 Well, how do spending limits burden
4 political speech? The Court reasoned that when
5 you're restricting the amount of money that a
6 candidate can spend for office in communicating
7 during a campaign, you are reducing by
8 definition the quantity of expression that's
9 going to reach the public, because the less you
10 have to spend, the less speech you are allowed
11 to put out there in public.

12 And when you reduce the quantity of
13 expression, you restrict the number of issues
14 that were discussed. And when you restricted
15 the quantity of expression, you are limiting the
16 depth in which the candidate could discuss those
17 issues or explore them. When you are limiting
18 the quantity of expression, you are by
19 definition limiting the size of the audience
20 that can be reached. And the reason is very
21 simple. It's very simple in the Gay Rights Act
22 was one of the Commission's concern. In order
23 to reach the public and communicate your ideas
24 in today's mass society, you're gonna to have to
25 spend money to do so. When you limit the amount

1 of money that someone can spend, therefore,
2 you're gonna limit the ability to raise that
3 speech.

4 Of course, the fact that our
5 government regulation conflicts with an
6 individual's right does not mean of necessity
7 that it is unconstitutional. And of course,
8 that went into the balancing between the
9 government's interest and the First Amendment
10 right at issue.

11 But, because the campaign expenditure
12 limit affected a core fundamental First
13 Amendment right, it was not going to be enough
14 for the government to show that such an
15 expenditure limit was rational, which it most
16 certainly is. There's nothing to get rational
17 about the proposal, but that's not enough to
18 sustain the proposal against constitutional
19 attack.

20 It's not enough to show that the
21 government's interest is of a higher magnitude
22 so that it is substantial. It's arguable that
23 the limiting government's interest here would be
24 substantial, but that's not sufficient to
25 sustain a limit on free speech. In order to

1 uphold a restriction on core political speech,
2 two things would have to be proven according to
3 the Buckley court.

4 Number 1, that the government's
5 interests was of the highest magnitude, or what
6 the law calls a compelling governmental
7 interest. And even if the government's interest
8 was compelling, there's a second step that it
9 has to satisfy. And that is, that there are no
10 means of achieving that compelling interest that
11 would be less restrictive of freedom of
12 expression. That was the test that the Buckley
13 court had to apply with the government's
14 interest compelling, and even if it was
15 compelling, are there less restrictive
16 alternatives.

17 Well, the Buckley court never got to
18 the second part of the test because it found
19 that the government's interest was not
20 compelling. The government's interest in
21 limiting campaign expenditures is not the
22 interest as the -- compelling under the law.
23 Let me walk you through the three different
24 interests that the Buckley court accessed.

25 Claim number 1. We need to prevent

1 fraud; we need to prevent corruption. The
2 Buckley court said that is not a compelling
3 interest in terms of campaign expenditures
4 because unlike, for example, contributions to a
5 candidate; the expenditures by a candidate is
6 not tantamount to or likely to be perceived as
7 trading dollars for favors. So, the Court
8 rejected that as a compelling interest.

9 The government interest number 2 in
10 the Buckley court assessed, what about
11 equalizing opportunities for all candidates? We
12 impose spending limits, and each candidate has
13 the same amount of money to spend, aren't we
14 serving some interest in equal opportunity for
15 those who aspire to a judicial seat? And the
16 Buckley court said, well, you know, that might
17 handicap a candidate of who lacks substantial
18 name recognition, incumbency, because, in fact,
19 he may start behind in the race. And when you
20 have a campaign limit expenditure limit, you're
21 not going to be able to catch up and inform the
22 public. And so the notion of equalizing it
23 might actually credit those candidates who
24 started without the benefit of incumbency or
25 without the benefit of main recognition. So,

1 that was not the compelling interest.

2 Of the third interest, and I suppose
3 in a sense that's the one that seems to be the
4 most intuitively obvious, what about the
5 government's interest in reducing the
6 skyrocketing cost of campaigns? We heard the
7 numbers here. We don't quibble with the
8 numbers. But first, that's irrelevant according
9 to the Buckley court, the constitutional
10 analysis, because apparently, a direct quote
11 probably expresses it best:

12 The First Amendment denies government
13 the power to determine that spending to promote
14 one's political views is wasteful, excessive or
15 unwise. All those factors may be true, but the
16 First Amendment does not fall because the
17 government just wants to tell you are wasting
18 money or spending too much money to express your
19 views. And that was Buckley versus Valeo.

20 The Court found that since there was
21 no compelling governmental interest of the
22 encouraged nonfree speech had to fall, and
23 again, never even had to reach the issue of the
24 second hurdle, however, the less restrictive
25 alternative.

1 Well, that was Buckley. The Special
2 Commission conceded a conflict of its
3 recommendations to whom expenditures with
4 Buckley. But made the suggestion that Buckley
5 may not extend to judicial elections, and noted
6 that the case of Shuster versus Marshall, which
7 at the time the Commission issued a report, was
8 still pending before the United States Court of
9 Appeals for the Sixth Circuit.

10 The Commission said, Shuster is going
11 to be what most scholars agree the test case on
12 Buckley. The test case as to whether the
13 reasoning in Buckley would be any different if
14 we moved out of the federal elections which, of
15 course, by definition we're not judicial
16 elections since federal judges are not elected.
17 Would those same arguments and analysis apply
18 when we move to judicial elections? Shuster was
19 a constitutional challenge to the Ohio Canon
20 that would limit expenditures in judicial
21 elections.

22 Well, after the Special Commission
23 had issued its report, actually almost to the
24 day one month ago today, July 30th, the U.S.
25 Court of Appeals for the Sixth Circuit did issue

1 an opinion in Shuster and its opinion affirming
2 the preliminary injunction that limited
3 expenditures in judicial elections, or I should
4 say the injunction against the Canon that would
5 have limited judicial expenditures, holding
6 that -- or that would be unconstitutional
7 because like the limitations in Buckley, you are
8 limiting speech and expression that was
9 guaranteed by the First and Fourteenth
10 Amendments to the United States Constitution.

11 The time that remains I'd like to
12 simply report, again not advocate or opine on
13 Shuster, to tell you why the Shuster court stuck
14 down the limitation on expenditures and judicial
15 elections.

16 The argument that was raised in
17 Shuster, just as the Special Commission argued
18 in its recommendations, is that judicial
19 elections are different. Somehow the analysis
20 would change with respect to the speech
21 limitations if the election was for judge rather
22 than for a different elected office.

23 The court began its analysis,
24 essentially as Representative Reber stated to
25 Mr. Mundy here this morning, that an election

1 candidate does not forego his or her First
2 Amendment rights simply because the seat he's
3 seeking is judicial rather than nonjudicial. So
4 you have the same speech interest presented when
5 you are running for judge and when you were
6 running for legislator or some other nonjudicial
7 office.

8 And just as the nonjudicial spending
9 limitations an issue in Buckley limited the
10 quantity of speech and burden-free expression,
11 so too the Shuster court found that the limits
12 on judicial spending infringed the First
13 Amendment rights of candidates for office
14 because you're limiting the quantity of speech
15 that's going to get out there.

16 And then the stage is set now for the
17 question of, now that we have a limitation on
18 speech, is the government's interest compelling?
19 That was the question that was to be asked in
20 Buckley. That's the question to be asked when
21 you're dealing with any fundamental right. That
22 was the question that the United States Courts
23 of Appeals in the Sixth Circuit asked in Shuster
24 and the outcome is the same as in Buckley. Just
25 as the government had no compelling interest in

1 limiting the speech of nonjudicial candidates,
2 it had no compelling interest in limiting the
3 speech of judicial candidates.

4 Of the first interest that was posed
5 was the interest in preventing corruption or the
6 appearance of corruption, the very same interest
7 that was raised in Buckley; the very same
8 interest that was rejected in Buckley, and the
9 very same interest that the Shuster court
10 rejected, basically under the same grounds; that
11 unlike a campaign contributor, a campaign
12 candidate's own money is not actually or
13 perceived as being traded for political favors.
14 So that, you did not have a compelling interest
15 in campaign expenditure limits in order to carry
16 out some notion that would prevent fraud or
17 corruption. You might have a different issue if
18 you were dealing in different constitutional
19 issues. If you would be dealing with
20 contributions, but not expenditures.

21 In fact, quite interesting, I think,
22 and have proposed this morning's conversation,
23 the court found that lifting any expenditures or
24 refusing to impose expenditures might be of the
25 proper approach to redressing a concern with

1 corruption. The polling data in Ohio, just as
2 in Pennsylvania, that's been discussed this
3 morning showed that voters wanted more
4 information; not less information. And the
5 Shuster court looked at that polling data and
6 said, that tells us that the absence of any
7 limit on campaign expenditures, the absence of
8 any limit on campaign expenditures might be
9 minimized with the perception of corruption
10 because the electorate would be more
11 well-informed about the candidate. The more you
12 knew, the more you would dispel any sense of
13 corruption.

14 So, it's interesting they took that
15 same polling data that was discussed this
16 morning to find that not only they did not
17 support the need for expenditures, but maybe was
18 the reason why there was no compelling interest
19 to limiting expenditures at all.

20 The Court then addressed a second
21 potential compelling interest, ensuring the
22 independence of the judiciary and they said that
23 actually the fact that the candidate is allowed
24 to spend his or her own money without
25 restriction is the assurance that the candidate

1 is independent; is the assurance he's beholden
2 to nobody. So again, the argument on its head
3 to find out these interests that are being posed
4 to justify the campaign expenditures really, in
5 the court's view, told the court why there
6 should not be expenditures and why there would
7 be no compelling governmental interest.

8 That really ends the case, could end
9 the case, once there's no compelling interest of
10 expenditure limit could not stand. That's where
11 Buckley ended its analysis. But, perhaps
12 gilding the lily, the Shuster court said, even
13 if there was a compelling interest; even if we
14 were convincing that we were incorrect; even if
15 somehow you could deposit a compelling interest
16 in limiting judicial campaign expenditures, you
17 have to satisfy another test to withstand
18 constitutional scrutiny. And that limitation or
19 that regulation has to be the least restrictive
20 way to achieve the government's interest.

21 The Shuster court found that
22 expenditure limits could not satisfy the least
23 restrictive alternative test because there were
24 other ways to get at the issue of the problems
25 that gave rise to this legislation. For

1 example, limiting campaign contributions could
2 redress the corruption concern without impinging
3 on the candidate's First Amendment right. And,
4 therefore, even if somehow you could posit
5 that as compelling interest which both Buckley
6 and Shuster rejected, expenditure limits would
7 fall under the second prong of the test, less
8 restrictive alternative.

9 But, if we take a look at the legal
10 landscape as we sit here on August 31st of 1998,
11 the Courts are in agreement that limits on
12 campaign expenditures in judicial elections
13 contravene fundamental rights guaranteed by the
14 United States Constitution, and rejected the
15 suggestion of the Commission that maybe judicial
16 elections are different. Shuster held no,
17 judicial elections are not different.

18 As Mr. Mundy mentioned this morning
19 that maybe this isn't the last word on Shuster
20 because his information tells him that someone
21 is going to file a petition to the United States
22 Supreme Court to reduce Shuster on certiorari.

23 I would just add to that, the current
24 statistics show the United States Supreme Court
25 accepts about three percent of the cases where

1 people seek review. Most of those cases are
2 where there's a split in the different lower
3 federal courts and there is no present split, or
4 where a lower federal court has issued a
5 decision contradictory to a previous Supreme
6 Court decision. Shuster, of course, is entirely
7 consistent with Buckley.

8 So, if I was to read the tea leaves,
9 this does not seem to fall within one of the
10 prime three percent of cases that the Supreme
11 Court is going to take. But, of course, you
12 will know the answer to that before you have to
13 take any action, I suspect.

14 Therefore, I respectfully submit that
15 under this committee's obligation to uphold the
16 constitution, that it should reject any proposal
17 to limited expenditures in judicial campaigns.

18 I'd like to turn it over to Mr.
19 Frankel to discuss some of the policy
20 ramifications.

21 MR. FRANKEL: I would like to augment
22 Professor Gildin's remarks by addressing a
23 couple of the practical issues raised by the
24 Commission's report. And, I believe that some
25 of the questions that came from the members of

1 the task force today really probably sets the
2 stage up or already covered this area.
3 Nevertheless, I would like to spend a few
4 moments speaking about them.

5 I believe that recent history shows
6 that attempts to limit campaign contributions
7 and campaign expenditures will inevitably be
8 evaded by creative lawyers, political
9 strategists and fundraisers. I think it's
10 reasonably safe to assume that several ingenious
11 folks are already figuring out loopholes to the
12 recommendations of the Special Commission.

13 I don't mean to sound overly cynical
14 or pessimistic. But, if one looks at what
15 happened in the 1996 Presidential and
16 Congressional elections or the experience the
17 State of Wisconsin, one will see that reform
18 efforts that focus on limiting contributions
19 will be avoided by using third parties to make
20 contributions or through donations used to
21 finance independent expenditure campaigns. And
22 there was some reference to that today, in Ohio,
23 that has occurred.

24 Limiting expenditures is no guarantee
25 for improving the quality of campaigns or

1 increasing voters' awareness of the names, much
2 less the records of the candidates. We know
3 that even high profile elections, let's go
4 beyond judicial elections. We can go to the
5 U.S. Senate or we can go Governor or we can go
6 to the President. Many voters make their
7 choices based on party affiliation, geography,
8 ethnic identification. Not what the position of
9 the candidate is, but on those kind of factors.

10 How are we going to get voters to
11 focus on the background, the expertise, the
12 experience of judicial candidates? Not their
13 views on issues, but just what qualities they
14 would bring to the job if they aren't allowed to
15 educate the voters about those issues.

16 Certainly, we can support the public
17 education program recommended by the Commission.
18 But, will it really be funded to an extent it
19 can permeate into people's minds? There's so
20 much information. There's so much advertising.
21 There's so much distraction out there already.
22 Can public education program really effectively
23 work when it's competing with all of the other
24 demands for people's time and attention?

25 And, would such a program really help

1 with relatively unknown candidates which runs
2 against the parties candidate in a primary? Or
3 as Representative Feese knows well, will it
4 really help the candidate from Lycoming County
5 when he's running against a candidate from
6 Allegheny County, Philadelphia County? Does it
7 allow that candidate from a rural area, from a
8 part of the state that has fewer voters to get
9 the kind of name recognition to run an effective
10 campaign?

11 Reality is that there is plenty of
12 evidence that shows key elements of a winning
13 strategy employed by underdog candidates is to
14 out-fundraise their opponent so that they can
15 educate their voters or gain the name
16 recognition that they need from the voters to
17 win a campaign. Any kind of restrictions are
18 really going to limit the ability of those
19 underdog candidates to a not serious challenge.

20 While spending more money is not
21 always the road to victory, it is often
22 necessary to overcome the advantages of party
23 registration, incumbency, birth or geography.

24 Besides harboring these doubts as to
25 the efficacy of the proposed reforms, the ACLU

1 agrees with others who have not embraced these
2 reforms because of their commitment to the merit
3 selection of judges. For many years now, the
4 ACLU of Pennsylvania has supported the concept
5 of merit selection of Appellate judges. We
6 believe that the current system of election of
7 judges poses significant threats to individual
8 freedoms.

9 Judges, who in the course of
10 enforcing the Bill of Rights, or rights
11 guaranteed under the Pennsylvania Constitution,
12 must favor minority interest over the majority
13 interest if they are to effectively carry out
14 the constitutional duties. They need to be
15 insulated from the political process and carry
16 out that important function. They need not
17 worry that they're not going to be retained in
18 the next election because they upheld a minority
19 interest as they should in keeping with the oath
20 of office that they have taken.

21 Potential candidates for judge
22 shouldn't have to worry about representing a
23 client jealously as they are supposed to under
24 the rules of professional conduct because they
25 think that that representation may be used

1 against them when they ultimately decide to run
2 for judge. Those are the kinds of problems that
3 we see in the electoral system that somehow it
4 undermines the ability to effectively protect
5 the rights of individuals.

6 On a personal note, I have come to
7 have another reason to favor merit selection of
8 judges. Every year about the last week before
9 an elections comes up, I almost don't want to
10 answer my own phone because somebody is going to
11 call me and ask who to vote for judge. On a
12 personal level I think many people in
13 Pennsylvania might be a little uncomfortable to
14 know that the Executive Director of the ACLU is
15 being called for recommendations on who to vote
16 for judges. But, that's the way the system is
17 working now. It's that kind of anecdotal
18 evidence.

19 Even the discussion back and forth
20 between Representative Manderino and the
21 distinguished Representative here from the Trial
22 Lawyers reinforced the problems in the electoral
23 system. The restrictions on speech which may or
24 may not be valid, but are based on preserving
25 judicial integrity and independence, to pride

1 the voters of information. But again, if the
2 judges are supposed to enforce minority rights,
3 we don't want the voters to be voting for judges
4 who are already stating they are going to ignore
5 minority rights. Although I think it would be
6 hard for any judge to come up and say that they
7 are opposed to individual rights.

8 You know, when asked certain
9 questions that puts them in a box when it comes
10 time for them to rule later, if anything, the
11 kind of testimony I heard today I think
12 reinforces the argument for merit selection.
13 Yes, the voters of Pennsylvania may not be ready
14 for it, and maybe the General Assembly has to
15 take more time to educate the voters about the
16 problems in the existing system and how
17 tinkering with campaign contributions or
18 campaign expenditures doesn't eliminate the
19 existing problems with judicial elections. We
20 hope that you will consider seriously how to
21 move this day forward to a merit selection
22 process and not engage in piecemeal reform that
23 won't really generate the kind of changes that
24 we believe are necessary.

25 Thank you, and we'll be happy to try

1 to answer any questions you may have. Although,
2 we will not -- in case any lawyers on the panel,
3 we are not authorized to give you C.L.E. credit
4 on the constitutional law which you received
5 from Professor Gildin today.

6 CHAIRPERSON FEESE: Thank you, Mr.
7 Frankel, Professor Gildin. Mr. Frankel, the
8 group that needs to complete this C.L.E., I
9 think I can make (inaudible; drops voice) I'm
10 hopeful that I have.

11 MR. FRANKEL: I am too.

12 CHAIRPERSON FEESE: Professor Gildin,
13 thank you for addressing Buckley and Shuster.
14 If you were here earlier when I asked Mr. Mundy
15 that question, I was concerned about the court
16 imposing as a rule a campaign expenditure limit
17 when, in fact, there appears to be a substantial
18 question I could be violating individual's
19 constitutional rights.

20 But, following up on one of the
21 questions that I asked Mr. Mundy which is a
22 concern to me as a lawyer and whether or not
23 it's impinging upon lawyer's constitutional
24 rights. And that is, that we as lawyers will be
25 refused if we gave a third-party contribution in

1 excess of the thousand dollar limit. For
2 example, if I gave \$2500 to a Republican party
3 to -- because I believe in its principles and
4 that they would go out and support candidates
5 that I as a lawyer would be recused then to
6 appear before any judge that they support.

7 It seems to me that somehow, I can't
8 articulate now, but somehow that that would
9 violate my rights as an individual to support
10 organizations and the principles that those
11 organizations support. I appreciate any
12 comments that you might have.

13 PROFESSOR GILDIN: It's an
14 interesting question when you get to a
15 different constitutional area when you talk
16 about limiting contributions. My view is it
17 offers false hope for reform because the Court
18 has taken it, the Supreme Court now, the U.S.
19 Supreme Court has taken a modestly different
20 attack on contribution limits. That is, they
21 view it as a lesser form of speech, limiting my
22 ability to contribute to my candidate. They do
23 that as a higher governmental interest in fraud
24 because there's more direct quid pro quo. I'll
25 give you the money, but you'll decide my way.

1 So, it gives a broader constitutional
2 basis to limit the contributions until you get
3 to the next issue; and that is, if I made my
4 contribution to an independent organization,
5 could you then limit the amount of speech that
6 independent organization could engage in? The
7 Political Action Committee, for example. The
8 Supreme Court has struck down any proposals to
9 limit expenditures by the independent
10 organizations to be a party of the Political
11 Action Committee.

12 So one thing is clear is that, you
13 want the contribution out, even if you upheld a
14 limitations on what I could contribute, you
15 could not limit the expenditures that that third
16 party or party organization would engage in.
17 Then it becomes unclear, oh, gosh, should you be
18 able to limit my contributions not directly to
19 the candidate, but to the third-party
20 organization which is (inaudible word) is
21 entitled to engage in unfederated speech. I
22 think you're right. You have a new
23 constitutional problem there.

24 CHAIRPERSON FEESE: In that case, it
25 would be eliminating one category. It doesn't

1 have to be lawyers simply because they are
2 lawyers. It's something that strikes me to be
3 fundamentally unfair.

4 MR. MUNDY: Correct. You get in the
5 grey area, but it's still highly problematic.

6 MR. FRANKEL: And if I can add a
7 pragmatic point. What about the law firm that
8 contributes to both parties? I mean, where are
9 they going to go? Are they going to be refused?

10 I mean, those are practical issues,
11 but I would assume that under the interpretation
12 of even this recommendation it would be
13 consistent that a lawyer is deemed, you know, a
14 whole law firm is covered by what an individual
15 lawyer does. So, if you have one lawyer who
16 contributes a lot to the Republican party and
17 one who contributes a lot to the Democratic
18 party, that law firm may have problems any
19 courtroom they can appear.

20 CHAIRPERSON FEESE: Representative
21 Hennessey.

22 REPRESENTATIVE HENNESSEY: Thank you,
23 Mr. Chairman. Larry, Professor Gildin, nice to
24 see you. I'm struck by the quote that you made
25 from the Buckley case which says, the First

1 Amendment denies government the power to
2 determine that the spending to promote one's
3 political views is wasteful, excessive or
4 unwise. And the quote from the Shuster case
5 that says that you don't give up any of your
6 First Amendment rights, presumably as guaranteed
7 by Buckley, when you choose to run for judicial
8 office rather than nonjudicial, a political one.

9 How does Canon 7 fair when it's asked
10 to meet both problems of that test, the test
11 that Buckley and Shuster seem to define? It
12 would seem to me that Canon 7, probably in
13 itself, is constitutional suspect under the
14 decisions that have come down; not just a
15 question of spending, but just the concept that
16 you can't talk about your political views if you
17 happen to be running for judicial office.

18 PROFESSOR GILDIN: It's a short
19 answer -- it's a short answer that came out of
20 the side of the table. That's one of the
21 reasons that merit selection makes much more
22 sense, but you'll avoid that tension there. To
23 the extent that the Courts have upheld it, and I
24 must say I haven't researched that issue, the
25 argument would have to be that now the interest

1 is risen to a compelling one. Because when
2 you're limiting a speech, the judge is going on
3 record as here's how I'm gonna decide this case
4 if it came before me; that the governments held
5 me in question -- actually deserving the
6 independence of the judiciary. That would have
7 to be the argument.

8 REPRESENTATIVE HENNESSEY: It would
9 seem to me that anyone who runs for office and
10 then had to make decisions that made statements
11 that this is the way we feel on a particular
12 issue. But, when we find the bill coming before
13 us, it doesn't deal with this particular issue.
14 Frequently, it deals with this issue and four,
15 five or six others with which we may totally
16 disagree, and we find ourselves having to turn
17 down and, perhaps, offend part of our
18 constituency who wanted us to vote yes on that
19 bill because it talks about issue A; and yet, we
20 find that we have to vote against it because of
21 all of the other trappings that go into it.

22 It seems to me that the judicial
23 candidate probably not that much different than
24 we are; that they can say yes, I'm basically
25 pro-life; or, yes, I'm basically pro-gun, but

1 when an issue comes before them with all these
2 other factual trappings, it wasn't as clear cut
3 as that. While I still feel that I'm pro-gun, I
4 have to say that this was a reasonable
5 restriction, or something. Some other --

6 I guess some people say it's
7 waffling, but the fact of the matter is that,
8 you know, you don't know what the facts of the
9 cases are that you're running -- that you may be
10 asked to decide here if you're elected for
11 office. You still can't predict what cases you
12 are going to get and how those fact patterns are
13 evolved.

14 And I don't think anybody is asking
15 in terms of loosening the restriction of Canon
16 7, and say, tell us how you're going to vote
17 when Smith versus Jones comes before you, but I
18 do think it grabs something that the electorate
19 would like to be able to know how you stand
20 generally on some issues. A person may say, I'm
21 for the death penalty and I think there should
22 be more of it and we ought to expand the amount
23 of crimes for which the death penalty is an
24 applicable offense. And somebody else would say
25 I favor the death penalty, but I think it should

1 be used as restrictly as possible. At least you
2 get some flavors as to how the candidates feel
3 on a particular issue.

4 I don't know that would necessarily
5 violate Canon 7, even in its current form. But,
6 the fact of the matter is, it's a grey area. I
7 don't know if candidates want to talk about it.
8 They don't want to risk violating the canons.
9 So basically, it becomes, well, I can't talk
10 about that. People think you're dodging the
11 issue and the public is dissatisfied with the
12 problems.

13 PROFESSOR GILDIN: I think the truly
14 well-informed electorate, the truly well-
15 informed electorate realizing that expediency in
16 the individual cases, not necessarily what you
17 should want as your judge; the truly well-
18 informed voter would say, I want a judge whose
19 answer to this question is, I walk into this
20 case with an open mind. I will decide this case
21 if it's an issue of constitutional law
22 consistent with the intent of the framers and
23 the interpretations of the judges for the past
24 200 years. If it was an issue of statutory
25 intent the answer would be, I'll decide this

1 with consistent with the intent of the
2 legislators as reflected in the text and
3 legislative history. And if was an issue of
4 common law, I will decide if -- consistent with
5 what the decisions of past judges have been, so
6 that how I act in this case is not based upon my
7 personal bias or value system. That's what the
8 informed electorate would want.

9 How you get that in a political
10 campaign when you -- your adversary is showing
11 the jail house door shut down is the expedient
12 answer seems to be I want her or him. I don't
13 understand what this person is saying. How you
14 get that in elections, our view is, you can't.
15 I think, perhaps, a nonpartisan or bipartisan
16 merit selection panel can understand why we have
17 different standards for who we want as our
18 legislator, that we want as our judge.

19 CHAIRPERSON FEESE: Thank you.

20 Representative Manderino.

21 REPRESENTATIVE MANDERINO: Thank you.

22 Representative Hennessey actually started the
23 line of thinking that I was going down. And I
24 haven't given it any depth of thought until
25 today. But, going back to restrictions on the

1 speech, the essence of Canon 7 or any type,
2 Canon 7 is a law that we passed, so I guess no
3 one could challenge the constitutionality of
4 Canon 7 on its own. So, I'm assuming that. I
5 don't know if that's correct or not.

6 MR. FRANKEL: I believe they could if
7 you look at the decision from the Sixth Circuit,
8 which we discussed today. That would be
9 challenged by judges or judicial candidates to
10 the canon. So, the candidates for judicial
11 office could file a constitutional challenge.

12 REPRESENTATIVE MANDERINO: Which has
13 or has not been done before? Do we know, except
14 for what they have just recently done in Ohio.
15 Are you familiar with any other --

16 PROFESSOR GILDIN: Ohio wasn't the
17 challenge; at least the court's issue wasn't a
18 challenge, a speech on issue component,
19 suspending the limitation issue. I would agree
20 with Mr. Frankel, there's nothing that insulates
21 any governmental action from attacking the
22 constitutional grounds. There's nothing special
23 about canons.

24 MR. FRANKEL: And I'm not aware of
25 any decision, but I will assure you that we will

1 do a little bit of research after we leave here
2 to see if this issue has been addressed by a
3 Court somewhere. And I think that certainly
4 discussion today has triggered an interest in
5 that particular canon.

6 REPRESENTATIVE MANDERINO: It seems
7 to me that -- I can see it from both sides. It
8 seems to me that you either take the gloves and
9 restrictions off and then you end with up a
10 system that maybe by contrast people will feel
11 they have a clear picture of whether they want
12 that system or whether they want something
13 different, or we live in this kind of murky,
14 in-between grey area whether we are today.

15 But, I don't think we have -- I'm
16 curious. Have we seen an example of a, all the
17 gloves off, everything can happen? And then
18 what happens? You know, if I can go out and
19 campaign and say, following up with what
20 Representative Hennessey said, I don't even have
21 to talk about a particular fact pattern in front
22 of me as a judge. But, if I can go out and say,
23 you know, I'm pro-gun, I'm anti-abortion, I'm a
24 hundred percent for the death penalty, in such
25 strong terms like that, then when litigants come

1 in front of me, what happens to the processes?
2 Does somebody have a right to ask me to recuse
3 myself because, even though the judges are the
4 ones in Pennsylvania that institute the death
5 penalty, if it's a jury question, how I might
6 rule on the evidence during the case of trial
7 may be reflected by what the litigant or the
8 defendant in front of me knows is my position,
9 clear-stated position on the death penalty, for
10 example.

11 Or, what I stated as my position on
12 abortion issue or on a gun issue may then have a
13 litigant in front of me on that issue say that I
14 should be recused from sitting on any trial that
15 deals with this issue because of my
16 predisposition rule a particular way. You know,
17 I don't know what happens there and if we have
18 seen that addressed in other states and how they
19 deal with this issue.

20 MR. FRANKEL: Again, we have to do
21 more research. But, my gut reaction would be to
22 concur with what Professor Gildin said. If a
23 court has looked at this, they may find that
24 there is a compelling governmental interest in
25 not having judges already on the record of how

1 they will decide on cases, both to preserve the
2 integrity of the system, but also to avoid
3 constant recusal motions. I don't know if those
4 cases have been decided.

5 REPRESENTATIVE MANDERINO: Yeah. If
6 you turn anything up on the challenges to the
7 Canons or any decisions on that, I think that
8 would benefit us greatly in deciding what makes
9 sense with regard to the practicality as well as
10 the -- both practical and the philosophical
11 component behind lifting or broadening speech in
12 judicial elections. Thank you. Thank you, Mr.
13 Chairman.

14 CHAIRPERSON FEESE: Thank you.
15 Representative Masland.

16 REPRESENTATIVE MASLAND: Just
17 following up on that last line of thought. Let
18 me suggest that you probably won't find any
19 cases out there. And the common sense reason
20 for that is, that most judicial candidates
21 recognize Canon 7 as a two-edge sword. Although
22 they might want to go out there and state their
23 views on a few things, they would very much like
24 to hide behind it. And I think some of my
25 colleagues would like to have a Canon 7 that

1 they can cite whenever they receive some of
2 these highly, narrow contrived questionnaires
3 that we need to answer during the election
4 cycle.

5 So, I don't think too many judges
6 have really challenged that, knowing what a
7 Pandora's box they would have if they were
8 successful.

9 MR. FRANKEL: I think some voters
10 believe that the legislators already have a
11 Canon 7 when they respond to questions. I think
12 any assurance that the answers would be clear
13 and understandable are doubtful where they come
14 from the person running for the highest office
15 to the lowest office in this country. You don't
16 want to offend anybody so they won't vote
17 against you.

18 REPRESENTATIVE MASLAND: Thank you.

19 CHAIRPERSON FEESE: Chief Counsel
20 Preski.

21 MR. PRESKI: Professor Gildin, if you
22 can brief me the constitutional law class for a
23 moment. Given what we have heard this morning
24 basically that the Supreme Court has established
25 this Commission, that they want now the judicial

1 council; that they plan to have some type of a
2 meeting on this in the fall. Is there a
3 constitutional authority for the court to impose
4 any of these recommendations without legislative
5 action?

6 PROFESSOR GILDIN: Well, I can answer
7 the first part of that; perhaps, unknowingly,
8 two-prong constitutional question. If they
9 concluded that the spending regulation violated
10 the Constitution, federal and state, they would
11 have no constitutional authority to pass a
12 legislation that violates the Constitution. Put
13 it this way: If they did, it would be subjected
14 to constitutional attack.

15 The question that I can't answer as
16 between judicial power versus legislative power,
17 really doesn't turn on whether this particular
18 provision is constitutional or not. That's an
19 issue of allocation of authority between these
20 two branches of this government under the
21 Pennsylvania Constitution.

22 I'm quite confident that if Mr.
23 Mundy's analysis is that at present we still
24 have a constitutional problem, I can't image why
25 the Court would say well, yes, we know we have a

1 constitutional problem, but let's pass it anyway
2 so the (speaking too fast; inaudible words) the
3 power, because it's gonna then find itself in a
4 court system subject to attack. I'm not sure
5 that was an answer your question.

6 MR. PRESKI: I guess the reason that
7 I asked that is, we've seen the court use its
8 rule-making authority to strike down legislation
9 enacted by this General Assembly. We have also
10 seen them use their authority to regulate the
11 practice of law to adopt various different
12 rules.

13 I was just wondering, could the Court
14 use the Pennsylvania Constitution? You
15 testified before this Committee on Article 1,
16 Section 8 questions, where the Court has
17 disregard for what the U.S. Supreme Court has
18 done to adopt what it wants to do under the
19 Pennsylvania Constitution. I guess my question
20 is, are either of those avenues available for
21 the court to kind of pick and choose what it
22 wants to do here?

23 PROFESSOR GILDIN: I don't think the
24 State's Supreme Court has any improper sense
25 disregarded what the United States Supreme Court

1 has said with respect to Article 1, Section 8,
2 because it's totally consistent with the
3 constitutional scheme, that states courts might
4 broader individual rights under the State
5 Constitution than the United States Supreme
6 Court, understanding that it's constrained by
7 federalism and its decisions have nationwide
8 impact has chosen to set up floor.

9 I don't think the Supreme Court has
10 done anything wrong, unconstitutional, or that's
11 anything other than perfectly consonant with the
12 scheme when they're finding greater rights under
13 the Constitution.

14 The question you're addressing is,
15 what about allocation of power legislature
16 versus courts under the Pennsylvania
17 Constitution? That's an issue that wholly apart
18 from what I have addressed here today. It's an
19 issue wholly apart from what the courts are
20 doing, Article 1, Section 8, and it's an issue
21 upon which I have no particular view.

22 MR. PRESKI: Thank you.

23 MR. FRANKEL: Can I respond briefly,
24 not having any answer necessarily with regard to
25 the Authority Act, but to the extent that these

1 recommendations are being reviewed by the
2 legislature, that the legislature has an
3 opportunity to at least provide some input that
4 the Judicial Council serves a function. That
5 may not confer the necessary constitutional
6 authority, but it certainly, to my knowledge,
7 unless they totally disregard the input that
8 legislators may give, is admirable as a
9 procedural matter; that there is some dialogue
10 that may go back and forth between the court and
11 the legislature in an area that may be somewhat
12 murky as to who has authority and who doesn't.

13 But, rather than just impose rules
14 and say, if you don't like it go sue us, that
15 kind of communication back and forth. Again, I
16 don't know it answers the authority question
17 completely, but that kind of communication
18 certainly establishes a basis for maybe an
19 amicable resolution to the matter rather than a
20 ongoing political dog fight.

21 MR. PRESKI: Thank you.

22 CHAIRPERSON FEESE: Thank you,
23 gentlemen, for your testimony. We appreciate
24 your input. Our next and last presenter will be
25 Barry Kauffman, Executive Director of Common

1 Cause/Pennsylvania. Mr. Kauffman, whenever your
2 ready.

3 MR. KAUFFMAN: Thank you. Thank you,
4 Chairman Feese, and members of the Judiciary
5 Committee which are hanging in there this
6 afternoon. I thank you for this opportunity to
7 present the views of Common Cause/Pennsylvania
8 on the need to dramatically reform our
9 Commonwealth's judicial selection process. My
10 name is Barry Kauffman. I'm Executive Director
11 of Common Cause/Pennsylvania, which is a public
12 interest advocacy organization representing over
13 12,000 Pennsylvanians who are committed to
14 promote open, accountable and honorable
15 government.

16 Since its inception in 1974, Common
17 Cause has worked successfully to improve the
18 integrity of Pennsylvania's election systems.
19 For most of that time, we have also been strong
20 advocate for upgrading our judicial selection
21 system.

22 Currently, Common Cause is a
23 two-pronged approach to dealing with the
24 problems posed by the judicial elections of our
25 state. First, the ultimate goal is to establish

1 a genuine, apolitical system of merit selection.

2 Second, until we achieve merit
3 selection, we have an obligation to ensure
4 Pennsylvania's citizens that our judicial
5 elections are open and honest, and that they
6 will produce jurists respected for their
7 temperament, their legal scholarship, and their
8 sound judgment, rather than for their abilities
9 to raise campaign money, often from sources with
10 interests before the courts or to manipulate
11 political powers.

12 Common Cause/Pennsylvania has from
13 time to time conducted studies on the financing
14 of Pennsylvania judicial elections, and we have
15 been troubled by the explosive growth in the
16 cost to run for these offices, as well as the
17 high levels of campaigns' financial resources
18 coming from those who will appear in court
19 before the successful candidate. To help
20 mitigate these problems, we have over the years
21 helped to develop and promote judicial campaign
22 finance reform legislation, most notably bills
23 introduced by Senator Allen Kukovich and former
24 Senator Craig Lewis.

25 We are delighted to see that the

1 reforms recommended by the Supreme Court's
2 Special Commission to Limit Campaign
3 Expenditures mirror many of those which Common
4 Cause has promoted over the past two decades.

5 The Special Commission notes it was
6 surprised that its polling data demonstrated
7 overwhelming public support for limits on
8 campaign contributions, campaign expenditures,
9 and even public financing of campaigns. Such
10 support should have been no surprise, quite
11 frankly. There have been strong indications of
12 public support for these reforms for many years,
13 especially for judicial races.

14 If not consciously, the public has an
15 intuitive understanding that the judiciary has a
16 very different role from the legislative and
17 executive branches of government. The latter
18 two are designed by intent to be more responsive
19 to public pressure, to the voters who are, in
20 fact, their constituents.

21 But, the voters are not the direct
22 constituency of the court. The law is the
23 judiciary's real constituency. And, citizens
24 have a fundamental understanding of this. They
25 know that the integrity of our court system

1 rests on the ability of the poorest and the
2 meekest in our society to be seen as the legal
3 equal of the wealthiest and the most powerful
4 when standing before a judge.

5 Our current method of financing
6 judicial branch political campaigns severely
7 damages the public's confidence in facing fair
8 and impartial jurists. The current system props
9 up cynical beliefs that the wealthy and
10 politically connected will prevail over right in
11 our courts. In many cases, the courts truly are
12 citizens' last hope for justice. Our citizens
13 must have confidence that justice will prevail,
14 and the Court's own Commission agrees.

15 Therefore, Common Cause urges the
16 Supreme Court to move ahead immediately to
17 implement the reforms within its jurisdiction,
18 and urges the General Assembly to establish the
19 Special Commission's proposed reforms as the law
20 of the land.

21 I now would like to present a few
22 brief comments in support of the individual
23 proposals. First, establishing contribution
24 limits is the most obvious place to start. The
25 landmark Buckely versus Valeo case clearly

1 recognizes that the act of a campaign
2 contributor giving money, goods or services to a
3 candidate or public official opens the doors to
4 at least the perception of corruption; and to
5 protect the public's confidence in government,
6 the state does have a compelling interest in
7 eliminating even the perception of corruption.

8 I'd like to comment straight from my
9 prepared comments for a second. I think it's no
10 irony that the Trial Lawyers does oppose
11 contribution limits because they have under the
12 LAWPAC one of the largest and most generous
13 law-funded packs. They do fully understand the
14 power of campaign contributions. I think it was
15 Mr. Reber who also said it was the contributors,
16 and that when I've talked to attorneys and been
17 in presence of attorneys in many social
18 occasions it often comes up, the reason why they
19 contribute is because they believe it works.

20 CHAIRPERSON FEESE: Mr. Kauffman,
21 excuse me. Maybe correct the record, we believe
22 the individuals from Trial Lawyers testified
23 that LAWPAC prohibits contributions to judges.

24 MR. KAUFFMAN: That is correct. I
25 think they should be commended for that

1 recognition of common interest, but they do make
2 large contributions to legislative and other
3 candidates.

4 Going back to Mr. Reber's concern,
5 that is there really a quid pro quo here. I
6 guess you really never prove quid pro quo, but
7 the contributors themselves think it works.
8 That's why they contribute and that's why they
9 continue to do it, and even attorneys themselves
10 say it's better to make a contribution than not
11 to make a contribution just to establish that
12 relationship.

13 And finally, I think it was Mr. Feese
14 who asked the question about the political
15 parties and making contribution to political
16 parties; should lawyers be banned from that? I
17 don't think that's really necessary. I think
18 we're really talking about third party, special
19 campaigns, the so-called unaffiliated campaigns.
20 I don't think you need to make those bans from
21 political parties.

22 There's also already provisions under
23 the election code that makes it illegal for
24 somebody making contribution to a political
25 party, or anybody else for that matter, and

1 direct it from being given to a specific
2 individual. If that part of the law is enforced
3 I don't think you'll have problems which we
4 already do.

5 The recommendations and contribution
6 thresholds suggested by the Special Commission
7 with regard to contribution limits are
8 responsible, and we believe they should be
9 adopted into law; and again. They must have
10 tight loophole-free provisions that deter
11 circumvention.

12 As the Special Commission's report
13 suggests, the Judicial Campaign Expenditure
14 Limits face some substantial obstacles. The
15 Buckley decision, unfortunately, has equated the
16 spending of money by candidates with free
17 speech. This controversial portion of the
18 Buckley decision has been under attack from the
19 moment it was announced, and the attacks have
20 been increasing with each passing year.

21 Clearly, the spending of money is not
22 the same as freedom of speech. Expenditure
23 limits, in reality, deal with the volume of
24 speech and have nothing to do with the freedom
25 of speech. Regulating expenditures at levels

1 that all candidates in the political arena to
2 present their positions in relatively equitable
3 volumes, so that the public can better cut
4 through the cacophony of campaigns and make
5 informed decisions is a reasonable goal for
6 governments.

7 The Courts have already readily
8 limited the volume of speech to protect the
9 public's health and welfare. You cannot take a
10 sound truck out into the community in the middle
11 of the night and blast your message. You can't
12 even do the same thing in the daytime over a
13 certain decibel levels. You are permitted to
14 hang on doorknobs with political campaign speech
15 to people's houses, but you can't take an
16 airplane over and dump tons of them on the
17 community.

18 Even in that quintessential forum of
19 political free speech, the town meeting, the
20 amount of speech allowed to each citizen may be
21 limited to permit all citizens take fair
22 opportunity to be heard. Allowing candidates
23 unlimited political expenditures to drown out
24 their opposition, likewise, is dangerous to the
25 health and welfare of our political process.

1 Again, I think, Mr. Feese, you
2 brought the point that maybe a wealthy candidate
3 might be able to dominate the process by not
4 voluntarily complying with contribution limits
5 purchased in public financing. We think that
6 maybe just the opposite may be true; where the
7 rich and wealthy that becomes a political issue.

8 I think it was New Hampshire first
9 implemented their expenditure limits, and some
10 wealthy people choose not to be part of the
11 expenditure limits of public financing systems.
12 That became a major political issue. And those
13 who did not comply with the system got trapped.
14 So, expenditure limits did work de facto.

15 I think one of the distinctions that
16 needed to be made is that the court did say in
17 Buckley that contribution limits were
18 permissible because there could be the
19 perception, if not the reality, that that
20 contributor could corrupt the person receiving
21 the contribution.

22 The argument on the other side is, as
23 Professor Gildin pointed out, they said you
24 could not corrupt an individual -- an individual
25 could not corrupt himself by expenditure limits.

1 However, the court did not go far enough and
2 argue there because, through massive
3 expenditures by one party or two parties, you
4 may not corrupt that individual, but you may, in
5 fact, corrupt the entire electoral system by
6 throwing it way out of kilter.

7 I think Mr. Feese also brought up the
8 item of -- We people from small rural areas are
9 put at a disadvantage, probably not because the
10 people in large urban areas probably also have a
11 larger network of contributors to tap right
12 away. So, I think it's balancing. As long as
13 the same limits apply to all people and they all
14 have to play by the same game, probably you do
15 create a more of a balancing system than having
16 a wide open system; because again, that person
17 from the rural area probably does not have
18 access in most cases to the network, especially
19 in statewide race that urban person does in the
20 first place.

21 Even Buckley permits voluntary
22 expenditure limits, and a variety of
23 jurisdictions have been implemented such limits
24 with strong incentives to participate. The most
25 common incentives are various forms of public

1 financing of campaigns. The Special
2 Commission's polls indicate strong public
3 support for public financing of judicial
4 political campaigns, because citizens recognize
5 that public officials' loyalties may lie, not
6 necessarily in all cases, but may lie with those
7 who help put them into office.

8 If the financial resources that help
9 to put judges into office come from the public,
10 there is a greater probability that judges'
11 loyalties will be focused on ensuring justice
12 and the welfare of the public interest, rather
13 than with the special financial interests that
14 provide the essential campaign support that
15 helps to put them into office under our current
16 system.

17 The first responsibility of any
18 government in our view, especially in a
19 representative democracy, is to protect its own
20 integrity and to protect the citizens'
21 confidence in that integrity. Therefore, the
22 General Assembly and the Court should move ahead
23 in tandem to institute expenditure limits and
24 partial public financing for judicial campaigns.

25 I think also you may want to get a

1 hold of another document. The ACLU, I respect
2 Mr. Frankel and Mr. Gildin's comments and
3 representative current position of ACLU, but
4 there is a large growing group of former ACLU
5 leaders, very well respected and very well known
6 who are now pushing an alternative point of view
7 for the ACLU. It is not the current leadership,
8 but they do aggressively support the kind of
9 campaign financing laws which we now see moving
10 through various entities.

11 Contemporary technology makes
12 instantaneous reporting of large donations
13 relatively easy. The warning to follow the
14 money in politics is all too often is
15 appropriate. Political money almost always is
16 an investment or a reward, an investment in
17 future influence, or a reward for being a
18 dependable ally. Voters should be aware of with
19 whom political figures are allied before they
20 vote. Knowing who a candidate's financial
21 supporters are can be the key to this
22 understanding.

23 The Special Commission's
24 recommendations for timely posting of judicial
25 candidates' contributors on the Internet and

1 requiring instantaneous filing of large
2 contributions during the final days of a
3 campaign should be implemented. Timely and
4 accurate information is, obviously, the key to
5 informed decision making.

6 The Special Commission's call for
7 recusal by a judge who is confronted with a case
8 in which a litigant is a campaign contributor,
9 or a known contributor to a political adversary
10 is obvious and essential. No judge should
11 participate in a case where such potential for
12 bias and conflicts of interest are apparent.
13 The very existence of such a recusal order may,
14 in fact, deter contributions that would be made
15 with hopes of securing favorable future
16 treatment. Common Cause encourages the Court to
17 move forward immediately to implement this
18 recommendation.

19 Helping the public to make informed
20 decisions about whom to elect to judgeships is a
21 laudatory undertaking. From time to time Common
22 Cause has attempted to assist with such efforts.
23 We encourage the court to move ahead to
24 implement this recommendation to get more useful
25 information into the hands of voters. We also

1 challenge the media and other public interest
2 organizations to dig in and provide the public
3 with useful information that will help the
4 voters to better grasp which candidates have the
5 best judicial temperament, best training,
6 expertise and hopefully wisdom.

7 One of the biggest flaws with the
8 election laws already on the books is the back
9 of enforcement. Remember that former Attorney
10 General Ernie Preate's major offenses were
11 violations of the state's ethics and campaign
12 laws, for which he never has been prosecuted.
13 It was relatively minor federal mail fraud
14 violations which in the end removed this corrupt
15 official from power. As the Special
16 Commission's report warns, quote, without
17 resolute enforcement, these recommendations will
18 become virtually meaningless, empty promises
19 prompting further disillusionment.

20 I think Mr. Reber brought up again
21 the issue of whether there is a case in problem
22 there or not, and how many judges have been
23 prosecuted so far by that time. Given the
24 fraternal nature of the judiciary and the entire
25 political system, I would be more surprised if

1 there were a lot of prosecutions when there
2 seems to be a tendency to look over minor
3 infractions. But, I think, again, the key is
4 enforcement.

5 The obvious purposes of these
6 proposed reforms is to promote public confidence
7 in the judiciary; not further disillusionment.
8 Unfortunately, the actions the court can take to
9 enforce these standards are limited to judges
10 and attorneys. That is why it is essential for
11 the General Assembly to move forward to
12 establish contribution and expenditure limits,
13 tied to public financing, for judicial
14 campaigns, so that enforcement will cover all
15 parties, candidates, judges, attorneys, campaign
16 operatives, political parties, PAC's, and the
17 so-called unaffiliated campaigns.

18 Common Cause encourages the court to
19 act immediately on the Special Commission's
20 recommendation to amend Canon 7 to explicitly
21 prohibit judges and judicial candidates from
22 encouraging or allowing court-appointed
23 employees to engage in partisan political
24 activity.

25 In conclusion, we believe that

1 implementing the reforms recommended by the
2 Supreme Court's Special Commission is long
3 overdue. We encourage the General Assembly
4 to move forward and to pass legislation limiting
5 contributions to candidates for judicial office,
6 to limit expenditures by candidates for judicial
7 office, and to provide partial public financing
8 of campaigns for the Supreme, Superior and
9 Commonwealth Court seats.

10 We urge the Supreme Court to move
11 forward aggressively to implement reforms which
12 appear to be exclusively within its jurisdiction
13 such as mandatory recusal, enforcing bans on
14 branch, partisan political activity by employees
15 of the judicial branch, and toughening sanctions
16 against judges, judicial candidates, and lawyers
17 who violate the judicial canons and rules.

18 Common Cause, for our part, pledges
19 to lend its support to ensure the success of
20 these efforts. They must succeed if we truly
21 hope to restore the public's confidence in our
22 judicial system, and the rule of law in
23 Pennsylvania.

24 I thank you for inviting me to
25 participate in this hearing, and I will attempt

1 to respond to any questions which you may have
2 for me.

3 CHAIRPERSON FEESE: Thank you for
4 your testimony, Mr. Kauffman. I just have one
5 question, and that is: Assuming that Professor
6 Gildin's interpretation of Buckley and Shuster
7 is correct, that it would violate the First
8 Amendment to have an expenditure limit. Would I
9 be correct in assuming that Common Cause would
10 not then be advocating Pennsylvania Supreme
11 Court to quickly enact expenditure limit?

12 MR. KAUFFMAN: That's a tough
13 question to answer. It's going to be a tough
14 case to win, quite frankly, given the current
15 people in the court an analysis of their past
16 voting on similar types of issues, suggestion of
17 the current Supreme Court might continue --
18 well, certainly would probably continue to be
19 very cautious on authorizing expenditure limits.

20 I think the case has to be framed
21 very carefully, and I think you must, as
22 Professor Gildin said, very demonstrably show
23 that there is a compelling state interest. And,
24 I think, we are beginning to get to that point.

25 CHAIRPERSON FEESE: I guess my

1 question wasn't clear. My question would be,
2 would Common Cause still be applicated that the
3 Pennsylvania Supreme Court enact a rule limiting
4 the total amount that can be expended on
5 judicial election, assuming Professor Gildin's
6 interpretation is correct. Because you began
7 your remarks by saying that Common Cause
8 promotes open accountable and honorable
9 government. I didn't know how the Supreme Court
10 enacted something that's unconstitutional if it
11 was open, honest and honorable.

12 MR. KAUFFMAN: It's obviously our
13 preference that the legislature do that, the
14 General Assembly do that. It's really more of
15 their domain. Which, I have seen as -- The only
16 reason I'm, quite frankly, aware of the other
17 jurisdictions issue, we attempted to do that.
18 We think it's preferable that be done by the
19 General Assembly.

20 CHAIRPERSON FEESE: Representative
21 Caltagirone.

22 REPRESENTATIVE CALTAGIRONE: No
23 comments.

24 CHAIRPERSON FEESE: Thank you, Mr.
25 Kauffman, for your testimony today.

1 That concludes today's hearing other
2 than just for purposes of the record, I have
3 written testimony from Pennsylvania for Modern
4 Courts that's attached to the cover letter to me
5 dated August 6, 1998, from the Executive
6 Director remarks. I will be submitting that for
7 the record.

8 Thank you all for attending today.
9 We appreciate your comments.

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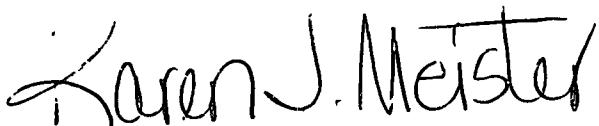
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I, Karen J. Meister, Reporter, Notary Public, duly commissioned and qualified in and for the County of York, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently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

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Dated this 3rd day of October, 1998.



Karen J. Meister - Reporter
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