HOUSE JUDICIARY COMMITTEE

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and

Representing the American Judicature Society

Hearing on Judicial Reform Proposals
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Statement of Robert L. Byer
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I appreciate the opportunity to appear before this Committee to testify concerning judicial reform, an area in which I have been active. I speak today from my perspective both as a lawyer who maintains an active practice before the Pennsylvania courts, including all three appellate courts. I also speak from the additional perspective of having served by appointment as a Commonwealth Court judge from June 1990 until January 1992.

I have been very active in the field of judicial rule-making and procedure. I have served for several years as a member of the Supreme Court's Appellate Court Rules Committee, and I have chaired that committee since July 1994. However, my testimony should not be construed as in my official capacity as chair of the Appellate Court Rules Committee, because that committee has not taken any position on the matters which I am addressing today and I do not know the views of most of its members on the subject matter of this hearing.

In addition to testifying in my individual capacity, I also am testifying as a representative of the American Judicature Society, an organization which has been at the forefront of judicial reform efforts in the United States for many years. In 1978, pursuant to a contract with the Pennsylvania Supreme Court, the American Judicature Society conducted an in depth study on the Pennsylvania appellate courts. The final report of that study, which was delivered to Chief Justice Eagan on November 8, 1878,

made several recommendations, including recommendations pertinent to consideration of the proposals now before the General Assembly. That report, together with the reports of the Pomeroy Commission and Beck Commission, is "must reading" for anyone seriously interested in improving the Pennsylvania Judiciary.

I will address my remarks primarily to the proposals contained in House Bill No. 10 and House Bill No. 838. However, before doing so, I think it is necessary to address briefly an important reform which is not in either bill, as currently drafted.

The proposals in House Bill No. 10 and House Bill No. 838 appear to be in response to abuses perceived to have been committed by members of the Supreme Court over the past several years. These abuses all relate to a perception that some members of the Court have been more involved in political or administrative matters than in the decision of cases.

If there is such a perception, then I believe it stems ultimately from Pennsylvania's continuing to be one of the few states which select all appellate judges by a partisan, election process. If we are to have any meaningful reform in Pennsylvania, then we must change that system in order to be sure that our appellate courts, and particularly our Supreme Court, attract jurists of outstanding legal ability whose primary interest is in

deciding cases of precedential significance through opinions which aid in the development of the law.

The American Judicature Society long has advocated that partisan judicial elections be replaced by appointment systems. The American Judicature Society made such a recommendation specifically for Pennsylvania in its 1978 report. The Pomeroy Commission made a similar recommendation in its 1982 report on Pennsylvania's Unified Judicial System, as did the Beck Commission in its 1988 report.

I recently testified before the Subcommittee on Courts concerning this subject, so I will not repeat that testimony here. However, I do attach the pertinent portions of my November 18, 1994 statement before that Subcommittee to this statement in the event the members of this Committee are interested in my views on the subject.

A. Elimination of King's Bench Power

The Supreme Court has had "King's Bench Power" since the Judiciary Act of 1722. That power has existed by statute, currently codified at 42 Pa.C.S. § 726 (extraordinary jurisdiction).

The American Judicature Society has no position on whether the King's Bench Power should be eliminated. Speaking

personally, the elimination of the King's Bench Power would have no discernible effect on the overwhelming number of lawyers and litigants. I certainly would have no objection to seeing that power eliminated, although I also see no problem in retaining it. Perhaps there should be good reason to eliminate a jurisdiction which has been such a historical part of Pennsylvania jurisprudence. If the problem is not so much the existence of the power as its application in a few unfortunate instances, then perhaps the problem would be better addressed in other ways.

However, if the General Assembly does intend to eliminate the "King's Bench Power," then I suggest that the elimination of that power need not be by constitutional amendment in House Bill No. 10, because the "King's Bench Power" does not derive from the constitution. Because this jurisdiction exists solely by statute, the elimination of that jurisdiction should be by amendment to the Judicial Code, as provided for in House Bill No. 838.

B. Judicial Council

The 1978 report of the American Judicature Society recommended that the Pennsylvania Judicial Council be reactivated. The Pomeroy Commission report recommended that the Judicial Council should be made stronger and more independent.

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The Judicial Council, as envisioned in both the American Judicature Society and Pomeroy Commission reports was largely an advisory body. The provisions embodied in both House Bill No. 10 and House Bill 838 would transfer the actual governing authority over the judicial system to the Judicial Council. There is much which can be said in support of such an idea.

However, if the Judicial Council is to be more than an advisory body, its members should not include anyone other than judges. I believe that the proposals, as currently drafted, would compromise the separation of powers principle implicit in the Pennsylvania Constitution and the principle of judicial independence which is at the heart of the notion of an impartial judiciary.

Certainly, the Judicial Council should consult with citizens and public officials, including lawyers and judges, in the conduct of its work. In this respect, it might be appropriate to draw on the federal model, particularly the Judicial Conference of the United States, the Administrative Office of United States Courts and the Federal Judicial Center, 28 U.S.C. §§ 331, 601 et seq. and 620 et seq. for guidance.

C. Selection of Chief Justice

In its 1978 report, the American Judicature Society recommended that the method of selecting the chief justice be changed. Fewer than 10 states choose their chief justice on the basis of seniority. As the American Judicature Society observed in its 1978 report, seniority is probably the worst way to select a chief justice. The report recommended that the chief justice instead be selected by the members of the court, perhaps in conjunction with a nominating commission.

The proposals before this committee appear instead to adopt the federal model of having the chief executive appoint the chief justice. Such a procedure would not be objectionable, provided that the process not be politicized. I think that the legislation could be improved by specifying that the chief justice would not be subject to replacement by a new governor, but would be eligible to continue to serve in that capacity so long as he or she is eligible to serve on the court.

In addition, House Bill No. 10 would require that the chief justice be chosen by the governor "from among the sitting justices." If Pennsylvania is going to follow the federal model, then I would see no reason why the governor should be restricted to the sitting justices in a situation where the vacancy in the office of chief justice occurs because the chief justice no longer serves

on the court, creating a judicial vacancy. Presidents of the United States have selected chief justices who have not previously served on the United States Supreme Court. Two recent examples are Chief Justice Warren and Chief Justice Burger, both of whom proved to be very capable administrators.

At a minimum, however, a change in the method of selecting the chief justice, coupled with the placing of the administrative aspects of the judiciary in the hands of the judicial council under the direction of the chief justice, is an important reform.

D. Rule-Making Authority

House Bill No. 10 would amend the Pennsylvania Constitution to shift the rule-making authority from the Supreme Court to the Judicial Council of Pennsylvania. In addition, the current language of Article 5, Section 10(c) which provides, "[a]ll laws shall be suspended to the extent that they are inconsistent with rules promulgated under these provisions," would be deleted and replaced with a provision that general rules promulgated by the Judicial Council shall not "abridge or infringe upon the legislative power of the General Assembly" and that neither the Judicial Council nor the Supreme Court "shall have the power to suspend statutes which are inconsistent with general rules."

If the goal of this provision is to provide the General Assembly with ultimate authority in connection with procedural and other rules covered by Article 5, Section 10(c) of the Constitution, then I suggest a better approach would be to adopt provisions similar to those under the federal Rules Enabling Act, pursuant to which procedural and other rules promulgated by the United States Supreme Court cannot take effect until they first are transmitted to Congress, which then has the power to amend or disapprove the rules. See 28 U.S.C. §§ 2072, 2074. The Rules Enabling Act also grants the Judicial Conference of the United States a substantial role in the promulgating of rules. 28 U.S.C. § 2073.

Under the Rules Enabling Act provisions, the United States Supreme Court could adopt a rule inconsistent with an act of Congress, but such a rule could not become effective if Congress disapproves it.

I see no problem in eliminating the Pennsylvania Supreme Court's current power to suspend statutes under Article 5 § 10(c) of the Pennsylvania Constitution, but would recommend that the amendment simply delete that power. The contrary provision that the Supreme Court would not have such power would appear to be superfluous and could result in confusion. The General Assembly then could enact provisions (which could be added to House Bill No.

838) setting forth a procedure similar to that under the federal Rules Enabling Act.

E. Centralization

The American Judicature Society's 1978 report strongly recommended in favor of centralizing the Pennsylvania courts. Similar recommendations appeared in the Pomeroy Commission report.

In considering the question of centralization, I think it is necessary to distinguish between the Supreme Court and the other two intermediate appellate courts.

With respect to the Supreme Court, I think it would be desirable to have the court conduct its argument sessions and conferences in Harrisburg. Accordingly, each justice would maintain chambers in Harrisburg. However, I would see no reason why justices of the Supreme Court could not continue to maintain chambers in their home counties as well, working in Harrisburg when the court is in session, and then returning to their home counties when the court is not conducting arguments or conferences.

The purpose of such centralization of the Supreme Court would be to facilitate communication among the justices, a necessary ingredient to collective decision-making at the highest judicial level. However, there has been some speculation that the purpose of such a requirement would be to insulate members of the

court from possible extraneous influence. Frankly, to the extent such a problem exists, it would be a problem of character and not of location. The solution to such a problem would be found in changing the judicial selection method, not in requiring the justices to move to Harrisburg.

Requiring all arguments to be held in Harrisburg would not pose an undue hardship on lawyers and litigants. If a case is of sufficient magnitude to justify review before our highest state court, then it is of sufficient importance to justify any necessary travel to the seat of government.

I think the considerations are different with respect to the Superior Court and Commonwealth Court. Although I do not like to differ with the 1978 recommendations of the American Judicature Society (and in this respect I am not speaking on behalf of the Society), the 1978 report was prepared at a time when all Superior Court and many Commonwealth Court cases were considered by the whole court instead of by three-judge panels. Today, all but a relatively few Commonwealth Court and Superior Court cases are decided by three-judge panels. There would be no added advantage to having all the judges in a single location where most conferences would be among the members of three-judge panels, the composition of which would change in each argument session.

Furthermore, it would pose an undue hardship on lawyers and litigants to have to travel to Harrisburg in each case before the Commonwealth and Superior Courts. That would be particularly true of public defenders and district attorneys in criminal cases before the Superior Court, the cost of which would be borne by the taxpayers.

Therefore, I would suggest that while centralization of the Supreme Court might be appropriate for the most part, I would urge that Commonwealth Court and Superior Court continue to operate as they currently do.

ATTACHMENT - PRIOR TESTIMONY ON MERIT SELECTION

Statement of Robert L. Byer
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Subcommittee on Courts
November 18, 1994

A. Merit Selection

Pennsylvania now is one of only eight states which continue to choose all appellate judges by partisan elections. My comments concerning merit selection are based in large part on my experience as a candidate in statewide judicial elections. However, I was a strong supporter of merit selection long before I first became a candidate. My experience as a candidate, as explained in this statement, has strengthened my conviction that the time has come for Pennsylvania to join the overwhelming majority of states by moving to a merit selection system.

A large part of the reason Pennsylvania's appellate courts now have such a poor reputation nationally is the strong perception that our judges are chosen because of partisan, elective politics rather than qualifications. And recent, well-publicized events have fortified the related perception that some of our judges and justices have continued to engage in politics on the bench and have decided cases or granted favors to litigants for political reasons.

This perception not only is destructive of public confidence in the ability of our courts to dispense equal justice, but it also is costing us revenue and jobs. Businesses understandably are wary of locating or continuing to operate in

Pennsylvania because, among other reasons, they are concerned that they will not be treated fairly in our courts.

Apart from these important considerations, my own experience as a candidate demonstrates many of the problems of selecting judges, particularly on the appellate bench, by partisan elections.

I have been a candidate twice for election to the Commonwealth Court of Pennsylvania. In 1987, which was the first judicial election after the General Assembly abolished cross-filing for statewide judicial candidates, there were two open seats on the Commonwealth Court. Of the two Democrats and two Republicans who emerged as candidates after the primary election, I was the only candidate to receive a rating of Exceptionally Well Qualified from the Pennsylvania Bar Association. I finished third in that election.

In 1991, I was one of two incumbents running in the election. I again was the only one of the four candidates to receive a rating of Exceptionally Well Qualified from the Pennsylvania Bar Association. I again finished third, this time behind the only candidate rated unqualified by the Pennsylvania Bar Association.

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My experience running both as a non-incumbent and as an incumbent in statewide judicial elections convinces me that we need to do away with the system of choosing judges in partisan elections and instead move to a merit selection system. I will discuss the reasons for that momentarily. However, there is one thing I want to clear up at the inception.

I have heard many people who oppose the creation of a merit selection system point to the method of selecting federal judges as evidence that a merit selection system would be as politically charged as partisan elections. I think this argument is based upon the false premise that judicial selection in the federal system is a "merit selection" process. I do not think that the way judges are picked in the federal system truly is a merit selection process, and I would never hold the federal system up as an example of how we should do things in Pennsylvania. Although the federal system does have the advantage of usually weeding out obviously unqualified people, judicial selection in the federal courts still places political considerations above considerations based solely upon the experience and qualifications of those under consideration. I think that the merit selection proposals which have been introduced in our General Assembly would be a great improvement over the judicial selection process used in the federal courts. What we are talking about today is merit selection. What

goes on in the federal courts is a political selection process which gives secondary consideration to merit.

Here are my reasons for supporting the adoption of a merit selection system in Pennsylvania.

1. It makes no sense to conduct partisan elections for an office which is supposed to be impartial.

Judges are different from other elected public officials, because judges are required to be impartial. Judges are supposed to decide cases solely on the law and on the evidence. Judges are not supposed to make decisions based upon the will of the electorate.

Other public officials are not supposed to be impartial. Nobody would want an impartial governor, senator or representative. Instead, we want to elect members of the executive and legislative branches based upon what they stand for. We want public officials who will announce their positions on the issues so that voters can choose carefully. The people have a constitutional right to lobby members of the executive and legislative branches with respect to issues, and there is nothing which restricts the considerations which an honest executive or legislative branch official may use in reaching a decision.

However, judges are not supposed to be so influenced. Lobbying a judge with respect to a decision is totally improper and, if the lobbyist is a lawyer or another judge, he or she would be subject to disciplinary proceedings, as seen in the recent disciplinary proceeding against a Supreme Court Justice.

Because judges are limited to the law and the evidence in making decisions, judicial candidates are not permitted to express an opinion on any contested legal or political question. This makes judicial elections different from other elections, where candidates are expected to express their positions.

There is no good reason to choose impartial public officials through a system of partisanship. Such a selection process is inconsistent with the role of the judicial branch.

One of the most important functions of the judicial branch is to uphold the rule of law even in situations where to do so is politically unpopular. Judges throughout our history have safeguarded our valuable constitutional protections by protecting the rights of a minority against the will of the majority.

The selection of judges who feel that they need to be responsive to the public could compromise judicial independence. I have no doubt that if federal judges had been required to run for election, the federal courts could not have ordered an end to

racial segregation in schools and other public institutions nearly forty years ago.

2. Judicial Elections are inherently corrupting.

The second reason I support merit selection is that partisan judicial elections are inherently corrupting. By requiring judges to be selected through a partisan political process, we run the risk that some individuals will continue to act in a political manner while on the bench. That, of course, is the root of some of the serious allegations involving members of our Supreme Court.

In addition, the inherently corrupting nature of the elective process becomes clear when one considers the impact of fund raising in judicial elections.

Like all statewide elections, judicial elections require the raising of money. However, the field of donors in judicial elections is far more limited than in elections for other offices. In judicial elections, the major donors are lawyers and litigants.

Although the ethical constraints on judicial candidates require that fund raising be conducted solely by a committee and preclude the judge from personal involvement in soliciting campaign contributions, the fact remains that judicial candidates are well

aware of their contributors. Apart from the fact that judicial candidates, including sitting judges, are permitted to attend political fund raising events organized for their election campaigns, thereby bringing them into personal contact with those who have made contributions, the Election Code requires all candidates, including sitting judges, to review political contribution reports for their own campaigns and to attest to their accuracy.

It is well known that when a sitting judge is a candidate for election either to a full term following an appointment or for election to a higher court, many lawyers and litigants will make contributions more out of fear than out of a deep seated conviction that the candidate deserves election. The situation is exacerbated when a sitting judge is a candidate for a higher court, because even if the judge loses the election for the higher court, he or she will continue to be a judge before whom that lawyer or litigant must appear.

Even political support short of the contribution of money has a corrupting effect. Judges are required to appear before various interest groups, knowing that the garnering of such support can be critical to a successful election campaign. When a candidate is a sitting judge, that person is painfully aware that

decisions made before the election could have a profound impact on support, both political and financial, from various groups.

I found this particularly troublesome when I was an incumbent running for a full term. One of the hallmarks of our system of justice is our insistence not only on actual impartiality, but upon the appearance of impartiality. The system of partisan elections is destructive of that process. How would you feel if you were a litigant who lost a case before a judge running for election, only later to learn that the opposing party or the opposing lawyer had made a substantial contribution to that judge's election campaign and you or your lawyer did not? That the current system of partisan elections requires that we ask such a question is itself reason to abolish that system.

3. Judges are elected for the "wrong" reasons, because voters do not have a basis upon which to vote.

My third reason for favoring the adoption of a merit selection system is that under a system of partisan judicial elections, the voters are not provided any real basis upon which to exercise their votes.

Ten days ago, Pennsylvania voters cast their votes for candidates to be our Governor and United States Senator. I would imagine that most voters who voted in that election knew something about the major candidates for that office, had some idea of where

those candidates stood on issues of interest to the voters and then cast their votes intelligently. And, nearly all of those voters today could tell you today for whom they voted. However, if we were talking about a judicial election, studies have shown that an overwhelming majority of those who voted would not be able to provide such information four months after the election.

This is not to say that voters are stupid. However, there are several good reasons for why votes generally are not cast on any intelligent or informed basis in a judicial election.

First, we are dealing with a specialized office which is not involved in partisan politics. When this is coupled with the fact that the candidates are not allowed to express their views on matters which would be of interest to the voters, most voters, particularly in a statewide election, are left with no basis upon which to make an informed judgment.

In addition, judicial elections are not newsworthy. The candidates are not expressing views on controversial issues, so the news media pay very little attention to a statewide judicial campaign, particularly as compared with other statewide elections. For a period of several months before the November 8, 1994 election, there was daily news coverage of the candidates running for statewide office. That never has been the case with respect to

statewide judicial elections. Because of the absence of any sustained news coverage, most voters have no idea of the identity of the candidates before they go to vote, let alone any idea of the candidates' experience or qualifications for the office.

Under these circumstances, voters in statewide judicial elections have no more basis for deciding who would make the best judge than they would have in trying to vote in a partisan election to select the engineers responsible for designing highway improvements in Pennsylvania. And it would make about as much sense to elect the engineers as it does to elect judges.

Because of the absence of pertinent information, voters make their choices based upon political party affiliation, a perception of whether they recognize or like the candidate's name, ethnic identification and ballot position. Yet, none of these criteria has any relevance to one's fitness for holding judicial office.

In 1987, when as a non-incumbent I lost what is regarded as one of the closest statewide general elections in modern Pennsylvania history, most experts attributed my defeat to straight-party votes cast in connection with the mayoral election in Philadelphia. Therefore, a judge of the Commonwealth Court was

elected based upon whether voters in Philadelphia preferred Wilson Goode to Frank Rizzo as their mayor.

In 1991, when as an incumbent I lost my seat on the Commonwealth Court by a margin of less than 1% of the votes, most of the experts attributed my defeat to straight-party voting in connection with the special election to fill the vacancy caused by the death of Senator John Heinz. Therefore, a Commonwealth Court judge was defeated and a new Commonwealth Court Judge was elected wholly without regard to a comparison of qualifications, experience or judicial performance, but because voters believed that Harris Wofford would make a better United States Senator than Dick Thornburgh.

What is particularly tough for me to deal with is that I was voted out of office even though no one challenged my qualifications or in any manner criticized my performance as a Commonwealth Court judge. Indeed, the election campaign did not result in one critical word about any opinion I had authored or any decision I had made as a Commonwealth Court judge.

Judicial elections are the only elections in which the results consistently are based on factors other than the qualifications, points of view and performance records of the

candidates. To continue a system of partisan elections under such circumstances serves no legitimate purpose.

4. Qualifications

My fourth reason for supporting merit selection is that it is the only way to insure that those selected for judicial office have the requisite qualifications, experience and ability. With increasing frequency, partisan judicial elections have resulted in the defeat of better qualified candidates for reasons unrelated to any factor relevant to fitness to serve on the bench.

This has not always been the case. There was a time when there were strong political leaders at the head of each of the political parties in Pennsylvania. Those leaders recruited and selected judicial candidates who not only had performed service to the party but whose experience and qualifications to be a judge were such that the political leader was proud to have that person as a candidate for judge. And, those strong leaders had the ability to enforce their endorsements. I do not have to tell members of the General Assembly how the strong political leadership has broken down in each of the political parties. In my opinion, this is as true for the Republicans as it is for the Democrats. In both parties, judicial candidates are selected primarily on the basis of political considerations unrelated to qualifications.

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Each time I was a candidate for the Commonwealth Court, I told people that the fact that the Pennsylvania Bar Association had given me a rating of exceptionally well qualified and the fact that I was on the ballot were largely coincidental. I continue to believe that is the case.

5. A Suggested Improvement to the Merit Selection Proposals.

I do make one suggestion for how the merit selection bills which previously have been introduced could be improved. I believe that under a merit selection system, there should be a requirement that no two successive nominees for the same court may be registered in the same political party. Such a provision would require bipartisanship in the judicial nomination process, preventing the Governor from nominating only members of the Governor's own political party, and I think that requirement fits well with the current requirement that a nominee be confirmed by a two-thirds vote in the Senate.

The people of this Commonwealth deserve a better judiciary than one which is selected on the basis of random partisanship. Instead, judges should be elected on the basis of their fitness to be impartial jurists on a particular court, and we should take the judiciary out of elective politics.

B. Regional Selection or Election of Appellate Judges

I oppose a system of regional selection or election of appellate judges. The use of regional rather than statewide elections does not solve any of the problems discussed earlier in this statement with respect to an election system. All of the problems inherent in a judicial election would be present even if the elections are held on a regional basis.

I also would oppose a system of regional merit selection. If a merit selection system is to be meaningful, then the selection of judges must be based primarily upon legal ability, experience and judicial temperament. Although geographic diversity might be desirable, it should not be a controlling consideration any more than political registration or other forms of diversity. If all things were equal, then a merit selection system should result in promoting geographic diversity as well as other types of diversity. But, if a potential nominee from Philadelphia were more qualified than a potential nominee from somewhere else, it would be contrary to the goals of merit selection to select the less qualified person merely because of a requirement of regional selection.

In addition, I strongly believe that judges do not represent constituencies, and that there is not a "regional perspective" on the law. Our appellate courts are statewide in nature, because they deal almost exclusively with issues of

statewide application. The regional considerations in litigation are addressed by having Common Pleas Court judges selected from and sit at the county level.

Finally, I have some concern about whether moving to a regional election or selection system would result in the necessity of decennial redistricting as the result of population shifts disclosed by the census. This adds a level of complication which is not offset by any corresponding benefit to the judicial system.

Moving to a pure merit selection system will enhance the opportunities of worthy individuals to serve on appellate courts even though they lack the political base of a major city. Once such an irrelevant political consideration has been eliminated by abolishing partisan elections, I believe that we will see a greater number of appellate judges from outside of the large population counties.