

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

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HOUSE BILL 79  
JUDICIAL RETIREMENT

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House Judiciary Committee  
Subcommittee on Courts

Matthew J. Ryan Office Building  
Room 205  
Harrisburg, Pennsylvania

Thursday, April 18, 2013 - 10:00 a.m.

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COMMITTEE MEMBERS PRESENT:

Honorable Glen R. Grell, Majority Subcommittee  
Chairman  
Honorable Bryan Cutler  
Honorable Dick Hess  
Honorable Rick Saccone  
Honorable Todd Stephens  
Honorable Scott Petri  
Honorable Thomas Caltagirone, Minority Chairman  
Honorable John Sabatina, Minority Subcommittee  
Chairman  
Honorable Bryan Barbin  
Honorable Vanessa Lowery Brown  
Honorable Madeleine Dean  
Honorable Deberah Kula

NON-COMMITTEE MEMBERS PRESENT:

Honorable Kate Harper  
Honorable Nick Kotik  
Honorable Chris Sainato  
Honorable R. Ted Harhai

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1 STAFF MEMBERS PRESENT:

2 Thomas Dymek, Esquire  
3 Republican Executive Director  
4 Republican Research

5 Michelle Moore  
6 Republican Administrative Assistant

7 Jennifer Duralja  
8 Republican Committee Secretary

9 Michael Fink  
10 Republican Research

11 E. Lauren Orazi, Esquire  
12 Democratic Executive Director

13 Vincent Bellman  
14 Democratic Research Analyst

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1                   SUBCOMMITTEE CHAIRMAN GRELL: I'm going  
2 to call this meeting of the House Judiciary  
3 Subcommittee on Courts to order. Good morning,  
4 everybody, and then, thank you so much for being  
5 here. Just for everybody's information, this  
6 hearing is being video-recorded, so keep that in  
7 mind.

8                   The purpose of today's hearing is to  
9 receive testimony and commentary and give the  
10 members an opportunity to ask questions regarding  
11 House Bill 79, sponsored by Representative Kate  
12 Harper; and, generally, the subject of mandatory  
13 retirements -- mandatory retirement for judges.

14                   Personally, I'd like to thank Chairman  
15 Marsico, Chairman Caltagirone for assigning this  
16 matter to the Subcommittee on Courts and asking  
17 that we conduct this hearing. I had a chance to  
18 preview the written testimony that's been  
19 provided, and we're in for a good hearing.  
20 There's a lot of very, very thoughtful commentary  
21 that we're gonna receive from some very  
22 well-qualified folks to speak on the subject.

23                   Subcommittee Chairman John Sabatina is  
24 on his way. So, in his current absence, I will  
25 ask Committee Chair Caltagirone to make any

1 opening comments that he might like to make.

2 CHAIRMAN CALTAGIRONE: Thank you, Mr.  
3 Chairman.

4 For the record, you know, I have  
5 personal experience with a retired federal judge  
6 that works in my district office in Reading. He  
7 is 83 years old. He's as sharp as a razor. He  
8 was working, basically, until age 81. As you  
9 know, with the federal system, they can stay for  
10 life. As a matter of fact, as of this year, they  
11 were trying to recall him back to continue  
12 sitting, and he declined. He said, I like  
13 working for Representative Caltagirone, and I'd  
14 rather stay in Reading rather than having to  
15 travel around the country.

16 But, just for the record, you know,  
17 this age thing, you gotta wonder, why do we  
18 restrict a number. And this guy that works for  
19 me--he's 83 years old--and he does a magnificent  
20 job, and he's just a wonderful asset. And I  
21 think we have a lot of people that sit on the  
22 court throughout this state that probably have  
23 the same issues to continue and to want to serve,  
24 but they're restricted because of this artificial  
25 age limit. So, I'm in agreement with your

1 legislation, and I certainly am being added as a  
2 co-sponsor to your bill. Thank you, Mr.  
3 Chairman.

4 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
5 very much. At this time, I'd like the members  
6 who are present to self-introduce, starting with  
7 Representative Kula.

8 REPRESENTATIVE KULA: Thank you, Mr.  
9 Chairman. I'm Representative Deberah Kula from  
10 Fayette and Westmoreland counties, 52nd District.

11 REPRESENTATIVE SAINATO: I'm  
12 Representative Chris Sainato. I represent the  
13 9th District, which is parts of Lawrence and a  
14 small section of Beaver County.

15 REPRESENTATIVE KOTIK: Representative  
16 Nick Kotik; Allegheny County.

17 REPRESENTATIVE DEAN: Good morning.  
18 Madeleine Dean from Montgomery County, Abington  
19 and Upper Dublin.

20 MS. ORAZI: Lauren Orazi, Democratic  
21 Executive Director.

22 CHAIRMAN CALTAGIRONE: Tom Caltagirone;  
23 Berks County.

24 SUBCOMMITTEE CHAIRMAN GRELL: I'm Glen  
25 Grell; 87th District, which is part of Cumberland

1 County.

2 MR. DYMEK: Tom Dymek. I'm Majority  
3 Executive Director.

4 REPRESENTATIVE HESS: Dick Hess; 78th  
5 District, Bedford, Fulton and Huntingdon  
6 counties.

7 REPRESENTATIVE SACCONI: Rick Saccone;  
8 39th District, southern Allegheny and northern  
9 Washington counties.

10 REPRESENTATIVE STEPHENS: Todd  
11 Stephens; 151st District, Montgomery County.

12 REPRESENTATIVE CUTLER: Good morning.  
13 Bryan Cutler; 100th District, southern Lancaster  
14 County.

15 REPRESENTATIVE LOWERY BROWN: Vanessa  
16 Lowery Brown; 190th District, Philadelphia  
17 County.

18 REPRESENTATIVE BARBIN: And Bryan  
19 Barbin representing Cambria County.

20 SUBCOMMITTEE CHAIRMAN GRELL: Terrific.  
21 Thank you very much to all the members for being  
22 here and for your interest in this subject.

23 With those opening remarks, I think  
24 we're prepared to begin with our witnesses; the  
25 first of which is Kate Harper, Representative,

1 and the prime sponsor of House Bill 79. Thank  
2 you for being here. Thanks for your legislation  
3 and you may proceed when you are ready.

4 REPRESENTATIVE HARPER: Thank you very  
5 much, Chairman Grell, Acting Chairman  
6 Caltagirone. Thank you for those remarks, and  
7 members of the committee, we had a pretty long  
8 session week this week, so I appreciate all of  
9 your attendance here this morning; and interested  
10 audience members and the witnesses as well.

11 I appreciate the ability to talk to you  
12 about my House Bill 79, which would affect a  
13 constitutional change to allow judges to serve to  
14 the end of the year in which they turn 75,  
15 instead of 70, as the current constitutional  
16 provision reads. This current provision has been  
17 in effect since 1968. 1968. There's people in  
18 the room who weren't born in 1968, okay?

19 But I think many of us know that there  
20 have been many demographic changes in  
21 Pennsylvania and in our nation since that time;  
22 not the least of which is, of course, that the  
23 life expectancy has advanced in that time from  
24 age 70 to 78. And it's no longer unusual, as per  
25 Chairman Caltagirone's remarks, to meet somebody



1 who's living and working well into their 80's and  
2 90's. Pennsylvania seems particularly blessed in  
3 that regard and has a large percentage of  
4 citizens in that demographic age group.

5 For some of us who remember back to  
6 1968, don't trust anyone over 30 was the mantra.  
7 Remember that? Okay. Suddenly, 75 doesn't seem  
8 as old as it did back in 1968, and retiring at 65  
9 is coming to be viewed as retiring early. So my  
10 bill proposes moving the mandatory retirement age  
11 from 70 to 75 for judges. Other proposed  
12 legislation in the Senate would actually remove  
13 the age entirely.

14 In other states, there is no maximum  
15 age at which one is allowed to serve as a judge,  
16 and other states still have retirement ages at  
17 70, 72, 74 or 75. In Vermont, the hardy  
18 Vermonters are allowed to stay on the bench until  
19 age 90.

20 The lawsuits, in fact -- There are  
21 lawsuits, in fact, that are challenging the  
22 Commonwealth's mandatory retirement age of 70 as  
23 arbitrary or as a violation of laws prohibiting  
24 age discrimination. And these are all important  
25 things to keep in mind, but they're not the

1 reason that I introduced the bill.

2 For me, a person who has practiced law  
3 at least part time for more than 30 years, I know  
4 and have seen many, many judges. I practiced  
5 before judges in state courts in their 40's, 50's  
6 and 60's, where, when they reach age 70, they're  
7 allowed to be senior judges and continue in  
8 service, and they actually have to either retire  
9 or became senior judge.

10 But I've also practiced in federal  
11 court where there are lifetime appointments; no  
12 upper limit. I've seen men and women in their  
13 courtrooms and in their communities, and I just  
14 have a hard time believing that, on your 71st  
15 birthday, suddenly you're incompetent to continue  
16 as a judge. In fact, I think the opposite might  
17 be true.

18 In his book, *Outliers*, that some of you  
19 have read, Malcolm Gladwell posits the theory  
20 that it takes 10,000 hours to master a subject;  
21 whether that subject is playing the violin or  
22 sinking a jump shot. And that's about five years  
23 if you're doing it full time; five days a week,  
24 40 hours, okay?

25 But think for a moment what it takes to

1 master the role of a judge and what it means to  
2 have mastery in the field of judging. The job of  
3 a judge is very different from the job that we do  
4 as legislators. As legislators, we're called  
5 upon to write good laws; to advance civilization;  
6 to correct perceived wrongs in the current  
7 system; and be mindful of what our constituents  
8 would like us to do and what they expect.

9 But, at the end of the day, as we all  
10 know, it is not the most brilliant law that gets  
11 enacted, nor the most just, nor the cleverest  
12 law, as some of us find to our chagrin when we  
13 think we have a law that meets those criteria.  
14 In the end, it's simply the law that gets 102  
15 votes in the House and 26 votes in the Senate.  
16 That's a very different job than being a judge.  
17 And I should say, also, one that the Governor is  
18 willing to sign.

19 A judge, by contrast, is sitting in  
20 judgment on a specific set of facts and specific  
21 individuals or businesses, and who is then tasked  
22 with applying the law to this specific set of  
23 facts. The judge doesn't write the law. He's  
24 supposed to know the law or look it up before he  
25 makes his decision, okay? But his decision

1 applies to those people who stand in front of him  
2 in the courtroom anxiously awaiting the decision.

3 The judge has to make a decision that's  
4 based on specific people, specific testimony,  
5 specific evidence. The legislators worry about  
6 the fate of the Commonwealth in general and his  
7 or her constituents in general. The judge is  
8 concerned about one citizen and what will happen  
9 to them as a result of the decision they make.

10 So it does seem to me that, whether we're talking  
11 about a legislator or a judge, the nature and  
12 extent of the human experience matters. And if  
13 it were not so, a well-programmed computer could  
14 do either of our jobs. But it can't.

15 Drill down a bit and think about these  
16 situations which judges deal with every day in  
17 the Commonwealth. In deciding the custody of  
18 children, let's say age 4 and 6, would it not be  
19 helpful for the judge to have some experience  
20 with people of that age? In determining whether  
21 a son is protecting a mother from her own  
22 frailties in minding her money for her, or in  
23 taking advantage of her in her frailty, would not  
24 some experience with a frail, elderly parent be a  
25 useful thing for the decision maker in looking at

1 those facts?

2 In parsing a knotty question of title  
3 to real estate, or just the mineral or other  
4 rights in real estate, wouldn't experience in  
5 handling those cases be a helpful thing in making  
6 a decision? Even in trying to persuade lawyers  
7 to settle a case, wouldn't experience with  
8 difficult personalities--and I say that as a  
9 former litigator myself--or even experience with  
10 the particular litigators who are in the room be  
11 a useful thing in trying to get them to come to a  
12 resolution?

13 For understanding veterans, isn't it a  
14 good idea to have a judge who served in combat or  
15 understands combat to be able to judge their  
16 unique situations?

17 I think the answer to all these  
18 questions is yes, and I think it means that  
19 experience matters in doing the job of judge.

20 At my law firm, my senior partner, Tom  
21 Timoney, namesake for Timoney Knox, which is our  
22 law firm, practiced until a couple of weeks  
23 before his death in his 80's. He was not only  
24 the go-to guy in our law firm for trust and  
25 estates, which is what he was an expert in,

1 having practiced for more than 50 years, but he  
2 was also the go-to guy for just about everything  
3 else.

4 In other words, if you had a brother  
5 and a sister fighting over whether to pay for a  
6 headstone for mom's grave, Tom Timoney was the  
7 guy who would tell you how to get them to agree.

8 He had spent 50 years practicing law,  
9 50 years married to the same woman, 50 years  
10 raising nine children, and he had a wealth of  
11 interpersonal experience that helped him make  
12 good judgments about what should be done.

13 I think, in the later years, lawyers  
14 like Tom Timoney have those experiences  
15 fermented, so they become wisdom in practice. In  
16 my own home county, Judge Charles Davenport, the  
17 county's first black judge, was a master at  
18 settlement conferences. His percentage at  
19 settling cases was better than any other judge on  
20 our court, and he only left when the law required  
21 him to do that. And as a result, the court's  
22 backlog grew a little bit because he was not  
23 there to do his job.

24 I know that some people will worry that  
25 an increasing percentage of older judges, as an

1 increasing percent of seniors, might be afflicted  
2 with conditions like Alzheimer's or dementia or  
3 other things that would affect their ability to  
4 be effective judges.

5           However, I do not believe we need a  
6 hard-and-fast rule that bars everyone over the  
7 age of 70 from serving. That's why we have a  
8 Judicial Conduct Board consisting of judges,  
9 lawyers and citizens who can investigate  
10 complaints, and a Court of Judicial Discipline.  
11 Each of these bodies deals with specific  
12 complaints, investigations, specific judges, and  
13 determines whether or not they should be on the  
14 bench.

15           The current mandatory age of retirement  
16 at 70, by contrast, simply throws the baby out  
17 with the bathwater, ridding the court of wise,  
18 older judges who may have become better with age,  
19 along with those whose abilities may have  
20 declined.

21           As Rabbi Harold Kushner, author of many  
22 influential books, put it, we do ourselves a  
23 disservice when we make old age something to be  
24 feared. Life is not a resource to be used up, so  
25 the older we get, the less life we have. In

1 fact, life is an accumulation of wisdom, love,  
2 experience of people encountered, obstacles  
3 overcome. The longer we live, the more life we  
4 possess.

5 House Bill 79 stands for the  
6 proposition that mere age alone is not a  
7 disqualifier if the human being selected as a  
8 judge is otherwise competent to be a judge. In  
9 fact, if we want wise and just judges making the  
10 right decisions for the individuals who stand in  
11 front of them, we just might learn to prize their  
12 extended experience and the wisdom that it  
13 brings. Thank you.

14 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
15 very much, Representative Harper.

16 Before we open up the questions, just  
17 noting for the record that we've been joined by  
18 Representatives Ted Harhai and by our esteemed  
19 Subcommittee Minority Chair, John Sabatina.  
20 John, did you have any opening comments that you  
21 wanted to make?

22 SUBCOMMITTEE CHAIRMAN SABATINA: I just  
23 want to apologize to everyone for being late. I  
24 had a 9:45 meeting that ran over. So, I got here  
25 as quick as I could.



1           REPRESENTATIVE HARPER: Thank you for  
2 being here.

3           SUBCOMMITTEE CHAIRMAN SABATINA: Thank  
4 you.

5           SUBCOMMITTEE CHAIRMAN GRELL: Are there  
6 questions for Representative Harper? Chairman.

7           CHAIRMAN CALTAGIRONE: Powerful,  
8 powerful testimony, and I couldn't agree with you  
9 more. You know, just alluding back to -- you  
10 were saying about veterans and whatnot. My  
11 federal judge in my office, retired federal  
12 judge, he was a fighter pilot in World War II,  
13 shot down over the Sea of Japan; and worked in  
14 the vineyards in the legal community for 30 years  
15 with the wealth of experience of cases that he's  
16 handled and 25 years on the federal bench. So  
17 you're absolutely right.

18           You know, we set up all these  
19 speciality courts around the state, and why  
20 should we throw that experience out? You know,  
21 I'm just dumfounded that we do that to some of  
22 our most experienced people. It's just like us  
23 in the legislature. You know, the more  
24 experience you get, the better you get at trying  
25 to get laws passed and correcting conditions

1 within this Commonwealth.

2 So, I concur and I agree with you.

3 Excellent testimony.

4 REPRESENTATIVE HARPER: Thank you.

5 SUBCOMMITTEE CHAIRMAN GRELL: Was that  
6 a question? (Laughter). Just kidding.

7 Are there any other questions?

8 Representative Barbin.

9 REPRESENTATIVE BARBIN: I want to thank  
10 you, Representative, for bringing this  
11 legislation to the committee.

12 Have you -- And I think the 75-year is  
13 kind of a good place to start the discussion.  
14 Has there been any study that you've come across  
15 in coming up with your age change that would  
16 suggest in any way that people that are age 70  
17 are any different than age 75 as far as mental  
18 acuity?

19 REPRESENTATIVE HARPER: I think we have  
20 testimony on that later today. And, so -- And  
21 I'm not a doctor and I wouldn't go into it that  
22 way. I do know that, as life expectancy has  
23 increased in America and in Pennsylvania, you  
24 know, people are more active longer. I don't  
25 know of a study that would say that, but perhaps

1 the medical doctor could talk about that.

2 REPRESENTATIVE BARBIN: And has there  
3 been any -- You have to pick a number. It's --

4 REPRESENTATIVE HARPER: Right.

5 Actually, you may not have to pick a number. I  
6 selected 75 believing it to be an incremental  
7 change. This is our constitution, after all. It  
8 has to go through two sessions and then the  
9 voters get to pick. So, I picked 75 because I  
10 thought it would be a more successful bill.

11 However, Senator Greenleaf has a bill  
12 that's very, very similar, but it simply removes  
13 any mandatory retirement age at all, which would  
14 mimic the federal system.

15 REPRESENTATIVE BARBIN: And see,  
16 that's -- That's where I was going with this  
17 question. Under current law, under our  
18 constitution, isn't there -- isn't it difficult  
19 to remove -- Assuming we had no limit; there was  
20 no age limit for retirement. Wouldn't we be in a  
21 more difficult position -- or wouldn't we be  
22 putting the courts in a more difficult position  
23 because, at that point, wouldn't you have a, you  
24 know, an adversarial position if someone objected  
25 to being removed because of a disability?

1           REPRESENTATIVE HARPER: I think  
2 removing a judge is properly difficult for the  
3 separation of powers of the three branches of  
4 government. I think also that when a judge  
5 becomes incompetent, and it's happened in my  
6 county, it is a very sad and difficult thing to  
7 deal with, but it can be dealt with. And I don't  
8 think that we should disqualify everybody because  
9 of one instance of someone having a problem.

10           REPRESENTATIVE BARBIN: And see, I  
11 would commend you for this bill, the way you're  
12 approaching the bill, because I do think there's  
13 a rational basis to pick a number. And I think  
14 what that does is, it avoids a lot of difficult  
15 cases. Whether that number is 75 or 80, by  
16 having a number, we won't force the courts to be  
17 in a position where they have to remove judges.  
18 And at the same time, we're allowing judges to  
19 serve that have more experience, and that  
20 benefits the courts as a whole. So thank you  
21 for --

22           REPRESENTATIVE HARPER: Right. That  
23 view --

24           REPRESENTATIVE BARBIN: And I will be  
25 signing on as a co-sponsor.

1                   REPRESENTATIVE HARPER: Thank you.

2                   That view's been expressed by others, so --

3                   SUBCOMMITTEE CHAIRMAN GRELL: Thank  
4                   you. Representative Kula.

5                   REPRESENTATIVE KULA: Thank you.

6                   I was just wondering if there has been  
7                   any statistics, or if you have seen any, as to  
8                   when -- if there is an average age when someone  
9                   runs for judge? I mean, it seems that maybe the  
10                  70 limit may keep good people from running for  
11                  judge because of the fact that maybe they can't  
12                  finish out a one-year -- or a term of 10 years.

13                  And I know a lot of attorneys, and back  
14                  in my county we have just gone through two judges  
15                  that reached age 70 and are now off the bench,  
16                  other than sitting as senior judges. So we --  
17                  You know, I have had great experience with what  
18                  it means. As a matter of fact, one of our common  
19                  pleas judges is part of the lawsuit now pending  
20                  because of having to retire.

21                  But, I -- I -- In looking at -- I  
22                  think -- I know, when I came into the House, I  
23                  was not your average young person. And had there  
24                  been an age limit, I don't know how much longer I  
25                  would be able to serve, which many people may

1 feel is a good thing. (Laughter). But, I'm just  
2 wondering if there is statistics that show, what  
3 is the average age of a judge coming into office?

4 REPRESENTATIVE HARPER: I only know  
5 from my own experience or I've watched in  
6 Montgomery County, which is a fairly populous  
7 county with an awful lot of judges. There is a  
8 discouragement of people who might not be able to  
9 serve a full term. I have seen that in the  
10 political process of electing judges.

11 And the odd thing about it is, many  
12 lawyers regard becoming a judge as the capstone  
13 of a career, so they don't even think about it  
14 until they master the art of being a lawyer, and  
15 that is gonna put them somewhere in their 50's or  
16 60's to begin with. So, I -- I know what you're  
17 saying to be true in my own county because I've  
18 seen it. But, the people are discouraged from  
19 running for judge if they can't comp -- so if  
20 they effectively have to be in their 50's, when  
21 they might not even feel ready to be a judge  
22 until 60 or above.

23 REPRESENTATIVE KULA: Thank you.

24 SUBCOMMITTEE CHAIRMAN GRELL:  
25 Representative Dean.

1                   REPRESENTATIVE DEAN: Thank you, Mr.  
2 Chairman. Thank you, Representative.

3                   You offered a really compelling opening  
4 statement for your legislation, and I'm a  
5 co-sponsor of it. I think we see examples of  
6 this, not just in the judiciary but maybe  
7 uniquely in the judiciary, but we see it in  
8 academia. I was a teacher before this, and the  
9 accumulation of experience in dealing with  
10 students. The professors I dealt with, those who  
11 were 70 were certainly qualified and even more  
12 qualified in many ways.

13                   We see it in industry also. You are  
14 not disqualified because you hit the age of 70.  
15 In fact, the accumulation of your time and  
16 experience actually adds to what you can do in  
17 all areas of life, I think. It's probably a  
18 cultural problem we have. Noting back to how we  
19 prize youth, and we maybe forget to prize the  
20 wisdom and experience of age.

21                   Two questions: Number 1, do you think  
22 this is more properly dealt with in the  
23 legislature rather than by the judicial branch?  
24 I know there is a case you've mentioned.

25                   REPRESENTATIVE HARPER: Well, I

1 expected that question and decided that it was  
2 not my place to say whether it should be done  
3 here or there. Obviously, it's a constitutional  
4 provision to change it in the constitution. You  
5 know, we have to go this route where we pass in  
6 two successive sessions and then put it on the  
7 ballot and let the voters make the final call.

8 I've also actually done some age  
9 discrimination work, so I know some of the cases  
10 that have been filed by judges around the state.  
11 I actually deal with that, and I don't know wanna  
12 prejudge that issue without having the evidence  
13 of whatever they're offering in front of myself.

14 So, I absolutely think it's appropriate  
15 for us to address it. Whether or not it's also  
16 appropriate for them to address it is a question  
17 for a different court, literally.

18 Okay?

19 REPRESENTATIVE DEAN: And then my other  
20 thought was, in preparing this legislation, did  
21 you take a look at the fiscal impact or impacts  
22 this could have?

23 REPRESENTATIVE HARPER: You know, it's  
24 difficult to get at that. I have been told by  
25 some people that the fiscal impact of allowing a



1 judge to serve is actually better because they  
2 don't start taking their pension right away, and  
3 you don't have to teach a new judge the ropes or  
4 fit out a new courtroom or do any of those  
5 things.

6 I think that -- I'm not exactly sure  
7 how that plays into the pension. Some people  
8 say, well, you've got to keep paying them for  
9 longer, but you'd be paying somebody anyway. So,  
10 it may be a net positive, but I can't say that  
11 for sure.

12 REPRESENTATIVE DEAN: Okay. Thanks  
13 very much.

14 SUBCOMMITTEE CHAIRMAN GRELL: Thank  
15 you. Are there any other questions for  
16 Representative Harper?

17 SUBCOMMITTEE CHAIRMAN SABATINA: Thank  
18 you, Representative Harper, and I apologize if  
19 you already covered this before I had got here.

20 But one question that comes to mind is  
21 that, how -- how would a judge that no longer has  
22 his mental faculties about him be removed, I  
23 guess, if there is no -- not so much in your  
24 bill, but, I guess in Senator Greenleaf's bill  
25 where there is no age -- there is no age limit?

1 How would a judge -- What's the process, I guess?

2 REPRESENTATIVE HARPER: We have a  
3 Judicial Conduct Board and a Court of Judicial  
4 Discipline to investigate and deal with  
5 complaints. So, likely it would be a complaint.

6 In my county when it happened to a  
7 judge who was, I think in his early 60's, it was  
8 a very painful experience, and he was persuaded  
9 to resign, you know. But -- So there's -- You  
10 know, you can get a debilitating disease like  
11 Alzheimer's earlier than age 70 right now, and  
12 that has happened. It's painful all around.  
13 But, in my county he was persuaded to resign, and  
14 the resort to judicial discipline, which is  
15 available, was not necessary.

16 SUBCOMMITTEE CHAIRMAN SABATINA: Okay.  
17 Thank you.

18 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
19 very much for your testimony, and you're welcome  
20 to join us up here if you'd like, Representative  
21 Harper.

22 REPRESENTATIVE HARPER: I'll sit right  
23 there. I did bring copies. I don't know if it's  
24 been handed out or not, but I have copies.

25 SUBCOMMITTEE CHAIRMAN GRELL: Yeah, we

1 will. Thank you.

2 REPRESENTATIVE HARPER: Thank you.

3 SUBCOMMITTEE CHAIRMAN GRELL: Our next  
4 testifier is Dean Kenneth Gormley, who is the  
5 Dean of Duquesne University School of Law.  
6 Welcome. Make yourself comfortable and begin  
7 when you're ready.

8 DEAN GORMLEY: Thank you very much.  
9 Good morning. My name's Ken Gormley. I have the  
10 privilege of serving as Dean of Duquesne  
11 University School of Law in Pittsburgh. It's an  
12 honor to have the opportunity to testify here  
13 today.

14 My thanks to Representative Grell,  
15 Chair of the Subcommittee, as well as  
16 Representative Sabatina, the Minority Chairman.  
17 Also my thanks to Representative Marsico, the  
18 Chair of the Judiciary Committee; Representative  
19 Caltagirone, the Minority Chair; and all of the  
20 members of both distinguished committees. I'll  
21 try to be brief, but I do welcome questions at  
22 the conclusion as well.

23 I've been teaching law in one fashion  
24 or another for about 30 years. My areas of  
25 expertise are constitutional law and, also, state

1 constitutional law, which I've been teaching  
2 since 1985. I'm the editor of a book called The  
3 Pennsylvania Constitution: A Treatis on Rights  
4 and Liberties. And so, I remain active as a  
5 teacher and a scholar in the field of  
6 Pennsylvania constitutional law, which is why I  
7 suppose I've been invited to testify today.

8 I support the proposed constitutional  
9 amendment to Article V, Section 16(b) to change  
10 the age from 70 to 75 years, both for practical  
11 reasons and, also, in furtherance of the overall  
12 long-term vitality of the Pennsylvania  
13 Constitution, which is designed specifically to  
14 adapt itself over time through systematic  
15 constitutional amendments like this.

16 So, first, let me say a word about the  
17 pragmatic reasons. At the time of the  
18 Constitutional Convention in 1967-68, which is  
19 now almost a half-century ago, the age  
20 established for the retirement of judges was a  
21 sensible one. The age of 70 for any jurist at  
22 that time was a pretty advanced age. Indeed, the  
23 debates at the Constitutional Convention  
24 specifically addressed this issue.

25 The framers were focused on selecting a

1 deadline; a clear-cut, a definite reasonable age  
2 for the retirement of judges to replace the prior  
3 system where judges in Pennsylvania were not  
4 required to retire at a specific time. And so,  
5 the age of 1970 -- the age of 70 in 1968  
6 represented, really, the high end of the spectrum  
7 at the time.

8           The average life expectancy in the  
9 United States at that time was 66.6 years for  
10 males; 74.1 years for females, so an average of  
11 70.2. I want to point out that, at that time  
12 there were very few female judges in  
13 Pennsylvania, so the age selected was well beyond  
14 the average life expectancy of most judges on the  
15 bench at that time.

16           Today, in 2013, the average projected  
17 life expectancy for males is 76.2 years; females  
18 81.1 years, with a combined average of 78.7  
19 years. So, by modern standards, 75 years is a  
20 very sensible age. And this is very important.  
21 I want to emphasize this with the committee. It  
22 is especially sensible when one focuses on the  
23 female life expectancy that has now surpassed 80  
24 years.

25           The dramatic increase of the number of

1 female judges serving today as compared to 1968  
2 is particularly important in my view. It means  
3 that maintaining -- if we were to maintain the  
4 mandatory retirement age of 70, this  
5 disproportionately impacts female judges in an  
6 adverse fashion.

7           Conversely, amending the constitution  
8 to change the retirement age to 75 is  
9 particularly fair given the growing number of  
10 female jurists in the Commonwealth. And on top  
11 of that, as you'll hear in later testimony, I  
12 believe, given changes in medical science, the  
13 age of 75 is much more in sync with the  
14 productive work cycle of all lawyers, jurists and  
15 professionals, generally, in our society.

16           I should note that the members of the  
17 Constitutional Convention who framed this current  
18 version in 1968 anticipated that the age of 70  
19 might have to change at some time. During the  
20 Con-Con of '67-'68, Delegate Mercer Tate, a  
21 Democrat from Philadelphia, proposed specifically  
22 adding language that would permit this body, the  
23 Pennsylvania legislature, to, quote, make such  
24 changes in that mandatory retirement age for  
25 judges as it might deem appropriate from time to

1 time.

2 And Delegate Tate explained: None of  
3 us knows sitting here today--this is 1968--what  
4 medical science may be able to do with our  
5 longevity. It may be that age 70 will be  
6 entirely unrealistic 30, 50 or 75 years from now.  
7 Therefore, rather than have to go through the  
8 cumbersome task of a mandatory process, I would  
9 like to open the door for the legislature to make  
10 some changes here.

11 And so, Delegate W. Walter Braham, a  
12 highly-respected Republican from Lawrence County,  
13 concurred that it might be the best approach to  
14 give the legislature flexibility to increase the  
15 retirement age. He said that setting the age too  
16 low did not leave enough time for a lawyer to  
17 move up the ladder of the profession and then to  
18 dedicate his or her prime years serving on the  
19 judiciary. So, he actually emphasized that, for  
20 him, 70 should be the bottom limit and we should  
21 go 70 or above.

22 Ultimately, the proposal to add  
23 language permitting the legislature to change the  
24 age of retirement by statute, periodically over  
25 time, did not gain the majority of votes. Yet,

1 this discussion clearly demonstrates that the  
2 delegates were extremely cognizant that the age  
3 of 70 selected for mandatory retirement might  
4 have to be revisited in future years.

5 And if you look at Reference Manual  
6 Number 5 of the Constitutional Convention, which  
7 is called just, The Judiciary, which you can  
8 actually get on the Duquesne Law School website,  
9 this discusses in detail the proposed mandatory  
10 retirement of judges at a fixed age. This  
11 document, incidentally, was prepared by the  
12 Convention for the delegates themselves, and it  
13 reveals that a number of possibilities were  
14 considered.

15 For instance, the Pennsylvania Bar  
16 Association at the time proposed an age of not  
17 less than 72 years for justices of the Supreme  
18 Court and judges of the Superior Court, and not  
19 less than 70 years for all other judges. The  
20 whole point was, at this time the goal was to  
21 lock down a specific age so that the retirement  
22 age did not remain open-ended.

23 And there was a reason for that, as I  
24 have in the prepared testimony, and you've  
25 touched upon it. It was to eliminate that



1 unpleasantness of forcing the Supreme Court or  
2 some other body to remove judges; that small  
3 number of judges who were having some kind of  
4 mental or physical infirmity, and that was the  
5 point, I think, Representative Barbin was making  
6 earlier.

7           So, even as Reference Manual Number 5  
8 embraced a fixed retirement age of 70, it went on  
9 to note--here is a quote--Difficult to fix a  
10 suitable retirement age; age is biological, not  
11 chronological. Moreover, with continuing  
12 advances in medical and health technology to be  
13 expected, a fixed retirement age may soon become  
14 unrealistic.

15           So, at the time, the age of 70 was a  
16 compromise, essentially, and the delegates knew  
17 that it might have to be revisited at some time.  
18 And the way you'd have to revisit it would be  
19 through constitutional amendment.

20           So, 45 years later, our society has  
21 changed. Many more women have entered the legal  
22 profession. Both men and women are physically  
23 and mentally more capable of performing judicial  
24 functions at a much higher level for a much  
25 longer time.

1           And secondly, I want to emphasize that  
2           it is both appropriate and fitting for this body,  
3           the legislature, to use the amendment process set  
4           forth in Article XI of the constitution to revise  
5           this retirement age. That's exactly what the  
6           amendment process is designed for in our  
7           fundamental charter.

8           And I just wanted to emphasize that  
9           state constitutions--And I've been teaching this  
10          a long time--are quite different than the federal  
11          constitution. As you know, it is extremely  
12          difficult to amend the federal constitution, and  
13          that's why we have so few amendments.

14          The state constitution in  
15          Pennsylvania, and in most states, is quite  
16          different. As you know, the process requires a  
17          simple majority and two successive sessions; then  
18          advertisement in newspapers of general  
19          circulation, and then a simple majority of the  
20          citizenry voting in a particular election can  
21          make it part of our state constitution. The ease  
22          of that process is intentional. It is -- Our  
23          constitution is longer and more detailed than the  
24          federal constitution, and that's true of almost  
25          every state constitution. We have nuts-and-bolts

1 provisions about the qualifications of judges on  
2 traffic court; the amount of debt in the City of  
3 Philadelphia that's allowed. State constitutions  
4 are purposely designed to be readily amended.

5           And so, the U.S. Constitution, in 226  
6 years, has only been amended 17 times. The  
7 Pennsylvania Constitution has been totally  
8 overhauled four times. There have been hundreds  
9 of provisions that have been amended, long and  
10 short, ever since the first document was -- the  
11 first version of this constitution was adopted in  
12 1776; one of the most influential state  
13 constitutions that actually influenced the  
14 drafting of the U.S. Constitution, I should note.

15           So, I believe that the proposed  
16 legislation that's currently before this  
17 committee is the best possible solution, and  
18 there are lawsuits going on and controversy that  
19 has been with us for several decades.

20           I should note that I do not favor a  
21 constitutional amendment that would change the  
22 retirement age for judges to 80; nor do I favor a  
23 provision that would leave the retirement age  
24 open-ended so that there was no mandatory  
25 retirement age at all.

1           In my role as a dean at a law school in  
2 this Commonwealth, I'm extremely sensitive to the  
3 fact that younger men and women entering the  
4 profession need to have an opportunity to advance  
5 and, ultimately, to have a chance to serve the  
6 Commonwealth through the election or appointment  
7 as a judge in the courts of this Commonwealth.

8           If there is no point at which judges  
9 must retire or take some sort of senior status,  
10 this may ultimately harm the citizens of this  
11 Commonwealth if there is no opportunity for fresh  
12 ideas, fresh talent and a diverse pool of  
13 qualified candidates to have an opportunity to  
14 compete for judicial election or appointment.

15           But I believe that changing the  
16 retirement age to 75 strikes the perfect balance.  
17 It adjusts the mandatory retirement age to  
18 reflect the fact that men and women do live  
19 longer and are both physically and mentally  
20 capable of this job. But it does, as the  
21 original provision did, fix a firm retirement age  
22 so that there is an automatic process for this,  
23 rather than leaving this important matter to  
24 individual situations and circumstances.

25           This new provision would still allow

1 for judges who are active and competent after  
2 retirement age to be assigned to temporary  
3 judicial service by the Supreme Court under  
4 Article V, Section 16(c). And in appropriate  
5 circumstances, as Representative Harper pointed  
6 out, if there is a physical or mental infirmity,  
7 there are provisions in the constitution, and I  
8 tried to end in the processes of the courts that  
9 I've mentioned in my written testimony, that do  
10 allow the courts to deal with this.

11           There are a couple additional reasons  
12 that I'll make -- that I believe make this  
13 sensible that I'll just mention quickly. First,  
14 don't forget that citizens will still have a  
15 chance to decide which judges will be retained  
16 through the ordinary retention process. So, if  
17 the voters do not think a particular jurist is  
18 competent to continue doing his or her job, if  
19 they come up for retention during that period,  
20 the voters can make that decision; the citizens  
21 can make that decision.

22           Second, the judges in Pennsylvania do,  
23 fortunately, receive a good, well-funded pension  
24 at the time they retire. I do believe it  
25 benefits the citizens of this Commonwealth if

1 judges continue to work longer if they're being  
2 paid with taxpayer dollars anyway; allowing  
3 judges to work more years, if they're getting  
4 paid anyway, seems to be fiscally prudent.

5           And third, many judges who have reached  
6 the age of 70 have, in fact, continued to serve  
7 by appointment beyond the retirement age. And  
8 so, this is one piece of evidence that says they  
9 are quite capable of doing productive work. And,  
10 in fact, it confirms that, as some of the points  
11 were made, their judicial experience and  
12 expertise is invaluable in allowing our system of  
13 justice to work efficiently.

14           So, in conclusion, I do believe it is  
15 both prudent and appropriate for the General  
16 Assembly to amend the constitution to change the  
17 mandatory retirement age from 70 to 75. In the  
18 end, I do believe that that change will benefit  
19 the citizens of this Commonwealth. It will allow  
20 jurists, both males and females, who dedicate  
21 their careers and their legal talents to serving  
22 the public on the bench to be able to do that  
23 through their productive years, rather than being  
24 removed at the peak of their productivity due to  
25 a provision that is now outdated and

1 anachronistic.

2           At the same time, I think it strikes a  
3 careful balance by maintaining a specific age  
4 that is both fair and rational. The word  
5 rational is a good one and important here. It  
6 eliminates the uncomfortable situation of having  
7 to do this on an ad hoc basis for the Supreme  
8 Court if there are problems.

9           And it also has the salutary effect of  
10 allowing young men and women entering the legal  
11 profession to have an opportunity to be elected  
12 or appointed to the bench after they gain the  
13 requisite experience and expertise, rather than  
14 making it impossible because there is never any  
15 turnover.

16           So, for all of these reasons, I support  
17 the current proposed constitutional amendment. I  
18 appreciate very much the opportunity to testify,  
19 and I welcome any questions.

20           SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
21 to Dean Gormley. We very much appreciate your  
22 thoughtful and well-researched testimony. I may  
23 want to talk to you at another time about the  
24 contract impairment clause in the state  
25 constitution, but that's for another day.

1                   Are there questions of Dean Gormley?  
2 Representative Saccone.

3                   REPRESENTATIVE SACCONO: Thank you, Mr.  
4 Chairman. Thank you, Dean Gormley, for your  
5 testimony.

6                   One question. Do you know what  
7 percentage of judges are retained at the ballot  
8 box?

9                   DEAN GORMLEY: I know, having been a  
10 president of the Allegheny County Bar  
11 Association; being involved in it, that it is an  
12 extremely high proportion. And very honestly,  
13 Representative, it is in precisely often --  
14 precisely the cases you want it to happen, if  
15 there is a specific problem where voters of that  
16 county understand that there is a problem where  
17 there have been exceptions. So it is rare, but  
18 it does happen on occasion.

19                   REPRESENTATIVE SACCONO: And I just  
20 want to address the other argument that we've  
21 heard a number of times on that, you know,  
22 people, the elderly, as they gain in age, that  
23 they're certainly capable of working. Obviously,  
24 that's true. We know that age is not necessarily  
25 a disqualifier.



1           But, I don't think that's the -- I  
2           don't think that's ever been the argument. I  
3           think it's more of, you know, this -- the  
4           argument for having an age limit is so you can  
5           refresh the blood in the system and allow people  
6           to move up. So, everybody acknowledges that you  
7           could be 90 and still be working well --

8           DEAN GORMLEY: Sure.

9           REPRESENTATIVE SACCONI: -- for some  
10          people. But, the problem is, when people start  
11          to slow down at a certain age--And I see this in  
12          academia, too; I teach college myself--you know,  
13          there's a leveling-off sometimes. And it may not  
14          be that someone is incompetent, and so you --  
15          it's very hard to remove someone, even though  
16          they're kind of leveled off and maybe even going  
17          down the hill a little bit, but they're not to  
18          the level of, you know, we really got to remove  
19          this person. But, it would be beneficial if that  
20          person stepped aside and let some younger people  
21          move in and take over. So, I think that's more  
22          of the argument for why we should have an age  
23          limit. Thank you.

24          DEAN GORMLEY: Yes, and I agree with  
25          that very much. I guess the question is where

1 you set that leveling-off stage, and I think 70  
2 used to be a good point for that. It isn't  
3 anymore.

4 Certainly, as Representative  
5 Caltagirone gave the example with the former  
6 federal judge, Judge Joe Weis on the Third  
7 Circuit is about to celebrate his 90th birthday  
8 and is still sharp as could be. Not everyone is  
9 going to reach that age. You don't want to build  
10 the system for that. You want to try to reach a  
11 nice medium, and I think this proposed  
12 legislation does it -- or this proposed  
13 amendment.

14 SUBCOMMITTEE CHAIRMAN GRELL: Next,  
15 Representative Stephens.

16 REPRESENTATIVE STEPHENS: Thank you.  
17 And thank you, Dean, for being here and offering  
18 your testimony.

19 I wondered if you could share with us  
20 how the senior judge system, I guess, survives  
21 constitutional scrutiny with the mandatory  
22 retirement age. In other words, how do we have  
23 senior judges sitting as judges beyond the age of  
24 70 when our constitution doesn't seem to permit  
25 that? Do you know -- Are you aware of that?

1 DEAN GORMLEY: Are you talking about  
2 under the state constitution?

3 REPRESENTATIVE STEPHENS: Yeah. I mean  
4 just generally in Pennsylvania.

5 DEAN GORMLEY: Um, I believe it is --  
6 There is a specific provision -- Is it 16 --  
7 Article V, Section 16. But, the way it works is,  
8 they reach retirement age. It's different than  
9 the federal system. That's why when you say  
10 senior status, I'm just hesitating. I'm not sure  
11 if that's the correct word under our system.

12 REPRESENTATIVE STEPHENS: It is.

13 DEAN GORMLEY: Oh, it is?

14 REPRESENTATIVE STEPHENS: We have  
15 senior judges in Pennsylvania.

16 DEAN GORMLEY: Okay. But what's  
17 different than when they take senior status in  
18 the federal system is, that they -- they actually  
19 retire and then they get compensated on a  
20 periodic basis if they are assigned to -- you  
21 know, by the court for specific duties. That's  
22 my understanding of how it works.

23 REPRESENTATIVE STEPHENS: So I guess my  
24 point is -- And in that case -- And maybe you're  
25 not the person I should be directing these to,

1 and there may be some other speakers afterwards  
2 that could speak on this subject. In that  
3 situation, it seems as though we may have that --  
4 that gatekeeper who will still permit a jurist to  
5 remain active and participate as a judge beyond  
6 the age of 70.

7 But if there are, you know, some  
8 issues, you know, then, whoever is making that  
9 decision--presumably, AOPC or the Supreme Court  
10 or whoever--you know, would be able to not  
11 utilize that person --

12 DEAN GORMLEY: Right.

13 REPRESENTATIVE STEPHENS: -- to avoid  
14 sort of the uncomfortable situation that I know  
15 Representative Harper had mentioned and, as well  
16 as you referred to in your comments. I mean, do  
17 you have any comments or thoughts on that?

18 DEAN GORMLEY: Well, I -- I think I  
19 understand enough, and there probably is someone  
20 who knows more about this. But, I do think that  
21 that is, in fact, the benefit of that gate-  
22 keeper; so you can decide not to appoint a person  
23 when they reach that age if you believe that  
24 there are issues, and that's very helpful.

25 But, the point is that, if you have

1 mandatory retirement at 70, there's no way you  
2 can make them a full-time functioning judge. You  
3 can only do it on this special status, and you  
4 get paid accordingly. That's my understanding.

5           And so, the problem is, you have this  
6 big, you know, group of judges who are quite  
7 competent to continue on a full-time status who  
8 aren't capable of doing that anymore. That's the  
9 difference. So, you still -- If you move it to  
10 75, you still have that gatekeeper function after  
11 75, and I think that that's valuable.

12           Did I answer your question?

13           REPRESENTATIVE STEPHENS: Yes. And I  
14 guess, I just wondered how, constitutionally,  
15 they're permitted to serve as a judge at age 72,  
16 for instance --

17           DEAN GORMLEY: Oh.

18           REPRESENTATIVE STEPHENS: -- as a  
19 senior judge.

20           DEAN GORMLEY: Oh, because it's in the  
21 constitution.

22           REPRESENTATIVE STEPHENS: Is it  
23 expressly permitted? Okay.

24           DEAN GORMLEY: Yeah.

25           REPRESENTATIVE STEPHENS: That's what I

1 was hoping for.

2 SUBCOMMITTEE CHAIRMAN GRELL:

3 Representative Stephens, Article -- or Section  
4 16(c) says: A former or retired justice or judge  
5 may, with his consent, be assigned by the Supreme  
6 Court on temporary judicial service as may be  
7 prescribed by rule of the Supreme Court.

8 And we also have a testifier later that  
9 can walk us through the senior judge process.

10 REPRESENTATIVE STEPHENS: That's  
11 terrific. I appreciate it. Thank you.

12 SUBCOMMITTEE CHAIRMAN GRELL: And we  
13 have Representative Barbin with a question?

14 REPRESENTATIVE BARBIN: Yeah. Thank  
15 you.

16 On the retention issue, current law  
17 says that you'll be elected for a 10-year term,  
18 and you'll be retained for another 10-year term.  
19 Do you have an opinion, or as --

20 We have a retention system. If our --  
21 If our number is 75, what it seems like the  
22 change would do would be to make the group of  
23 judges that are beyond 70 but are competent, and  
24 now with this change beyond 75, may be a smaller  
25 group. Because, under the law, you're gonna have

1 these people that were 70 and had to be -- either  
2 get senior status or be removed from the bench,  
3 you'll now have those same people serving on with  
4 more experience.

5           Isn't it more appropriate, given the  
6 fact that we have a retention basis for judges,  
7 to have a higher number? Because, if the idea is  
8 that the citizens always have a say, but the  
9 retention nature of the -- of the judge election  
10 after the first term is a limited question; it's  
11 a yes or no.

12           DEAN GORMLEY: Right.

13           REPRESENTATIVE BARBIN: Well, then,  
14 doesn't it make more sense to move that number to  
15 75, because what it does is, it allows a system  
16 we have already have in place, which is  
17 retention, 10 additional years, yes or no, to be  
18 advanced? Because a lot of the people that go  
19 into these judge positions are going in at 50.  
20 And they're 51 or 52, and what we're doing is,  
21 we're taking out their ability to serve a second  
22 term. I mean, do you have an opinion on it?

23           DEAN GORMLEY: Well, I think that's a  
24 very good point. I -- I certainly concur in that  
25 because, you know, ultimately, you -- Someone

1 asked the question about what age most people  
2 become judges, and I don't know if it was  
3 Representative Dean, or someone asked that  
4 question.

5 But, it is true that most people, from  
6 my experience, it's when you're moving into the  
7 50's and 60's. And there is clearly a barrier  
8 constructed if you know you're going to have  
9 to -- Even running for retention creates stress,  
10 and you have to, you know, have some kind of a  
11 little campaign or whatever. And so, if you kind  
12 of block people from doing that, then you're  
13 losing a lot of talent.

14 So, I do think it -- It's the ultimate  
15 check here that you have the retention vote.  
16 That's one of the checks, along with the other  
17 things. And, of course, it all depends on when  
18 that cycle hits for that individual person for  
19 the 10 years. That's why it's gonna change in  
20 individual circumstances. But it is another good  
21 argument.

22 REPRESENTATIVE BARBIN: Thank you.

23 SUBCOMMITTEE CHAIRMAN GRELL: I have  
24 one question. On this issue of whether to fix an  
25 age or not, leave it open-ended --



1 DEAN GORMLEY: Yeah.

2 SUBCOMMITTEE CHAIRMAN GRELL: -- what  
3 would you think of the idea of putting in the  
4 constitution that the legislature would have the  
5 ability to fix that age from time to time;  
6 however, it would not be lower than 75, for  
7 example? That would avoid having to go through  
8 this 10 or 20 years from now again.

9 DEAN GORMLEY: That's a great question  
10 that I haven't thought a lot about.

11 SUBCOMMITTEE CHAIRMAN GRELL: Fair  
12 enough.

13 DEAN GORMLEY: I do think that the --  
14 You know, you still have the same problem that  
15 the Convention worried about in 1968. If you  
16 leave it to legislation, it can -- you know,  
17 you're gonna be revisiting this every two years,  
18 or whatever. I don't know that you want that.  
19 So I can't say I'm opposed to it, but I can't say  
20 I'm thrilled with it either.

21 SUBCOMMITTEE CHAIRMAN GRELL: Fair  
22 enough.

23 DEAN GORMLEY: There's something nice  
24 about locking it down in the constitution.  
25 Frankly, waiting 45 or 50 years to go through

1 this process, that's not a bad thing. That's how  
2 the system is supposed to work. That's how our  
3 constitution is supposed to work.

4 So, it -- it settles the question, if  
5 you will, for our time, and by the time there are  
6 new debates over this, most of us will probably  
7 be doing something else other than this; and so,  
8 we can leave it to another generation to worry  
9 about.

10 SUBCOMMITTEE CHAIRMAN GRELL: Thank  
11 you. I think we have two more, hopefully, brief  
12 questions. Representative Dean.

13 REPRESENTATIVE DEAN: Very brief.  
14 Thank you very much. Thank you, Dean Gormley,  
15 for your terrific testimony and great perspective  
16 and detail.

17 Similar to the question that I asked of  
18 the Representative, you've compellingly tell us  
19 why it is appropriate that we get involved in  
20 this issue and use the constitutional amendment  
21 process to do so. What do you think is the role  
22 of the judiciary in the question of age of  
23 judges?

24 DEAN GORMLEY: Oh, I can just say that  
25 that's a separate issue in my view. That's

1 dealing with what we have now and is there a  
2 problem with it under both the federal and state  
3 constitutions, so I don't take the position on  
4 that. That's the past. That's what's in here  
5 now. Does it create a problem?

6           What this deals with is the future and  
7 how we deal with it. I do -- If you fix this in  
8 the constitution, I do believe, incidentally,  
9 that it is constitutional under, you know --  
10 Obviously, if it becomes part of the Pennsylvania  
11 Constitution, it, you know, will be  
12 constitutional in Pennsylvania.

13           But, in terms of the federal  
14 constitution; if a federal court says it's  
15 unconstitutional under the U.S. Constitution to  
16 have any mandatory retirement age, well, you'll  
17 find out about that soon enough, I would think.  
18 That issue, in my understanding, has been dealt  
19 with before.

20           And so, I think it is very wise to be  
21 doing this at this time. If it gets resolved in  
22 another way in the courts, fine; you've done your  
23 job. But, my guess is, this is ultimately how  
24 it's going to have to be resolved.

25           SUBCOMMITTEE CHAIRMAN GRELL: And,

1 finally, Representative Saccone.

2 REPRESENTATIVE SACCONI: Sorry. One  
3 more question, Dean Gormley.

4 Knowing that this hearing was today, a  
5 few people asked me to present this question, and  
6 maybe you're the right person to do that to.  
7 Maybe in conjunction with this, or separate,  
8 would it be better to -- to change the term of  
9 the judges for the retention from 10, to move it  
10 back to something like 6, especially if you're  
11 gonna increase the age so that -- as you said it,  
12 so they would have to go through a little bit of  
13 str -- more stress more frequently, and allow  
14 them that, as they reach an older age, to show us  
15 they are still capable of doing that, and that  
16 the voters make that choice more frequently than  
17 they do now?

18 DEAN GORMLEY: Again, I would have to  
19 say that's not a question I've spent time  
20 thinking about until this moment. But I would  
21 have to say, my instinct is I do not favor that.  
22 I do not favor that because I believe that the  
23 judiciary, as the point was made earlier, is  
24 quite different than the political branches of  
25 the legislature and the executive branch. Their

1 job is to stay out of politics as much as  
2 possible and to decide cases as much as possible.  
3 I qualify that.

4 But, their -- their core role in  
5 deciding cases is not a political role. That's  
6 what I want to emphasize. Their job is to decide  
7 cases under the law and the constitution. The  
8 more you throw them into the political process,  
9 the more that is jeopardized, in my view, because  
10 you have to go out and, at times, raise money,  
11 and we all know how that kind of complicates  
12 life.

13 So, I have to say I -- You know,  
14 there's a whole separate question -- And Lynn  
15 Marks, of course, is here today. But, a whole  
16 separate question about merit selection versus  
17 election of judges --- And I'm not here to talk  
18 about that. All I will say is, I am in favor of  
19 keeping judges out of politics as much as humanly  
20 possible. So I would not be inclined to favor  
21 that.

22 REPRESENTATIVE SACCONI: Of course, and  
23 the people on the other side of that argument say  
24 it's because they have such a sheltered, isolated  
25 term there that they can -- they can be involved

1 in politics more than -- and they can inject --  
2 inject their own political views into their cases  
3 more easily because they're not subject to the  
4 voters as frequently. So, there's two sides to  
5 that argument, too, but thank you very much.

6 DEAN GORMLEY: Okay.

7 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
8 very much, Dean, for being here. We appreciate  
9 your commentary and answering our questions.

10 DEAN GORMLEY: Thank you to all of the  
11 members of the committee.

12 SUBCOMMITTEE CHAIRMAN GRELL: Next we  
13 have a panel from the Pennsylvanians for Modern  
14 Courts: Lynn Marks, Executive Director,  
15 accompanied by Kaleena Laputka, who is a  
16 University of Pennsylvania Law School intern.  
17 Ladies, welcome and thank you.

18 I will note that we are running a  
19 little bit behind, as is typically the case. We  
20 have your written testimony. If you'd like to  
21 read that, you're welcome to do that. But if you  
22 could excerpt it a little bit, that would also be  
23 helpful.

24 MS. MARKS: Okay. Thank you very much  
25 for inviting us to testify today. I won't read

1 the whole thing. I know you have it before you.

2           Pennsylvanians for Modern Courts is a  
3 state-wide nonpartisan organization working to  
4 ensure that all Pennsylvanians can come to court  
5 with confidence that they will be heard by fair,  
6 qualified and impartial judges. And we're here  
7 today, really, to be a source of information for  
8 you rather than testify in favor or against the  
9 bills before you.

10           We see arguments on a number of the  
11 sides, so we have not taken a position at this  
12 point, but we have done extensive research over  
13 it. It has become a hot issue, as we know, over  
14 the -- the past few months. And I applaud -- we  
15 applaud Representative Harper for really bringing  
16 this issue out into the public dialogue and she  
17 really -- her testimony was very compelling.

18           We are not going to limit our remarks,  
19 though, to the proposal to increase the age to  
20 75; but, instead, to talk about comparing the  
21 perspectives of keeping it at 70, extending it to  
22 75, or eliminating it all together, such as in  
23 one of the Senate bills.

24           We all know, there's been a lot of talk  
25 lately that there's gonna be an enormous turnover

1 on our state Supreme Court in the next five  
2 years. Five out of the seven justices will be  
3 new for -- will be turning 70, and one, as we  
4 know, has resigned following the criminal  
5 conviction.

6 So, that sea change will really have a  
7 huge effect on the -- on the institution, but we  
8 don't think that the public policy should be  
9 made -- should be determined by the situation at  
10 this point, although it's certainly something  
11 which I'm sure people will take into  
12 consideration.

13 Representative Harper did talk a little  
14 bit about the national landscape, but I just want  
15 to point out, I don't think that she did -- 33  
16 states, plus the District of Columbia, have  
17 provisions requiring mandatory retirement of  
18 judges. Most of those, and we have all the  
19 numbers in the testimony, are in the  
20 constitution, though some of them are required by  
21 statute. Currently, 16 other states are  
22 considering bills that are addressing this --  
23 this very issue.

24 We basically look at court-related  
25 issues through the lens of people who use the



1 court system and the court system itself, so we  
2 are not speaking from the perspective of, say,  
3 judges and lawyers, and, hopefully, you will hear  
4 from some of them.

5 We have a chart attached to our  
6 testimony, which we hope would help you in your  
7 analysis of dividing it into three, about  
8 maintaining the mandatory age at 70; extending it  
9 to 75, and eliminating it. So I'm not gonna go  
10 through that because of time, but, hopefully,  
11 that will be helpful in terms of setting out some  
12 of the issues.

13 But, I do want to talk, though, a  
14 little bit about how we think that the arguments  
15 can kind of be whittled down into two basic  
16 arguments at the heart of the issue. And one is  
17 age-related deterioration versus increased life  
18 expectancy. And the second is creating space for  
19 new judges versus the loss of institutional  
20 wisdom.

21 First, in terms of the age-related  
22 deterioration versus life expectancy, the  
23 mandatory retirement provisions really recognize  
24 that age-related deterioration of a judge's  
25 mental capabilities is a detriment to the -- to

1 the court system; that the role as -- of a judge,  
2 as Representative Harper said, is intellectually  
3 and physically demanding. And when a judge  
4 struggles to perform, it's the public that --  
5 that suffers.

6 So, proponents of mandatory retirement  
7 argue that it really protects the integrity of  
8 the court by removing aging judges from the bench  
9 before problems arise.

10 On the other hand, age affects  
11 individuals differently, and gee, we -- we all  
12 know that. There's been no evidence to support  
13 the notion that 70 is a cutoff where age begins  
14 to take a toll. There are many examples of  
15 jurists who serve splendidly well beyond the age  
16 of 70, and Representative Caltagirone talked  
17 about one of these. But even if 70 is used to be  
18 an individual threshold marking the descent into  
19 old age, times have changed and people are living  
20 longer. Advances in medicine have allowed people  
21 to stay healthy and vibrant longer.

22 Further, the judicial discipline system  
23 is in place to remove unfit judges regardless of  
24 age. And the discipline system, as we've heard  
25 before, but I really want to stress, should

1 assure -- reassure the public that either, quote,  
2 bad apples or, for this discussion, you know,  
3 people whose faculties are compromised by age are  
4 removed from the bench.

5           The second basic overall arguments we  
6 divide into creating space for new judges versus  
7 loss of institutional wisdom. On the one hand,  
8 mandatory retirements allows for the regular  
9 infusion of fresh blood into the judiciary and  
10 prevents incumbent, older judges from securing a  
11 monopoly over the bench without mandatory  
12 retirement of some age. And particularly in the  
13 smaller counties, eager, younger lawyers aspiring  
14 to become judges might get frustrated waiting for  
15 years for a vacancy. Courts are constantly  
16 evolving, and precedents need to keep pace with  
17 the times. Proponents of mandatory retirement  
18 argue that older judges may have a more difficult  
19 time adapting to new legal or cultural trends.

20           But, on the other hand, there's no  
21 evidence to support the assertion that younger  
22 judges are more open-minded or are more aware of  
23 modern legal trends. In fact, there have been  
24 some -- some studies showed that age is not a  
25 reliable indicator of a judge's beliefs; and,

1 also, etiology should not be a qualification for  
2 judging anyway. After all, as Dean Gormley was  
3 saying, the role of a judge is very different  
4 from the role that you have in the legislature.

5 I think one other argument here, and  
6 that is something that Representative Harper  
7 talked about, which is, in many ways, judges  
8 is -- judging is a learned-by -- by-doing  
9 profession; that the best judges, some would  
10 argue, tend to be the ones that have the most  
11 experience. And so, mandatory retirement would  
12 force older judges, who often have the most  
13 experience, off the bench.

14 And while senior status allows some  
15 judges to continue serving, even judges -- senior  
16 judges, at least currently, are subject to age-  
17 related limitations at the age of 78. Being a  
18 judge requires a specific skill set, and often  
19 those are knowledge, experience, temperament,  
20 confidence, are positively correlated with age,  
21 and Representative Harper gave some really  
22 wonderful examples about that.

23 I'm gonna skip over the rest of our  
24 arguments and just kind of present a few  
25 questions that we had for you, and maybe some of

1 these will be answered by -- by some other  
2 speakers.

3 And one of them which has touched on  
4 is, what is the effect of the changing mandatory  
5 retirement on senior judges that Representative  
6 Stephens had asked about. The legislation does  
7 not address the issue of senior judges. And  
8 currently, we all know that the senior judge  
9 system does use retired judges to fill gaps and  
10 ease the caseload in overburdened courts. And  
11 so, these judges can receive temporary  
12 assignments and are paid on a per diem basis.

13 So, if the age is -- is increased to  
14 75, would senior judges continue and then  
15 continue to 78? On the other hand, if it's  
16 eliminated altogether, I don't really see a --  
17 that there would be a need for a senior judge.  
18 On the other hand, the senior judges have been a  
19 vital resource, so I'm glad you have somebody  
20 from AOPC who will talk about it.

21 By way of comparison, and -- and Dean  
22 Gormley mentioned this, on the federal system  
23 does not have mandatory retirement, but allows  
24 judges to take senior status, which is different  
25 because that allows for vacancies to be created

1 on the bench, but avoids many of the problems  
2 with mandatory judicial retirement.

3 Another question we have, what's the  
4 financial impact of increasing or eliminating  
5 mandatory retirement? What effect, if anything,  
6 will this have on the judicial discipline  
7 process? We did some research. We did not come  
8 up with any -- We did not learn of any  
9 independent commissions that examined the fitness  
10 of judges over a certain age; that mental and  
11 physical decline is often encapsulated in the  
12 term, quote, disability in judicial discipline  
13 system. So, they're usually reviewed similarly  
14 to standard judicial disciplinary proceedings.

15 Are there additional prophylactic  
16 measures that should be put in place if mandatory  
17 retirement is eliminated or increased? Some have  
18 suggested that there be some kind of periodic  
19 review of judges over a certain age, which could  
20 help mitigate or eliminate the threat of  
21 age-related deterioration. To be effective,  
22 though, I think, if -- if you opt for something  
23 like that, I think the review should cover not  
24 only age-related -- age-related issues, but also  
25 efficiency and temperament, rate of reversal; you

1 know, perhaps mental and physical acuity.

2 We've also heard, though, from some  
3 judges who are particularly offended that there  
4 would be a process set up specifically to look at  
5 age. And also, though, if you did something like  
6 that, or if Pennsylvania did something like that,  
7 it really would require a commitment of resources  
8 from an already underfunded system.

9 Related to this but not before you, we  
10 believe that all judges should be subject to some  
11 kind of judicial performance reviews during their  
12 terms on the bench. We've looked into these  
13 judicial performance evaluations in other states  
14 in which data is collected from -- about judges'  
15 temperament and productivity and knowledge of the  
16 law and behavior on the bench and so forth. And  
17 the data is collected from litigants, lawyers,  
18 law clerks, court staff and self-evaluations by  
19 the judges themselves and as well as samples of  
20 written opinions and orders.

21 And the states with these performance  
22 evaluations report that -- that these are -- this  
23 is a source of information which is very helpful  
24 for voters at the time of retention. But also,  
25 the judges themselves find it valuable to receive

1 this honest feedback about their performance for  
2 self-improvement.

3 So, as I said, hopefully this chart  
4 will help you. There are a number of things  
5 which we haven't talked about; some have already  
6 been talked about earlier, but some have not.  
7 So, we hope that we can be a resource to you  
8 as -- as you go along and discuss this important  
9 issue. Thank you.

10 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
11 very much, Lynn. Your -- Your testimony is  
12 really terrific, and I must say, this is the --  
13 some of the most heavily footnoted testimony I've  
14 seen in a long time.

15 MS. MARKS: Well, we have a law  
16 student, so we thought we might as well make use  
17 of her.

18 SUBCOMMITTEE CHAIRMAN GRELL: I figured  
19 that's where Ms. Laputka might fit in. Did Miss  
20 Laputka have anything else to offer, or are you  
21 just here to take the question -- recall the  
22 questions?

23 MS. MARKS: She was gonna answer all  
24 the hard questions.

25 MS. LAPUTKA: I can certainly take



1 questions. Just to say that I, obviously, have  
2 done extensive research on the topic, really,  
3 over the course of the past year, and it is a  
4 very important issue, but one with significant  
5 concerns on all sides and all positions. So, I  
6 really believe the chart is going to be  
7 especially helpful when you're considering this  
8 to take all of those things into consideration.

9 SUBCOMMITTEE CHAIRMAN GRELL: Thank  
10 you. I'm sure it will be. Do we have questions  
11 from the members?

12 (No audible response).

13 MS. MARKS: Thank you.

14 SUBCOMMITTEE CHAIRMAN GRELL: Wow. You  
15 got off easy. Thank you very much.

16 The next testifier is Doctor Thomas  
17 Weida from Penn State Hershey Medical Group, in  
18 gerontology. Welcome. Thank you very much, and  
19 you may begin whenever you're ready.

20 DOCTOR WEIDA: Good morning. Chairman  
21 Grell and Chairman Sabatina, thank you for  
22 inviting me to testify at today's hearing. I'd  
23 also like to thank Chairman Marsico and Chairman  
24 Caltagirone for authorizing this hearing  
25 examining the issue of raising the retirement age

1 of our jurists.

2 I am Doctor Thomas Weida, a family  
3 physician and professor of family and community  
4 medicine at the Penn State Hershey Medical Center  
5 and College of Medicine. I've been in practice  
6 for 25 years and am board certified in family  
7 medicine and geriatrics. I see a majority of  
8 patients who are over the age of 65 in my medical  
9 practice, and appear today regarding the wisdom  
10 of increasing the mandatory retirement age of  
11 judges from 70 to 75.

12 The essential concern of increasing the  
13 mandatory retirement age is the deterioration of  
14 cognitive functioning in the elderly. Sadly, we  
15 all reach our peak mental acuity at age 25--we're  
16 all over the hill--with a progressive decline  
17 from then. Brain volume shrinks beginning at age  
18 30. But, like most organs of the body, the brain  
19 also has tremendous reserve, so that this decline  
20 for most individuals is not functionally  
21 noticeable in old age or even advanced old age.

22 According to a number of studies, the  
23 number of people over 65 with dementia compared  
24 to the population, known as the prevalence of  
25 dementia, increases with advancing age, ranging

1 from 1.5 percent in the 65-to-69-year age group  
2 to about 3 percent in the 70-to-74-year age  
3 group. It approaches 6 percent in the 75-to-79-  
4 year age group. Therefore, even in advanced age,  
5 the prevalence of dementia, which can interfere  
6 with decision making, is relatively small,  
7 particularly up until the age of 75.

8 In animal studies, brain cells with  
9 advancing age can lose 45 percent of spiny  
10 dendrites, which are things that communicate with  
11 other neurons, and they're responsible for  
12 learning and remembering new things. However,  
13 the stubby dendrites, which are responsible for  
14 things which have been known for years, suffer no  
15 decline. Hence, new memories may be more  
16 difficult to retain with age, but knowledge and  
17 expertise remain intact, oftentimes, well into  
18 the 80's.

19 We all know individuals whose mental  
20 capabilities remain sound well into their 80's  
21 and 90's. I have a number of patients 80 years  
22 of age in my practice who are highly functional  
23 mentally and physically, participating on boards  
24 of directors and running businesses.

25 Penn State's College of Medicine has no

1 mandatory retirement age. In the world of  
2 medicine and its critical decision making,  
3 individual functionality is favored over an  
4 arbitrary retirement age. Expertise trumps  
5 memorization of rote facts. Also, the Board of  
6 Medicine has no age at which a physician must  
7 relinquish his or her license. Medical licenses  
8 are revoked for performance issues; not after a  
9 predetermined age has been reached.

10 As such, age cannot be the only factor  
11 affecting mental acuity and reasoning. Only  
12 about 20 to 25 percent of the variation among  
13 people in standard measures of memory, problem  
14 solving and other executive functions is the  
15 result of age. The rest, 64 to 96 percent on  
16 different cognitive test scores, is the result of  
17 other factors.

18 Factors which negatively affect mental  
19 abilities as one ages are low education status,  
20 genetic factors, high blood pressure, diabetes,  
21 hardening of the arteries, smoking, depression,  
22 head trauma, poor diet and poor social networks.

23 Americans are living longer, now with  
24 an average life expectancy of 78. Additionally,  
25 they are living healthier longer, which

1 correlates with retained cognitive abilities.

2           What improves mental acuity with age is  
3 the same thing that improves the body's overall  
4 functioning: Aerobic exercise, such as brisk  
5 walking. Three vigorous, 40-minute walks a week  
6 over a six-month period improved memory and  
7 reasoning according to a study done at the  
8 University of Illinois. It also stimulated the  
9 birth of new brain neurons and increased the  
10 volume of white matter, which connects neurons in  
11 areas responsible for executive functions as  
12 planning.

13           A Canadian study showed that use of  
14 nonsteroidal anti-inflammatory drugs, such as  
15 Ibuprofen or Aleve, wine consumption in  
16 moderation--not bad to hear--coffee  
17 consumption--also not bad to hear--and regular  
18 physical activity were associated with a reduced  
19 risk of Alzheimer's disease.

20           A study by Bruce Campbell showed that  
21 adult cognitive development continues  
22 indefinitely in active learners; that college-  
23 degreed, older adults who are actively engaged in  
24 learning use age-specific learning strategies,  
25 and that the benefits of late-life learning

1 appear to be an antidote to aging.

2 Studies show that individuals with  
3 higher levels of education have a lower  
4 prevalence of Alzheimer's disease. Other studies  
5 show that engaging in mentally- stimulating  
6 activities decreases the prevalence of dementia,  
7 and that those elderly participating in daily  
8 mentally-challenging activities show less decline  
9 on cognitive tests.

10 As such, there is no evidence that a  
11 specific age denotes a significant deterioration  
12 of thinking and reasoning which would interfere  
13 with the judicial decisions. There are already  
14 sufficient safeguards in the Pennsylvania  
15 Constitution and with the Pennsylvania Supreme  
16 Court to remove judges who are cognitively  
17 impaired; a condition which can occur at any age.  
18 Therefore, I see no medical evidence to prevent  
19 increasing the mandatory retirement ages for  
20 judges to 75. There's no sharp decline of mental  
21 functioning between 70 and 75. We should not  
22 lose valuable expertise and wisdom on the bench  
23 by forcing retirement of jurists at age 70.  
24 Advanced age does not equal and equate to  
25 advanced senility. Thank you.

1           SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
2 very much for your testimony. The thing I like  
3 most about this job is that we get to learn new  
4 things all the time. We learned about spiny  
5 dendrites and stubby dendrites today.

6           Does anybody have any questions for  
7 Doctor Weida? Representative Barbin.

8           REPRESENTATIVE BARBIN: I have -- I  
9 agree with you. And the only thing, can you  
10 point me in the right direction of this animal  
11 study, because I find that very interesting,  
12 especially from the point of Alzheimer  
13 prevention?

14          DOCTOR WEIDA: I can get that  
15 information to the committee.

16          REPRESENTATIVE BARBIN: Thank you.

17          SUBCOMMITTEE CHAIRMAN GRELL: Thank  
18 you. Representative -- or Chairman Sabatina.

19          SUBCOMMITTEE CHAIRMAN SABATINA:  
20 Doctor, I'm afraid this question's probably  
21 impossible to answer, but I'll ask it anyway. Is  
22 there an average age that humans do lose their  
23 mental capacity, I guess, is -- I mean, I know it  
24 probably varies for everyone, but I just wondered  
25 if there's any scientific study that predicts a

1 downhill projectory.

2 DOCTOR WEIDA: All right. The study  
3 that I referenced, where 1.5 percent have  
4 dementia at 60 to 65, et cetera, does show that,  
5 for every five years there seems to be a doubling  
6 of the rate of dementia. So, I think that's --  
7 that's about as close as you're gonna get to  
8 that.

9 So, certainly, someone -- folks in the  
10 90, there's a -- 90's, there's a higher rate of  
11 dementia in the 90's than there are in the 75.  
12 But, each individual is different. My aunt is  
13 91, and she's probably smarter than I am and  
14 remembers much more than I do at 91.

15 SUBCOMMITTEE CHAIRMAN SABATINA: Thank  
16 you, Doctor.

17 SUBCOMMITTEE CHAIRMAN GRELL: Any other  
18 questions for Doctor Weida? Representative  
19 Saccone.

20 REPRESENTATIVE SACCONE: So, if I  
21 understand what you just said; so, every five  
22 years is a doubling of the chance of increase of  
23 dementia. So, if we increase from 70 to 75,  
24 we're doubling the chance --

25 DOCTOR WEIDA: The 1.5 percent to 3



1 percent, and from 75 to 79 went to 6 percent. If  
2 you go from 80 to 84, you're at 12 percent.

3 REPRESENTATIVE SACCONI: Thank you.

4 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
5 very much for being here and sharing your  
6 expertise with us.

7 DOCTOR WEIDA: Thank you.

8 SUBCOMMITTEE CHAIRMAN GRELL: Next we  
9 have Thomas Wilkinson, Junior, President of  
10 Pennsylvania Bar Association, and Chancellor  
11 Kathleen Wilkinson from the Philadelphia Bar  
12 Association. Whoever is going to go first may  
13 proceed.

14 PRESIDENT WILKINSON: Thank you,  
15 Chairman Grell, and thank you, members of the  
16 committee. On behalf of our 28,000 members of  
17 the Pennsylvania Bar Association, I'm Tom  
18 Wilkinson, the current president of the  
19 Association. We have submitted written  
20 testimony, and I'll simply -- briefly summarize  
21 that for you, if I may.

22 Our members are keenly interested in  
23 issues that impact the judiciary, and they're  
24 very much interested in this legislation. We do  
25 not yet have a formal policy because our House of

1 Delegates is our policy-making body, and they're  
2 scheduled to review this issue at the annual  
3 meeting next month. That is on May 10th. It  
4 also has not yet gone to our Board of Governors.

5           However, we do have a Judicial  
6 Administration Committee that looks at  
7 improvements to the judicial system. That  
8 committee has issued a resolution favoring this  
9 bill, and that resolution will be presented to  
10 our board and to our house next month.

11           But let me, if I may, provide some of  
12 the considerations that have been brought to the  
13 table and that are addressed in that resolution,  
14 and some of the considerations that are addressed  
15 by others who've expressed concerns among our  
16 membership so that you have a full flavor and you  
17 can take it into account in your deliberations.

18           You've already heard the fact that the  
19 average life expectancy has extended since this  
20 mandatory retirement age was adopted in the late  
21 1960's; extended nearly five years and, of  
22 course, will presumably continue to extend with  
23 additional improvements in lifestyle and medical  
24 attention. So I won't go into that detail.

25           But I will mention that, as you have

1 heard, there are many federal judges who sit well  
2 beyond the age of 70 and perform at a very high  
3 level. In the eastern district alone, we have 14  
4 senior judges who continue to accept case  
5 assignments on a regular basis. There are other  
6 senior judges who do not or very rarely accept  
7 cases. They handle cases from start to finish,  
8 through trial, and also provide an important  
9 backup system with respect to settling cases;  
10 and, frankly, our federal judge system could not  
11 live without the senior judges.

12 The justice system certainly benefits  
13 from the wisdom and experience of more senior  
14 judges. The longer you're on the bench, the more  
15 types of areas of law you've seen and the more  
16 types of cases, the more experience you have in  
17 resolving matters. And sometimes the gray hair  
18 or lack of hair is very useful.

19 There's also a system, as was  
20 mentioned, for the removal of judges through our  
21 Judicial Conduct Board and the Court of Judicial  
22 Discipline. And I should make clear that the  
23 Judicial Conduct Board receives, on average,  
24 about 700 complaints about judges a year. Of  
25 course, many of them are unfounded.

1           It's -- You know, it's my spouse was  
2 believed rather than I was believed in my family  
3 court case. But, of course, they also deal with  
4 issues of comportment; of appearing on the bench  
5 on a timely fashion and other issues of that  
6 nature which might -- The issues you would think  
7 would be of concern are a greater concern with  
8 more senior judges than with more junior judges.  
9 So that system is in place.

10           And in addition, our modern society has  
11 generally rejected stereotyping, particularly  
12 with respect to age and other generalizations.  
13 As you know, the Age Discrimination in Employment  
14 Act did have age- related restrictions and  
15 approved those restrictions years ago, but all of  
16 those restrictions have been deemed unlawful at  
17 this point, at least at the federal level.

18           And in addition, even if this is  
19 passed, of course, through the legislature, it's  
20 ultimately up to the people to decide whether  
21 they wish to extend the mandatory retirement age  
22 or not, and not every state where the matter has  
23 gone to the people have had -- have the voters  
24 decided to approve it. Some states have  
25 approved, and other voters have decided not to

1 approve an extension.

2           The issues that have been raised in  
3 opposition to the bill, or concerns or objections  
4 have been raised, have included that there is a  
5 system, as mentioned by Representative Stephens,  
6 to serve in a senior judge capacity at present.  
7 And under that system, judges who reach the age  
8 of 70 who have shown they're competent to serve  
9 can apply and then be certified as a senior judge  
10 with the approval of the Supreme Court. This  
11 system provides some flexibility to address the  
12 caseload on a county-by-county basis and serves  
13 as somewhat of a screen to ensure that  
14 well-qualified judges meet that established  
15 criteria for service.

16           According to the Center for State  
17 Courts, other states that have a mandatory  
18 retirement age, I think there are 24 that impose  
19 a retaid (phonetic) -- an age below 75, and  
20 90 -- 19 have a retirement age of 70. A new  
21 study from the RAND Corporation, addressed by the  
22 doctor who appeared before me, indicates that the  
23 increase of dementia, of course, occurs after the  
24 age of 70. Fifteen percent of Americans, at  
25 least at age 71 have some dementia. And that

1 dementia doubles as time goes on, as mentioned by  
2 the doctor.

3           So, there is some risk of dementia  
4 among more senior judges. But again, we have the  
5 existing system in place. And as Representative  
6 Harper indicated, it is not at all uncommon for  
7 other members of the judiciary and the county  
8 where a judge who might be impaired serves, or  
9 for the Bar and others to encourage more senior  
10 judges who are less effective or productive to  
11 step down.

12           Some of our members in more rural  
13 counties have expressed the concern that there's  
14 only one, two or three judges in their county.  
15 That means that there will be limited  
16 opportunities to step up and serve the public on  
17 the bench; and that extending the retirement age  
18 would tend to diminish those opportunities or the  
19 frequency of those opportunities.

20           It's unclear, as mentioned, at this  
21 point what the budgetary impacts would be if the  
22 legislation were adopted. As noted, the ranks of  
23 senior judges might dwindle somewhat, and, of  
24 course, some judges will choose to retire and do  
25 other things in any event after the age of 70, so

1 it's a little bit difficult to tell how it'll  
2 play out. It may well be that it turns out to be  
3 fiscally neutral over time and depending upon how  
4 the retirement system and the pension system are  
5 addressed.

6 But regardless of which direction  
7 Pennsylvania proceeds, it's our view that careful  
8 review of the judicial retirement age provides an  
9 opportunity to consider the benefits of  
10 establishing a statewide judicial performance  
11 evaluation or assessment system in order to  
12 ensure that every judge, regardless of their age,  
13 maintains the competency and productivity the  
14 public has a right to expect.

15 Such a system would help to identify  
16 and address those hopefully rare instances where  
17 a judge no longer has the capacity to serve. A  
18 fair assessment system would help to ensure that  
19 all the judges, particularly those more senior,  
20 would continue to serve the public effectively  
21 through retirement.

22 Thank you again for the opportunity to  
23 provide some brief remarks. I appreciate it very  
24 much.

25 SUBCOMMITTEE CHAIRMAN GRELL: Thank

1 you, Tom. And I hope you will let us know what  
2 the House of Delegates decides at the May  
3 meeting.

4 PRESIDENT WILKINSON: We will timely  
5 convey --

6 SUBCOMMITTEE CHAIRMAN GRELL: Great.

7 PRESIDENT WILKINSON: -- the results of  
8 those considerations. Thank you.

9 SUBCOMMITTEE CHAIRMAN GRELL:  
10 Chancellor.

11 CHANCELLOR WILKINSON: Good morning,  
12 Chairman Grell, Chairman Sabatina, Representative  
13 Harper and members of the House Judiciary  
14 Committee. My name is Kathleen Wilkinson. I'm a  
15 partner at Wilson, Elser, Moskowitz, Edelman and  
16 Dicker, and I am my -- I am the Chancellor of the  
17 Philadelphia Bar Association.

18 The Philadelphia Bar Association is the  
19 oldest association of lawyers in the United  
20 States, with over 13,000 members. I thank you  
21 for the opportunity to address you today.

22 The Philadelphia Bar Association has a  
23 long history of advocating for high-quality -- a  
24 high-quality judiciary that wisely interprets and  
25 fairly applies our laws. We applaud the General



1 Assembly for taking a strong interest in the  
2 viability of our courts and the quality of  
3 justice to our citizens.

4 I would like to begin by noting that  
5 the Philadelphia Bar Association has not taken an  
6 official position on House Bill 79.

7 Additionally, my testimony here does not address  
8 the recent lawsuits challenging the mandatory  
9 retirement age that are pending before the  
10 Pennsylvania Supreme Court, as well as the United  
11 States District Court. As we already know,  
12 current law requires retirement at the age of 70.

13 However, I do want to note that judges  
14 are the only elected officials in the state who  
15 are required to step down at a certain age. No  
16 elected members of the executive or legislative  
17 branches face such a requirement. And I noted  
18 that was raised earlier by one of your members  
19 here today.

20 Of course, Pennsylvania does have an  
21 important interest of maintaining a judiciary  
22 fully capable of performing the demanding tasks  
23 of judicial office. At the same time, judges can  
24 perform their duties credibly and sometimes with  
25 great distinction at an advanced age.

1           For example, one only need to consider  
2 the examples of Oliver Wendell Holmes, Louis  
3 Brandeis and Billings Learned Hand to confirm  
4 this point. Each performed with distinction into  
5 their 80's. As such, members of the judiciary  
6 can be expected to have a substantial stock of  
7 productive years well beyond attaining the age of  
8 70. Currently, four justices of the United  
9 States Supreme Court, Ruth Bader Ginsburg,  
10 Stephen Breyer, Antonin Scalia and Anthony  
11 Kennedy, are all over the age of 70. Their vigor  
12 and mental intellect is beyond question.

13           You've already heard that 33 states and  
14 the District of Columbia have set mandatory  
15 retirement ages. However, many states do  
16 recognize that older judges can continue to  
17 adjudicate full time beyond their 70th birthdays.

18           You've already heard about the federal  
19 system. I won't repeat that testimony. I have  
20 similar testimony as well. But I do want to  
21 point out that federal judges may choose to take  
22 senior status once they've been on the federal  
23 bench for at least 10 years and their age plus  
24 years on the bench add up to at least 80. This  
25 is called the Rule of 80. This is actually

1 called the Rule of 80, which means they could  
2 take that status earlier than age 70.

3           However, I would also like to echo the  
4 testimony that senior federal judges who continue  
5 to work at least a third of the case law of an  
6 active judge in the court must be certified each  
7 year in the federal court by the court's chief  
8 judge and the chief judge of their circuit.  
9 Yearly certification is given in federal court  
10 unless there is some impairment or there are  
11 issues concerning, perhaps, handling of  
12 personnel. No active federal judge can be  
13 removed without impeachment or being adjudicated  
14 an incompetent. Once a federal judge elects  
15 senior status, however, an active judgeship is  
16 created.

17           Pennsylvania, as you've heard, also  
18 maintains a senior status system. According to  
19 the rules, a Pennsylvania judge may be at least  
20 65 years old on the date on which he or she  
21 begins senior status. So, therefore, they can be  
22 65 instead of 70 and begin senior status should  
23 they choose to do so. The same rule applies  
24 about the Rule of 80 in Pennsylvania.

25           In most cases, I'd like to point out,

1 senior status ends on the last day of the  
2 calendar year in which a judge reaches 78. So  
3 that shows that we have senior judges who are  
4 being used -- utilized well beyond the age of 70,  
5 until the age of 78, currently performing very  
6 major cases; handling major caseloads, including  
7 in Philadelphia. I can speak personally about  
8 that.

9 We've already heard that we could -- we  
10 could have competency concerns if the age is  
11 raised to 75. You've heard about the mechanisms  
12 in place; the Judicial Conduct Board. I also  
13 have similar testimony in my written remarks. We  
14 also have noted, the Philadelphia Bar, the  
15 increased longevity of the general population,  
16 including the judiciary, makes it important to  
17 inquire periodically whether adjustments in the  
18 mandatory retirement age that we do have are  
19 justified.

20 I'm gonna skip over some of the similar  
21 testimony you've heard today, but I'd like to go  
22 into another area to emphasize.

23 We know, of course, that an increase in  
24 the mandatory retirement age is likely to cause  
25 incompetent judges to remain on the bench longer,

1 thereby reducing the number of openings available  
2 for younger, aspiring judges. This past Sunday,  
3 the Baltimore Sun had an article where there was  
4 the impending retirement of a judge in Maryland  
5 where the same mandatory age of 70 is in  
6 existence. Chief Judge Robert Bell stated to the  
7 Sun, quote: As time passes, you need the  
8 infusion of new energy and new visions and new  
9 ideas. You're more likely to get that with new  
10 blood, end of quote.

11 While Judge Bell raises a good point,  
12 an extended retirement age may also serve to  
13 attract qualified lawyers at their height of  
14 their careers to run for the bench who otherwise  
15 may have thought that it was too late for them to  
16 do so.

17 An extended retirement age may also be  
18 a boon for women, who often experience career  
19 interruptions due to family obligations early in  
20 their careers and, therefore, may not feel ready  
21 to sit on the bench until later in their  
22 professional lives than their male counterparts.  
23 In addition, women have a greater average life  
24 expectancy than men. So, while it is clear that  
25 judges of both genders can expect to live longer

1 than the age of 70, it would have a significant  
2 impact on women; the current age.

3           So, in summary, we see compelling  
4 reasons and compelling demographic trends that  
5 make a compelling argument for an upward  
6 adjustment in the current mandatory retirement  
7 age of 70. As Representative Harper has  
8 indicated, by giving judges more time on the  
9 bench, the Commonwealth and its citizens will  
10 benefit from the knowledge, experience and  
11 temperament of seasoned jurists.

12           Thank you for this opportunity to  
13 address you on this vital issue that's of  
14 critical importance to our bar.

15           SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
16 very much. Thanks to both of you for being here  
17 today, and thanks to your bar associations for  
18 taking this issue under consideration.

19           Chancellor, is it likely that your bar  
20 association will adopt a position on this  
21 legislation?

22           CHANCELLOR WILKINSON: Similar to what  
23 President Wilkinson said from the Pennsylvania  
24 Bar Association, when this issue came up, we  
25 weren't able to convene a meeting of our Board of

1       Governors. But, certainly, if we do take an  
2       official position, we will be happy to share that  
3       information with you.

4                   SUBCOMMITTEE CHAIRMAN GRELL: Okay.  
5       Thank you very -- We would certainly appreciate  
6       this.

7                   Questions from the members, starting  
8       with Representative Saccone.

9                   REPRESENTATIVE SACCONO: Thank you, and  
10       thanks to our esteemed guests. I really do  
11       appreciate --

12                   PRESIDENT WILKINSON: Thank you.

13                   REPRESENTATIVE SACCONO: -- your  
14       testimony. And I always try to come to these  
15       hearings with an open mind. I try to clear  
16       myself of any of the -- you know, the  
17       prejudgments that I might have on these things.

18                   But, as a political scientist and a  
19       former investigator, I always like to hear,  
20       really, both sides presented by both sides. Is  
21       this a decided question or -- because I don't see  
22       any advocates for the other side, really. You  
23       know, are there none as is -- out there, or, you  
24       know --

25                   PRESIDENT WILKINSON: Well, as I

1 mentioned, we have members who have expressed  
2 concerns about accessibility of judgeships,  
3 particularly in small counties. There are always  
4 people out there who don't wish to tinker with  
5 the constitution to make changes of this sort,  
6 although I, obviously -- Dean Gormley spoke to  
7 that issue.

8 We have people who think that 75 is not  
9 necessarily the right age. Maybe there should be  
10 no age limit or restriction at all, and some  
11 people have expressed opposition on that basis  
12 alone. And we have people who have had  
13 particular experiences with the very-senior  
14 judges who -- which have been unfavorable, or a  
15 particular judge that's been unfavorable, and  
16 felt perhaps they shouldn't have continued to  
17 serve.

18 So those are the kinds of things we  
19 also hear as part of our, you know, collection of  
20 comments, and those kinds of comments well -- may  
21 well be voiced when we have our House of  
22 Delegates' meeting on May 10th.

23 REPRESENTATIVE SACCONI: And one more  
24 quick follow-up. Of the 700 complaints that you  
25 received, how many were actually removed; that



1 resulted in some removal of a judge? You  
2 mentioned that 700 --

3 PRESIDENT WILKINSON: Well,  
4 typically --

5 REPRESENTATIVE SACCONI: I know --

6 PRESIDENT WILKINSON: -- the conduct  
7 board, if they receive complaints and,  
8 particularly, if it's any kind of pattern of  
9 complaints, they have the opportunity to sit down  
10 with the judge and, for lack of a better phrase,  
11 read the judge the riot act to change their --  
12 the way in which they do things and ensure that  
13 they're on the bench timely or they have -- they  
14 get appropriate treatment or get rid of the  
15 compartment issues that they may face. They have  
16 the ability to place those concerns in writing.  
17 They have the ability to ratchet up the level of  
18 sanction and commensurate with the misconduct.

19 And I can't give you the statistics on  
20 how many get removed, but that would be available  
21 from the JCB and from the Court of Judicial  
22 Discipline. It's quite rare, and I think that,  
23 as a practical matter, many judges step down when  
24 they -- they hear expressions of concern from  
25 their fellow jurists; from the bar and, you know,

1 family members and others, staff, if they're not  
2 at the level of competency that -- that is  
3 expected. Because they -- you know, many of our  
4 judges have a very high level of -- They wanna be  
5 respected, and they wanna be at the top of their  
6 game when they serve on the bench. And if they  
7 feel that's not the case or their colleagues  
8 express concern about it, then, oftentimes,  
9 they'll simply step down.

10 CHANCELLOR WILKINSON: May I address  
11 your question as well?

12 REPRESENTATIVE SACCONI: Um-hm.

13 CHANCELLOR WILKINSON: From the  
14 standpoint of the Philadelphia Bar Association,  
15 our preliminary discussion, without being able to  
16 have a full meeting and opportunity to have a  
17 board of governors make a formal vote, centered  
18 on the fact that there is no age at which lawyers  
19 are required to turn in their law licenses; we  
20 can continue practicing law as long as we're  
21 keeping our CLEs current, there's no cutoff for  
22 us. So that was discussed.

23 One of our incoming chancellors, our  
24 vice chancellor, will probably be very close to  
25 70 when he becomes chancellor of the Philadelphia

1 Bar Association in two years.

2 There was discussion of many lawyers at  
3 prestigious law firms, including people like  
4 Arlin Adams. Judge Arlin Adams is still working  
5 at Schnader Harrison. We could -- We could give  
6 you a list of many, many lawyers who are still  
7 practicing actively in Philadelphia.

8 We also discussed the fact that there  
9 are so many accomplished federal court judges,  
10 including Judge Norma Shapiro, who is one of the  
11 most senior judges on the bench and the first  
12 woman federal judge, who's past the age of 80 and  
13 is functioning at such a high level. I mean --  
14 And she is still participating in Pennsylvania  
15 Bar Association activities, American Bar  
16 Association activities, Philadelphia Bar  
17 Association activities. She gets on airplanes  
18 and travels all the time. And she actually has  
19 some physical but not mental limitations.

20 But then there was also discussion  
21 that, you know, we wanna make sure -- And we  
22 didn't have the benefit of the medical study that  
23 we heard here today. We -- We -- So we couldn't  
24 answer that question. We didn't have that  
25 information. We also wanted to make sure what

1 the financial impact was. We -- We really didn't  
2 have the data available about pensions and salary  
3 and what the financial impact would be, so --

4 You know, we've heard a lot more today  
5 that I think would help us. But I think you  
6 should know that, at least in the Philadelphia  
7 community, we have significant numbers of highly  
8 productive lawyers and judges. We have a senior  
9 law committee of highly productive people past  
10 the age of 70. Many are serving as arbitrators  
11 and mediators full time.

12 REPRESENTATIVE SACCONI: Thank you  
13 very much. Thank you, Mr. Chairman.

14 CHANCELLOR WILKINSON: You're welcome.

15 SUBCOMMITTEE CHAIRMAN GRELL: Thank  
16 you. Representative Dean.

17 REPRESENTATIVE DEAN: Thank you, Mr.  
18 Chairman, and thank you, President Wilkinson and  
19 Chancellor Wilkinson, for your consideration; for  
20 the bars' consideration of this important issue  
21 about what represents the best use of people at  
22 the top of their career, at the senior moments of  
23 their career.

24 I am gonna use this moment just to put  
25 in a shameless plug for a resolution that I am

1 pushing, which is Resolution -- House Resolution  
2 107, which speaks to how do we enrich the lives  
3 at the beginning of our career, and it has to do  
4 with -- My resolution urges pro bono experience  
5 among law students. And I'm thinking of our  
6 intern that's sitting here. I think she's  
7 participating in that very thing; that it would  
8 urge the Supreme Court of Pennsylvania to require  
9 50 hours of pro bono work for admission to the  
10 bar.

11 I think, you know, at both ends, the  
12 bookends of one's legal career, we can do things  
13 that will enrich the lawyers that work within our  
14 Commonwealth. So, I'm hoping -- And I know we've  
15 spoken, but I'm hoping we can review that and  
16 members of the bar will support such a measure.

17 CHANCELLOR WILKINSON: Representative  
18 Dean, to the extent that's a question, I would  
19 like to respond as follows: I mean, in the  
20 Philadelphia bar Association, our young lawyers  
21 would be very open to having more opportunities.  
22 We're doing a program, actually, on Monday  
23 entitled, 20th Century Associates in a 21st  
24 Century Legal Environment, concerning what you  
25 learn in law school and what you need in private

1 practice. But, we'd be happy to study that  
2 further.

3 REPRESENTATIVE DEAN: Thank you.

4 PRESIDENT WILKINSON: The access to the  
5 justice gap is very serious in Pennsylvania, and  
6 the pro bono requirement might help to fill or  
7 close that gap. We spent all day yesterday  
8 meeting with our congressmen in Washington,  
9 reviewing the civil legal aid crisis, and it's  
10 something that's very worthy and deserving of  
11 serious consideration.

12 CHANCELLOR WILKINSON: I agree with Tom  
13 Wilkinson. I also saw some smiles. And just in  
14 case you're wondering, we are husband/wife. I  
15 saw a few people smiling at us, so I thought I  
16 better put that on the table. And just so you  
17 know, this would be a historic first; that the  
18 President of the Pennsylvania bar, the Chancellor  
19 of the Philadelphia Bar, both the heads of the  
20 two largest bars in the Commonwealth of  
21 Pennsylvania are testifying at a hearing  
22 together. So that -- note that in your  
23 historical records.

24 REPRESENTATIVE DEAN: Congratulations  
25 to both of you.

1 CHANCELLOR WILKINSON: Thank you.

2 SUBCOMMITTEE CHAIRMAN GRELL: I'm glad  
3 we have a photographer here to capture -- to  
4 capture the occasion. (Laughter). Chairman  
5 Caltagirone with a question.

6 CHAIRMAN CALTAGIRONE: Thank you.  
7 Recently, I've been working on a piece of  
8 legislation that would be a constitutional  
9 amendment. I haven't shared it with the  
10 committee yet or the members of the General  
11 Assembly. It would be dedicated court funding,  
12 and -- something which I think is long, long  
13 overdue.

14 And I might be interested in your  
15 comments and in taking a look at that because, in  
16 some areas, it probably is gonna be a little  
17 touchy and sensitive to certain segments of our  
18 society up here on the Hill. But, I certainly  
19 would like to run that by the different groups  
20 around the state to get their input. I just  
21 wanted to share that with you while we're doing  
22 commercials.

23 CHANCELLOR WILKINSON: Is that in  
24 regard to the civil justice gap? Is that what  
25 you're referring to?

1           CHAIRMAN CALTAGIRONE: No, no. It's our  
2 criminal justice system.

3           PRESIDENT WILKINSON: We would very  
4 much appreciate the --

5           CHAIRMAN CALTAGIRONE: -- our  
6 judiciary.

7           PRESIDENT WILKINSON: We would very  
8 much appreciate the opportunity to comment on the  
9 wisdom of stabilized court funding. Thank you.

10          CHANCELLOR WILKINSON: And as would the  
11 Philadelphia Bar.

12          SUBCOMMITTEE CHAIRMAN GRELL: Thank  
13 you. Representative Barbin, I think, with the  
14 last question of this panel.

15          REPRESENTATIVE BARBIN: Thank you.

16                 I appreciate, Mr. Wilkinson and  
17 Chancellor Wilkinson, the -- your testimony. The  
18 one piece of information that I saw in your  
19 testimony was that there was an increased  
20 Alzheimer's risk on a RAND study. And it kind of  
21 relates to this issue of -- that's before the  
22 court right now on 16(c).

23                 Does the fact that our constitution has  
24 one provision that says a sitting judge or  
25 justice has a mandatory retirement have a



1 constitutional implication on a temporarily  
2 assigned judge? And I appreciate your  
3 testimony -- both of your written testimony  
4 today, because you point out that not only don't  
5 lawyers have that requirement, but some of our  
6 best jurists, our Supreme Court justices, are.

7           And I also wondered, isn't this a red  
8 herring as far as a constitutional issue?  
9 Because, every day, in both the state and the  
10 federal system, we appoint masters that have  
11 particular levels of expertise. And as far as I  
12 know, and I practiced 25 years before I came to  
13 the legislature, no one ever asked anybody a  
14 question when they were assigning masters  
15 positions, well, how old are ya? What they would  
16 say is, are you experienced in this field of law  
17 to the extent necessary that you can handle  
18 complicated litigation that makes the job -- the  
19 ultimate decision-making job of the justice or  
20 the judge easier and quicker?

21           So, having said that, is there really  
22 an issue with the -- 16(c)'s constitutional  
23 provision on whatever number we decide to pick  
24 for a mandatory retirement age for our state  
25 judges?

1           PRESIDENT WILKINSON: Well, I may need  
2 to defer the constitutional question to our  
3 courts. But, you're absolutely right that we  
4 have many masters, mediators and arbitrators who  
5 serve very well and with distinction beyond the  
6 age of 70.

7           With respect to the senior judge  
8 system, more detail will be provided by Mr.  
9 Mittleman from the AOPC; how that works on a  
10 day-to-day basis; how many such senior judges we  
11 have; how they're allocated. So I'm not sure I  
12 can comment further than that.

13           CHANCELLOR WILKINSON: And from the  
14 Philadelphia bar Association's standpoint, I  
15 would observe that we make great use of the  
16 senior judges that are available to us. I have  
17 personally appeared before many of them. I've  
18 handled trials in front of them. I'm a  
19 litigator. It is subject to -- The testimony  
20 you're about to hear by the AOPC is subject to  
21 approval by, I believe, the Supreme Court. But,  
22 that is a way to control, you know, the ability  
23 as to who was assigned.

24           But, in terms of, I think you're asking  
25 the constitutional question -- I mean, it kind of

1 speaks to itself; that Philadelphia County's  
2 already using judges past the age of 70 and  
3 getting into 78 and, perhaps, even turning into  
4 79 and still sitting on the bench as senior  
5 status, and they are very vital to us.

6 REPRESENTATIVE BARBIN: But isn't there  
7 a big difference, constitutionally, between  
8 saying -- having the electorates say, we want  
9 judges to serve up to 75, and to saying to a  
10 co-equal branch of government, by the way, we  
11 also wanna tell you how to do your job; and when  
12 you do your job as it relates to senior judges,  
13 we want you to employ the same standard that we  
14 have that the electorate, the citizens, have said  
15 we'd like you to use as far as your mandatory  
16 retirement? They seem to be two completely  
17 different issues to me.

18 CHANCELLOR WILKINSON: I'm unable to  
19 answer that question based on the information  
20 that I have.

21 REPRESENTATIVE BARBIN: Thank you for  
22 your testimony.

23 CHANCELLOR WILKINSON: You're welcome.

24 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
25 very much.

1                   PRESIDENT WILKINSON: Thank you very  
2 much.

3                   CHANCELLOR WILKINSON: Thank you.

4                   SUBCOMMITTEE CHAIRMAN GRELL: We're  
5 almost back on schedule. We slipped a little  
6 bit. Batting cleanup, we have Joseph Mittleman,  
7 Esquire, who is Director of Judicial Programs at  
8 the AOPC. Thank you for your patience, and thank  
9 you for your anticipated testimony. You may  
10 begin whenever you're ready.

11                   MR. MITTLEMAN: Thank you, Mr.  
12 Chairman. Thank you, Chairman Sabatina. As has  
13 been pointed out, every day in this Commonwealth,  
14 judges over the age of 70 serve and serve  
15 effectively in our courts, and this is through  
16 our senior judge system. Senior judges are  
17 permitted by the constitution, by statute and by  
18 court rule. We have -- An essential part of our  
19 system is our senior judges because they handle a  
20 caseload. They are provided a cost-effective  
21 judicial assistance in needed cases.

22                   Service as a senior judge is not a  
23 matter of right. There are rules and it's a --  
24 at the discretion of the Supreme Court that  
25 anyone serves as a senior judge. Senior judge

1 service is really looked at in two processes.  
2 First is certification. In order to become  
3 certified as a senior judge, there are certain  
4 criteria that a judge has to -- has to meet, and  
5 those are spelled out in rule of court and are  
6 part of the written testimony I've provided.

7 But not everybody who meets those  
8 criteria is automatically certified. It's up to  
9 the discretion of the Supreme Court. Most are --  
10 who do apply are certified. But certification  
11 itself does not equate to service. Once  
12 certified, and once a judge is certified as a  
13 senior judge, the judge remains certified unless  
14 the judge resigns their certification as a senior  
15 judge or some other event occurs that would  
16 require the de-certification, such as a violation  
17 of court rule or removal by the Judicial Conduct  
18 Board.

19 Service as a senior judge occurs at the  
20 request of a president judge of a judicial  
21 district, and service can be in several aspects.  
22 We have what we call in-county senior judges;  
23 when a judge wishes to continue serving in the  
24 county from which he or she had been elected.  
25 Then, if the president judge certifies to the

1 state court administrator and to the Supreme  
2 Court that there is a need for additional  
3 judicial services, then that in-county senior  
4 judge can be assigned to that county, and these  
5 assignments are on a monthly basis.

6 Another type of certification occurs  
7 when a county does not have a senior judge within  
8 their county but has caseload needs. They would  
9 then make a request to the AOPC asking for senior  
10 judicial assistance. We would then, using our  
11 roster of certified senior judges, find a senior  
12 judge, hopefully in the vicinity of the county  
13 where the assignment is, who is willing to  
14 undertake the -- and available to undertake the  
15 assignment, and then that assignment is  
16 recommended to the Supreme Court for approval.  
17 That assignment also is on a monthly basis.

18 Third type of assignment is when  
19 there's a full bench recusal; when, for whatever  
20 reason, all of the judges in a county feel the  
21 need to recuse themselves and an out-of-county  
22 judge is appointed. More often than not, that  
23 out-of-county judge is a senior judge, and,  
24 again, we go through the process; finding a judge  
25 who, hopefully, is in the vicinity who's

1 available to take the assignment. So those are  
2 how the assignments occur.

3 We have, currently, 102 common pleas  
4 senior judges, 114 magisterial district judges  
5 who are sitting in -- who are serving on senior  
6 status. Last year we had more than 1200 senior  
7 days assigned. But, when it comes to payment,  
8 not every day is compensable. There are two  
9 limitations that are placed upon the compensation  
10 of senior judges.

11 The first is a statutory limitation. A  
12 senior judge cannot earn more -- When adding  
13 their per diem assignments as a senior judge,  
14 plus their pension cannot exceed in a given year  
15 the salary of a commissioned judge. That's the  
16 statutory limitation.

17 In addition, because our line item, our  
18 appropriation for senior judges is limited, we  
19 limit senior judges to 10 compensable days per  
20 month. So, a judge can be paid for 10 days per  
21 month, but, oftentimes, judges will work more  
22 than those 10 days. And, hopefully, if there is  
23 money available at the end of the year, then is  
24 distributed at a pro rata share to those judges  
25 who worked more than 10 days. But more often

1 than not, those judges end up working those days  
2 for free. And that's a choice that those judges  
3 make.

4 As far as the qualifications to be a  
5 senior judge, when the senior judge program  
6 began, there was no age limit on senior judges.  
7 In 2002, the Supreme Court, by rule, placed a  
8 limit of age 78 upon senior judges. And since  
9 that time forward, no judge can serve past the --  
10 the year in which they turn 78.

11 The minimum age has been pointed out by  
12 previous testimony; that the -- a judge has to,  
13 first of all, serve at least a full term, and  
14 then either be at least age 65 or have years of  
15 service plus age totaling at least 80.

16 In addition, a senior judge can serve  
17 no more than 10 years as a senior judge. The  
18 Supreme Court felt that, since judges themselves  
19 had to stand before the electorate every 10 years  
20 to be judged again as to whether they're suitable  
21 to serve, so, too, should a senior judge's  
22 certification lapse at the end of 10 years. So  
23 there is that limit as well.

24 The senior judge program, I said -- as  
25 I said, is essential to the operation of the



1 court system. We would anticipate that if there  
2 were an age increase of -- on the retirement age,  
3 that there would be fewer senior judges  
4 available. But we would simply be able to fill  
5 in with, if our appropriation remained the same,  
6 the judges working more time, so we would,  
7 hopefully, be able to satisfy the needs of the  
8 judicial districts for judicial service with our  
9 available complement, but only time would tell.

10 In addition, not every judge who  
11 becomes a senior judge waits until age 70 to do  
12 that. It is not uncommon for judges to retire  
13 early and assume senior status before the age of  
14 70. And we would anticipate that, even with the  
15 75 retirement age, we would still have that  
16 instance.

17 Those are the -- the outlines of the  
18 senior judge program. I would be happy to answer  
19 any questions from this committee.

20 SUBCOMMITTEE CHAIRMAN GRELL: Thank you  
21 very much for your testimony. Chairman Sabatina.

22 SUBCOMMITTEE CHAIRMAN SABATINA: Thank  
23 you, Chairman. Thank you for your testimony  
24 today.

25 As you were testifying, I was just

1 running through my mind as to the need of -- If  
2 we do -- If the age of judges are -- is raised to  
3 75, I'm wondering about the need for senior  
4 judges, as well as the -- the financial aspects  
5 of -- of maybe eliminating senior judges, and  
6 just -- You know what I mean?

7 The give-and-take and the balance  
8 there, if you eliminate senior judges and raise  
9 the age to 75, what are the financial benefits or  
10 detriments to that?

11 MR. MITTLEMAN: Well, with -- The  
12 raising of the age limit will not eliminate the  
13 need for senior judges because there will --  
14 raising the age limit will not increase the total  
15 number of senior judges available. So we would  
16 still have the same number of judges handling the  
17 same number of cases, the same number of -- in  
18 most jurisdictions, increasing numbers of cases.  
19 So, the mere fact of raising the age limit does  
20 not eliminate the need.

21 In addition, senior judges are often  
22 very helpful in filling in when there are  
23 vacancies, especially if a judge is retiring at  
24 a -- at a point where his or her judgeship will  
25 not be filled before their retirement; so that

1 there is a gap between their retirement and when  
2 the new judge who is replacing them takes their  
3 place. So you have a while -- one year, and  
4 sometimes more than a year's gap in which a  
5 senior judge, often that same retiring judge will  
6 fill that need.

7 So we -- we'll still have vacancies  
8 occurring in which judicial districts will have  
9 need for additional assistance, and the senior  
10 judges are the most cost-effective way of  
11 providing that assistance. So I think this --  
12 the age range on retirement age will not have an  
13 impact on the need for senior judges.

14 SUBCOMMITTEE CHAIRMAN SABATINA:

15 Follow-up question is, if we raise the age to 75,  
16 you had mentioned that, I guess, senior judges  
17 serve until age 80.

18 MR. MITTLEMAN: 78.

19 SUBCOMMITTEE CHAIRMAN SABATINA: 78,  
20 okay. So if we raise the age to 75, I'm  
21 wondering if tinkering is necessary for the age  
22 of the senior judges, or does it -- or would you  
23 recommend keeping it at 78?

24 MR. MITTLEMAN: Well, it would -- I  
25 think it would be a matter for the Supreme Court

1 to decide, if they were to find that the  
2 complement of senior judges was inadequate to  
3 handle the need, then they could look at the  
4 possibility of raising the age, if that was -- if  
5 that was advisable. But that's a decision of --  
6 for the Supreme Court to make.

7 SUBCOMMITTEE CHAIRMAN SABATINA: Okay.  
8 Thank you very much.

9 SUBCOMMITTEE CHAIRMAN GRELL: I know a  
10 lot of us are having -- having difficulty getting  
11 around -- or getting to the financial aspect of  
12 this legislation. And rather than go through a  
13 lot of specific questions, I think, if it would  
14 be appropriate, if we could follow up in writing  
15 with a request for some data dealing with  
16 caseloads of senior judges, caseloads of regular  
17 judges and those kinds of things, so that we can  
18 get a -- get our arms around the financial  
19 aspect.

20 But let me just ask, when you have a  
21 vacancy, what's -- what is the cost calculation  
22 of whether you fill that vacancy or assign a  
23 senior judge to assist with the caseload?

24 MR. MITTLEMAN: Well, we don't engage  
25 in a -- in a cost evaluation. If there is a

1 vacancy, that would depend upon the Governor's  
2 nomination and the -- the approval of the Senate.  
3 As I'm sure the Chairman is aware, that the Chief  
4 Justice has currently asked there be a moratorium  
5 on appointments to vacancies, given the funding  
6 difficulties that the unified judicial system's  
7 been having.

8           The exception being when a president  
9 judge of a judicial district has certified that  
10 there is a need to fill the vacancy immediately,  
11 then that request -- then the Chief Justice will  
12 communicate to the Governor his agreement with  
13 filling that vacancy.

14           But as far as the cost-effectiveness,  
15 if there is a vacancy that occurs and a president  
16 judge certifies to us that they need assistance,  
17 we will provide the assistance.

18           SUBCOMMITTEE CHAIRMAN GRELL: But I  
19 guess the cost analysis is evident if the court  
20 has decided it is, um, budgetarily wise to keep  
21 the 20 or so vacancies and backfill with senior  
22 judges as needed; that it's probably less  
23 expensive to use a senior judge than to fill that  
24 vacancy.

25           MR. MITTLEMAN: Yes, far less expensive

1 paying the per diem for the senior judge than to  
2 pay salary and benefits for a commissioned judge,  
3 because the senior judges are already receiving  
4 their benefits, although the only cost is the --  
5 would be the per diem payments and any  
6 incidentals such as travel.

7 SUBCOMMITTEE CHAIRMAN GRELL: And then  
8 the use of the facility and the law clerk and the  
9 secretary and all that that goes along with the  
10 support for the senior judge?

11 MR. MITTLEMAN: Right. And those costs  
12 would be borne by the county; not by the --

13 SUBCOMMITTEE CHAIRMAN GRELL: Oh, okay.

14 MR. MITTLEMAN: -- not -- not by the  
15 state system.

16 SUBCOMMITTEE CHAIRMAN GRELL: Does  
17 somebody evaluate a request from a president  
18 judge as to whether the caseload justifies the  
19 appointment of a senior judge, or is that pretty  
20 much assumed that the president judge has done  
21 that analysis?

22 MR. MITTLEMAN: There's no statistical  
23 analysis that we engage in. We generally take  
24 the representation of the president judge that  
25 the caseload needs require it. If a president

1 judge is making a request for more than one  
2 senior judge, in some instances, then in that  
3 case we would evaluate the request. But if it's  
4 a single judge for a -- for caseload reasons, we  
5 do not evaluate that.

6 SUBCOMMITTEE CHAIRMAN GRELL: Okay. I  
7 think we will follow up with a request for some  
8 additional data. Would that be directed to you  
9 or to the chief or --

10 MR. MITTLEMAN: You could direct that  
11 to Mr. Koval, and he would be -- make sure it  
12 gets to the proper authority.

13 SUBCOMMITTEE CHAIRMAN GRELL:  
14 Excellent. I believe Representative Saccone has  
15 a question?

16 REPRESENTATIVE SACCONI: Yes. Thank  
17 you, Mr. Chairman. It's very similar to  
18 Representative Sabatina's question.

19 So, if I understand this right, the  
20 Supreme Court said, well, look, because judges  
21 have to stand for retention every 10 years, that  
22 we're gonna extend the age limit for senior  
23 judges to 78, which isn't 10 years; it's eight  
24 years. So -- Am I right with that?

25 MR. MITTLEMAN: Well, the 10 years is

1 the -- The 10 years dealt with the fact that  
2 senior judges can only serve for 10 years. The  
3 age -- 78 age limit was put into place because,  
4 when there was no age limit, it was found that,  
5 unfortunately, there were some senior judges who  
6 were serving beyond their ability to serve. And  
7 the Supreme Court thought it -- it best to have a  
8 bright-line age limit, and they put the 78 into  
9 place.

10 REPRESENTATIVE SACCONI: Okay, I see.  
11 So, as far as the tinkering or the amendment, if  
12 you were for this, that would seem like, I don't  
13 know, it would be better to put it in statute  
14 rather than leave it up to the courts to decide?  
15 If you're gonna extend it to 75, shouldn't you  
16 extend the senior judge limit to whatever; 83 or  
17 85 maybe, or something? Not in your opinion; I'm  
18 just asking you.

19 MR. MITTLEMAN: Well, I have no opinion  
20 on whether the age limit for seniors should be  
21 increased. That would be solely the province of  
22 the Supreme Court.

23 REPRESENTATIVE SACCONI: Okay. Thank  
24 you.

25 SUBCOMMITTEE CHAIRMAN GRELL: Any other



1 questions?

2 (No audible response).

3 SUBCOMMITTEE CHAIRMAN GRELL: If not,  
4 thank you very much for your testimony.

5 That is the end of the hearing. I do  
6 want to thank everybody who participated, both  
7 the members up here and all of the testifiers,  
8 and everybody else who came out today to express  
9 your interest in this issue. Not sure where it  
10 goes from here, but the subcommittee will report  
11 back to the committee. There may be some  
12 follow-up. Certainly, the bar associations, if  
13 you do take formal action, please let us know.  
14 And thank you all.

15 Chairman Sabatina, do you have any  
16 closing comments?

17 SUBCOMMITTEE CHAIRMAN SABATINA: No,  
18 Chairman. Just thank you all. It was very  
19 enlightening and interesting today, and we'll see  
20 where it goes. Thank you.

21 SUBCOMMITTEE CHAIRMAN GRELL: Yeah, I  
22 think the testimony was just outstanding, and we  
23 appreciate your indulgence with all of our  
24 questions. So thank you very much, and this  
25 meeting is adjourned.

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(At 12:05 p.m., the hearing concluded).

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C E R T I F I C A T E

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, to the best of my ability, of a House committee hearing taken from a tape recording and reduced to computer printout under my supervision.

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