Rock the Capital's Testimony before the **Pennsylvania Bar Association Constitutional Review Commission Article V (Judiciary) Subcommittee**

March 16, 2011

I. Introduction

Rock the Capital's ("RTC") (1) testimony will address and be limited to "Judicial Selection & Financing Judicial Campaigns" and "Funding Pennsylvania's Courts So As to Guarantee an Effective Judiciary."

While we are not opposing or endorsing formulaic solutions to complex legal and judicial questions that confront the Court system, we believe the burden is on those groups, individuals and attorneys who advocate a "merit model" to demonstrate that the current paradigm is failing and explain how a transition to a selection process serves the greater good.

Our testimony will provide a brief background and history of issues and challenges facing Pennsylvania's court system. We will ask the Pennsylvania Bar Association Constitutional Review Commission Article V (Judiciary) Subcommittee to consider, respond and discuss pointed questions and concerns we have recorded since the Supreme Court retention election of 2006 relating to "Judicial Selection & Financing Judicial Campaigns" and "Funding Pennsylvania's Courts So As to Guarantee an Effective Judiciary."

To that end, we respectfully request that the Commission compile a compendium of questions and answers from this investigation.

We encourage the Bar to continue a public dialogue with the same degree of enthusiasm the Bar embraced the 1999 initiative called the Pennsylvania Commonwealth Partners Program.

> Its goal was to provide a forum, not otherwise available at the time, in which judges and legislators could informally exchange views in a setting that promoted frank and candid comments. The need to open the lines of communication between the two branches was clear. Just as in state capitols across the land, in Pennsylvania one often overheard legislators lament that the only time they saw judges was when the judiciary wanted something. (2)

However, while the exchange of ideas was a noble exercise, that paradigm may have actually contributed to an unhealthy relationship that fostered interdependency due to the absence of public oversight. We hope the Bar will facilitate an open and fluid dialogue that welcomes constructive suggestions to improve the legal umbrella we all live under.

II. Background

Judges were appointed in the Commonwealth of Pennsylvania until 1850 when citizens were given the ability to judge who judges them. Of course "citizens" was a limited term in 1850 and the "election" and "selection choices" were the prerogative of a limited population. Amendment 13, abolishing slavery was not ratified until 1865, Amendment 14 - acknowledging civil rights - was not ratified until 1868, and Amendment 15, which extended the vote, regardless of "race, color or previous condition of servitude," was not ratified until 1870.

Pennsylvania - like other states - did not directly elect US senators until the 17th amendment was ratified in 1913. And women were not afforded the right to vote until the following year with the ratification of Amendment 19.

The Pennsylvania Bar Association has supported a form of appellate-court merit selection since 1947, which of course was prior to the abolition of the poll tax under Amendment 24 in 1964.

The Bar also vets, evaluates and recommends judicial candidates, and its members are among the most prolific contributors. (3)

The 1968 Constitutional Convention created the current structure of Pennsylvania's court system, i.e., Administrative Office of Pennsylvania Courts The Administrative Office of Pennsylvania Courts ("AOPC")
"is the administrative arm of the Pennsylvania Supreme Court. This office was established in 1969 to assist the court in operating the Pennsylvania court system." (4)

The 1968 conventioneers punted the question of whether to appoint or elect judges to the voters. In the spring of 1969, the voters of Pennsylvania decided that Supreme, Superior and Commonwealth Court judges should be elected by a margin of just 19,000 out of nearly 1.3 million votes cast.

Of course 18 years olds drafted to serve in Vietnam could not vote at the time of the Convention, since the 26th Amendment was not ratified until 1971.

There are two observable trends moving in different directions that are with noting. At the federal level, increased electoral participation has been of paramount import for over 150 years and supported by elected representatives.

Yet, for some in the Pennsylvania legal community, disenfranchising voters and reducing public exposure has been a popular cause for over sixty years.

Elections of judges are interconnected to partisan politics, limited campaigning, special interest finance and essentially provide a position for life since voters rarely turn out judges during what used to be perfunctory retention "elections."

The Pennsylvania Constitution - under Article V: The Judiciary - provides clear and accountable governance protocols if implemented as intended under Sections 1, 14, 16 and 17. (5)

However, in 1994 the Judiciary was embarrassed by the impeachment and conviction of Supreme Court Justice Rolf Larsen which may have led to the formation in 1998 by the Pennsylvania Supreme Court of a "Special Commission" relating to the public perception of judicial elections.

The Special Commission (6) - composed of judges, campaign consultants and academics - made the following observations after meeting and conducting polling:

• Voters strongly believe that amount spent on campaigns threatens integrity and fairness of elections and judicial rulings. Voters believe special interest contributions dominate ordinary voters. Voters believe the money problem is growing worse. Voters believe contributors expect and receive something for their contributions.

• Voters are more anxious about the judiciary than about other elected offices.

• There is little demographic, geographic, or partisan variation in voters' attitudes on these issues.

The Commission made the following recommendations:

• Contribution limits including $1,000/individual, $5,000/legal entity for statewide races.

• Expenditure limits, including $1,000,000 for Supreme Court office, $500,000 for Superior Court and Commonwealth Court office, and $250,000 for Court of Common Pleas.

• Expedited disclosure, accessible on web page designed by the court's administrative office.

• Mandatory recusal of judges in cases where opposing party or counsel has contributed above the limits.

• Public education and enforcement enhancements.

RTC submits that the decline in the Judiciary's standing is not an outgrowth of elections, but more the result of the inability or unwillingness of the Court to adopt the above identified recommendation, a reluctance to enforce self-policing protocols, and an overt hostility to public criticism.

Amending the system would mean amending the Pennsylvania Constitution, a process that requires approval by the Legislature in two successive sessions and then by voters. If this is the case, the PBA should be recommending a General Constitutional Convention.

Let's be frank, the Judiciary's standing declined substantially after the passage of Slots or Act 71 of 2004.

The House of Representatives initially produced a bill that would have set requirements for background checks of persons employed by Pennsylvania race tracks.

What started out as a two-page bill on "background checks," languished in the House and Senate for a total of 147 days. When the bill finally moved forward, it was amended on the floor of the Senate. All of the original language was stripped out of the two-page bill and was replaced with a 146-page amendment.

This type of Constitutional shell game referred to as "gut and replace" lawmaking, violates Article III , Section 1, 2, 3 and 4 of the Pennsylvania Constitution which requires that lawmakers maintain the "original purpose" of the legislation, "reference to committee," and follow clear-cut procedures required for the consideration of bills.

The Supreme Court supported the undemocratic manner in which Act 71 of 2004 – the Slots law – was passed in the middle of the night with no public scrutiny. In fact, the entire Supreme Court ruled against Pennsylvanians Against Gambling Expansion when they challenged the constitutionality of the slots gambling law.

That all the Justices - who were elected by the people and endorsed by the Bar - upheld a patently unconstitutional law raises the vital question: How would merit selection have changed or altered that outcome?

The "Pay Raise" – Act 44 of 2005 – was another blatant case of denying the public due process in the manner in which our laws are enacted.

Even in dissent, the Court failed the citizenry of Pennsylvania. Justice Saylor argued that the pay raises for judges and legislators were linked and "non-severable," but he also stated:

> I join the majority's holding and reasoning that the Legislature's attempt, via Act 72, to repeal Act 44's compensation plan is unconstitutional as it relates to the salaries of judicial officers, since the enactment plainly reduces those salaries during judicial terms of office, and therefore, violates Article V, Section 16(a) of the Pennsylvania Constitution."

Justice Saylor agreed that the intent of the legislation was not to sever the pay raises of the legislature from the judiciary. But, he also reasoned on behalf of his own self-interest, since you can't cut a judge's pay in mid-term, the pay raise for judges must stand.

This bill - introduced on May 3, 2005 - was originally intended to prohibit any executive branch official from earning more than the Governor earns. It remained exactly that way until the Senate Appropriations Committee amended it on July 6, 2005, to prevent it from being enforced retroactively.

On July 7, 2005 the bill went to Conference Committee where the pay raises for the legislative and judicial branches were amended into the bill. The General Assembly passed the bill and the Governor signed it within less than 24 hours.

The Court accepted this "gut and replace" legislation, which immediately increased compensation for public officials, despite the fact it clearly violates Article III of the Pennsylvania Constitution.

We believe that the Supreme Court should serve as an impartial legal referee and provide an emergency brake to runaway legislation. In the instances of slots and the pay raise, the Supreme Court provided an accelerant to a legal fire.

Even in instances where legislative involvement is minimal, the Court has robotically followed the "presumption of constitutionality" into the realm of the absurd. For example, the Court's 2001 decision on redistricting (the redrawing of legislative districts).

Pennsylvania is redistricted every 10 years by a five member commission composed of the leaders from both parties of each chamber. They cobble together an "incumbent protection program" by developing a redistricting scheme that defies laws of common sense. The legislature doesn't enact the plan, nor does the Governor have the ability to veto it.

Of course, the public has no input either. The only safeguard to keep the commission from going Picasso is the constitutional right of an aggrieved citizen to go to the Supreme Court and seek relief.

Again, Justice Saylor's opinion in the redistricting process demonstrates the legal gymnastics the Court is willing to entertain in order to defer to the legislature's geographic schizophrenia.

> ... I remain circumspect concerning the manner in which state constitutional requirements of compactness and integrity of political subdivisions have been applied by the Court in the prior decisions that are followed here, and I am receptive to the concern that the Court should no occupy an unduly passive role in the vindication of these essential precepts. I write, therefore, to express my own position that facets of the Commission's present plan for reapportioning the Pennsylvania Legislature test the outer limits of

> justifiable deference, at least in the absence of some specific explanation for why the constitutional prerequisites of compactness and respect for political subdivisions cannot be accommodated simultaneous with the maintenance of substantial equality of population and enforcement of voting interests of protected groups in the manner prescribed by federal law." (7)

Redistricting is now on the legislative menu and will likely fall into the lap of the Court. Would merit selection - which would include stake holders who have a vested interest in redistricting - produce a fair and equitable solution? Will merit selection provide geographically contiguous and competitive districts?

According to former-Chief Justice Cappy (8) and Justice Saylor (9), public criticism of the Court system is dangerous, and it threatens judicial independence.

Justices have referred to the critiques and reforms proposed by Democracy Rising Pa, ***Rock the Capital*** and Pa Clean Sweep as "threats" and "intimidation" by "special interest groups" that could interfere with the Court's ability to act as an impartial referee.

Also in 2007, judges were compelled to file financial disclosure statements with the State Ethics Commission. This level of public scurrility occurred after for more than 20 years, when judges only had to file in-house financial statements with the Administrative Office of Pennsylvania Courts. Judges had been excluded from the disclosure requirement in the state Ethics Act, because a 1983 Pennsylvania Supreme Court decision said that applying that law to the judiciary was an unconstitutional violation of the separation of power. (10)

Then a judicial tsunami hit the court system on November 8, 2005.

> For the first time in this state's history, one standing Supreme Court justice was tossed out and another retained by a surprisingly thin margin, by angry voters making a stand against business as usual in state government.
>
> And yet it's not quite as simple as he would have us believe. The state Supreme Court was part of the problem, not the solution.
>
> The high court did its part to sustain the most outrageous aspect of the whole smelly pay-raise debacle. In an earlier case, it ruled legal the ethically challenged loophole known as "unvouchered expenses," which allowed lawmakers to take their raises immediately instead of waiting until their next term, as the constitution requires. (10)

After the demise of Justice Nigro, former-Governor Rendell introduced a merit selection proposal in 2007 which featured a 14-member nominating commission that would give the governor a list of five names for each vacancy. The governor would send his choice from that list to the Senate for simple-majority confirmation. The commission would consist of four gubernatorial appointees (no more than two lawyers, no more than two from a single political party, and all from different counties); one chosen by each of the General Assembly's four caucuses; and six "public" members selected from civic groups, unions, business organizations, lawyers' groups, non-lawyer professional groups and law-enforcement associations. Four years after a jurist is selected, he or she would face a 10-year retention election.

In the same year, Philadelphia-based Senators. Vincent J. Fumo and Anthony H. Williams, both Democrats, proposed a process for the governor to appoint Philadelphia judges, based on the recommendation of a 19-member nominating commission.

Which brings us to our current conundrum.

III. Topics for Discussion

#2: "Judicial Selection & Financing Judicial Campaigns."

I) Condition of Current System.

A: Is this topical area an acknowledgment that the current system is broken? Or an advertisement that the "condition" of the system for electing judges is flawed?

B: If the current system is somehow flawed by popular elections, are the decisions reached through this process similarly impeached and impugned?

C: Does the transition to a selection based system create a precedent that could be extended into other democratically elected provinces like school boards and county row offices?

II) Metrics & Selection Committees.

A: What metrics are available that quantifies and qualifies merit selection produces more qualified judges who render more "effective" results?

B: Who or what makes merit recommendations to assure that vested interests do not game the process and create appointment backlogs that feed judicial gridlock?

C: Are states that select judges less likely to appoint magistrates with dubious moral skill sets? Has the Judiciary self examined itself after recent unethical behaviors manifested? Is there a need for an outside agency to conduct an audit of the Pennsylvania judiciary prior to moving to merit selection?

III) Conflicts of Interest.

A: The current system is dominated by the legal profession. Will this reality on the ground continue to influence outcomes and skewer election of judges? How do we avoid duplicating Conflict of Interests in the nomination process that currently permeates Executive appointments with Senate conformation where *quid pro quo* or "partisan balancing" frequent the appointment landscape?

B: Judges have personal preferences, affiliations and biases. How do we make sure that judges have the legal tools as well as "life skills" to enhance their ability to pass judgment on people who live in different demographic universes?

C: How does a "meritocracy" balance power between the branches of government, and allow judges to be judged by the citizens, taxpayer and residents?

D: If the public is excluded from the hiring process, why should taxpayers underwrite the costs to employ separate and unequal employees?

IV) Is the Issue Campaign Finance or Election of Judges?

A: Is the issue campaign fund raising? If so, why not consider public financing or eliminating donations form the legal community?

B: Most of the moneys raised are familial, political or partisan in nature. Are we saying that money - or too much money - from vested interests is polluting the judicial pool? Or, are we saying that judges should not be burdened or tainted with fundraising?

C: Can there be public or private campaign opt-in and opt-out mechanism(s)? Is there a hybrid that allows for selection if a certain percentage of voter threshold is not realized?

D: Can we encourage campaigning judges to speak more freely and actively engage constituents?

#4 "Funding Pennsylvania's Courts So As to Guarantee an Effective Judiciary."

A: Please quantify and qualify the term "effective", and how it will be measured under merit selection.

B: Please describe how the current system is "ineffective."

C: How will merit selection be more "effective" and impartial than public elections? What recourse do voters have if the meritocracy does not achieve desired outcomes?

D) Is the only issue at play whether the judiciary must submit to the legislature for an annual budget? If so, would the judiciary be willing to accommodate a two year budget cycle with an odd year forensic audit?

E: Will the Administrative Office of Pennsylvania Courts ("AOPC") be willing to out source procurement or coordinate with Department of General Services for aggregate purchasing of energy, real estate, hotel rentals, and transportation?

F: Will the Bar and AOPC be willing to instill public confidence by expanding the Open Records law and developing a judicial Penn Watch program?

G: How many AOPC person hours are dedicated each year to the budget process that renders the current system "ineffective"?

H: How will voters and taxpayers measure productivity, and how will the judiciary provide accountability under a meritocracy?

End notes

1 ***Rock the Capital*** is a nonpartisan voter education organization formed after the Pennsylvania legislative, judicial and executive branches conspired to enact a compensation package in violation of a state constitutional provision which bans seated lawmakers from granting themselves a pay raise.

RTC is a registered Political Action Committee (PAC) located at 4100 Hillsdale Road, Harrisburg, PA 17112.

Rock the Capital is affiliated with the ***RocktheCapital.com*** which is a for-profit Pennsylvania registered Limited Liability Company.

Research provided by Dennis Baylor.

2 "Finding Common Ground Between Governmental Branches: The Pennsylvania Commonwealth Partners Program" by Jack A. Panella, Judge of the Superior Court of Pennsylvania.

• Number 3.• Volume 43 • Summer 2004 • American Bar Association

• Judge's Journal • 48 "Finding Common Ground Between Governmental Branches: The Pennsylvania Commonwealth Partners Program" by Hon. Jack A. Panella, published in Judge's Journal, Volume 43, No.3, Summer 2004.

3 "California Commission on Campaign Financing" , (1995); "Report of the Citizens' Committee on Judicial Elections", (1995); "Public Affairs Research Council of Louisiana", (1996); and, the "Pennsylvania Supreme Court's 'Special Commission,'" (1998).

4 The AOPC is headed by the Court Administrator of Pennsylvania. Its departments and units include Policy and Research, Judicial Services, Judicial Education, Judicial Programs, Judicial Automation, Judicial Security, Legal, Finance, Human Resources, and Communications and Legislative Affairs. The AOPC has offices in Harrisburg and Philadelphia." (Web site: http://www.aopc.org/T/AOPC/)

5 • **Unified Judicial System Section 1**. The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, Courts of Common Pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system. Election of Justices, Judges and Justices of the Peace; Vacancies Section 13.2 (a) Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.

• Judicial Qualifications Commission Section 14.

(a) Should the method of judicial selection be adopted as provided in section 13 (d), there shall be a Judicial Qualifications Commission, composed of four non-lawyer electors appointed by the Governor and three non-judge members of the bar of the Supreme Court appointed by the Supreme Court. No more than four members shall be of the same political party. The members of the commission shall serve for terms of seven years, with one member being selected each year. The commission shall consider all names submitted to it and recommend to the Governor not fewer than ten nor more than twenty of those qualified for each vacancy to be filled.

(b) During his term, no member shall hold a public office or public appointment for which he receives compensation, nor shall he hold office in a political party or political organization.

(c) A vacancy on the commission shall be filled by the appointing authority for the balance of the term.

• Compensation and Retirement of Justices, Judges and Justices of the Peace Section 16.3 (a) Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law.

Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

• Prohibited Activities Section 17.

(a) Justices and judges shall devote full time to their judicial duties, and shall not engage in the practice of law, hold office in a political party or political organization, or hold an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof, except in the armed service of the United States or the Commonwealth.

(b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.

(c) No justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument of perquisite other than the salary and expenses provided by law.

(d) No duties shall be imposed by law upon the Supreme Court or any of the justices thereof or the Superior Court or any of the judges thereof, except such as are judicial, nor shall any of them exercise any power of appointment except as provided in this Constitution.

6 "Report of the Special Commission to Limit Campaign Expenditures," (1998).

7 Justice Castille and Eakin joined in the concurring opinion.

8 *Chief justice defends pay-raise ruling in TV appearance*, Christopher Lilienthal "Capitolwire," September 2, 2006.

9 Justice Saylor's speech on October 25, 2007 before the Republican Party of Lebanon County.

10 **Nominating Petition of James Owens, 922 A.2d 973 (2007)**

Case Conclusion Date: March 23, 2007

Outcome: All judicial candidates must file disclosure documents with the Ethics Commission including judges seeking higher office or retention.

Description: Representing challengers to a judicial candidacy, the Commonwealth Court held, as argued by the challengers, that the provisions of the Ethics Act requiring that all candidates for public office file statements of financial interests with the Ethics Commission and append copies thereof to their nominating petitions do not violate separation of powers, and are not prohibited by the Pennsylvania Supreme Court's precedent.

Financial reporting rules widened for judges who run for office

Associated Press, Peter Jackson, March, 2007

" Judges seeking election to higher judicial offices or additional terms in their current position must file financial disclosure statements with the State Ethics Commission, a Commonwealth Court judge has ruled."

11 " Nigro's loss is Pa. voters' win," *Philadelphia Inquirer*, John Grogan Fri, Nov. 11, 2005.