

The Arlin M. Adams Center
FOR LAW AND SOCIETY
Susquehanna University

ARLIN M. ADAMS CENTER FOR LAW AND SOCIETY

SUSQUEHANNA UNIVERSITY
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HOW THE PENNSYLVANIA JUDICIARY
UPHOLDS RIGHTS AND LIBERTIES

PARTICIPANTS:

John Bender, Superior Court Judge
James J. Fitzgerald, III, Superior Court Judge
Joan Orié Melvin, Superior Court Judge
Allan Sobel, Director, Arlin Adams Center

Before: Sarah C. Thomas, RMR
Reporter-Notary Public October

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MR. SOBEL: Good evening. I am Allan Sobel, the director of the Arlin M. Adams Center for Law and Society here at Susquehanna University. I welcome all of you who have joined us here this evening for tonight's program on the Pennsylvania judiciary, how it upholds our rights.

The Pennsylvania judiciary, of course, is made up of a number of courts; the trial courts, the Common Pleas Court, the intermediate appellate courts, both the Commonwealth Court and the Superior Court, and the Pennsylvania Supreme Court. And the judges we have with us here tonight, who I will be introducing momentarily, are judges on the Superior Court, which is an intermediate appellate court sitting between the trial courts and the Supreme Court of Pennsylvania.

What I find very interesting about the Superior Court is that it was created by a legislative act in 1895, which makes it, if not the oldest, certainly one of the oldest intermediate appellate courts in the United States. I asked Judge Tamilia, who is here with us tonight and wrote a history of the Superior Court, whether, in fact, it is the oldest and he thought it may well be, if not the oldest, certainly one of the first few created in this country. It's astonishing to me that the legislature of the Commonwealth created the court that early on because if you look at the intermediate appellate courts throughout the United States, you will find that generally they were created in the 1960s.

Why were they created in the 1960s? Well, they were created then because of a United States Supreme Court decision *Gideon versus Wainwright*, which gave to all defendants in criminal cases facing possible imprisonment the right to counsel. And that generated a whole slug of cases that were tried very seriously in the trial courts and then went up on appeal claiming that there was error in various legal rulings made by the trial court judge. There also was a wide variety of legislation passed, both state wise and federally, in the 1960s, creating numerous causes of action which led to an of litigation in the state trial courts and more appeals.

So we were blessed by the foresight of our legislators back as early as the late 19th century in creating this very, very important court. I say it's very, very important because the truth is, of the various courts in the Pennsylvania judicial system and the judicial system of other states, the real work horses -- the real work horses are the trial courts and the intermediate appellate courts.

The intermediate appellate courts probably take, for every one case decided by the Pennsylvania Supreme Court, hundreds of cases. They are the court to which a party claiming a right to appeal has an automatic review of his or her claim, whereas the Supreme Court of Pennsylvania, like the Supreme Court of the United States, has the discretion to either grant or not grant review in virtually all of the cases in which a party is seeking review by that court.

Well, we are going to hear more about the Superior Court from the real authorities on the court, and we are going to hear about how that court and the other Pennsylvania courts protect our right to liberties from three members of the Pennsylvania Supreme Court. We have on the far right Justice Fitzgerald, who is a senior member of the Pennsylvania Superior Court. He has been nominated by Governor Rendell for a permanent seat on the Pennsylvania Superior Court. The justice has sat, by a nomination of Governor Rendell, on the Supreme Court of Pennsylvania, which I might note for those historical people of historical interest, our Pennsylvania Supreme Court is the oldest Supreme Court in the United States. It has sat longer than any other Supreme Court in the United States.

In the middle is Judge Bender. Judge Bender is a permanent member of the Pennsylvania Superior Court.

And to my immediate right is Judge Joan Orié Melvin, who is the president judge of the panel of the Pennsylvania Supreme Court that's currently sitting in Sunbury hearing cases in the Northumberland County courthouse.

Please join me in welcoming these three members of the Superior Court. And after we welcome them, we are going to see a DVD showing a little bit of the history of the Pennsylvania judiciary. Please join me in welcoming.

JUDGE ORIE MELVIN: I just wanted to say a few introductory remarks before we watch this DVD. I want to share with you, on behalf of my colleagues who are here in the audience and here on the stage, what an honor it is to be here tonight. On behalf of the Superior Court I do want to extend our thanks to Susquehanna University President Jay Lemons and Allan Sobel, the director of the Arlin M. Adams Center, for inviting us here for this wonderful event. We are very impressed with this beautiful campus, your knowledgeable students, many of whom we have met, and the thought-provoking programs that you continued to present here at the Arlin Adams Center each year.

As you've been introduced to my panelists who are sitting here in Sunbury -- Judge Bender, from Allegheny County; Justice Fitzgerald, who resides in Philadelphia County -- we are also very honored to be serving in a special session riding the circuit here in Northumberland County.

I am also pleased to introduce two of our esteemed colleagues who are sitting in the audience, Superior Court Judge Jack Panella, if you could stand, and Judge Pat Tamilia. Judge Tamilia is the author of this book that is out in the hallway that he is sharing with everyone. It's called the "Keystone of Justice" The Pennsylvania Superior Court. He is truly the court historian and he is working on a book that details the history of the Supreme Court. He is such a knowledgeable author.

I would like to acknowledge that the special session and the attendant events would not have been possible without the existence of our Superior Court prothonotary, who came to Northumberland County with us, Karen Reed Bramlett, and deputy prothonotary Jim McCullough, who is here with us also tonight. I would also like to extend thanks to the Northumberland County Bar Association president Jeffrey Apfelbaum and past president Thomas Boop for coordinating a reception for the judges on Monday night. It was wonderful to meet the members of the Bar, as well as those from the Susquehanna Valley last evening. We are very grateful for their hospitality.

Just a few people I would like to mention who are here in the audience that are special to us. We have President Judge Sacavage of Northumberland County; Judge William Wiest of Northumberland County; Senior Judge Barry Feudale, who served on the Commonwealth Court; Judge Harold Woelfel of Snyder County; Senior Judge Samuel Ranck of Northumberland County; retired President Judge Wayne Bromfield of Union County; the first lady of Susquehanna University, Marsha Lemons; the executive vice president of the University, Sara Kirkland; the assistant director, Michelle Arcuri, and those are some of the luminaries we have here in the audience. Tonight we will be speaking on the topic how the Pennsylvania judiciary upholds rights and liberties. We will be showing you a new 15-minute video that was created and written by our colleague, Judge Jack Panella, that details the Pennsylvania Unified Judicial System. It is a very, very good DVD that will give you some information about the court system here in Pennsylvania. It tells you how it's organized, why the importance of the individual freedom and democracy. The video also features our Superior Court President Judge Kate Ford Elliot, who specifically discusses the workings of the Superior Court.

After the video presentation, which I said takes about 15 minutes, we have Judge John Bender, who is going to talk to you about the history of the Superior Court and relate to you some of the statistics regarding our court's operation.

Then Justice Fitzgerald will provide you with some insight regarding some of the Superior Court special programs. Then, finally, I would like to speak on the important topic of judicial independence. Afterwards we will encourage feedback from our judges and we will entertain any questions the audience may have of the three panelists here, as well as our esteemed colleagues who are sitting in the audience. With that said, we will proceed with the DVD.

(Whereupon, a DVD was played.)

JUDGE ORIE MELVIN: Our first speaker is Judge John Bender and he is going speak about the history of the Superior Court.

Judge Bender: Thank you, Judge Orie Melvin. Before I begin I want to acknowledge Judge Jack Panella's project here. This is the first time I've seen it and it's quite impressive.

My job here tonight is to talk about the history of the appellate courts; basically, the history of the Superior Court, and we can't begin unless we step back just a little bit. As the film we just saw said, the Supreme Court was created in 1722. Now, when it was created it consisted of one chief justice and two justices, three appellate judges. Currently it consists of seven justices, a chief and six associates.

Our court was created in 1895. Now, keep in mind that in 1722 until 1895, there was one appellate court in the state of Pennsylvania. The primary reason for that was it was a small state. The state was just growing. History will show as the state grew, we were an industrial center. There was an influx of citizens as well as an influx of businesses, which resulted in more cases. Accordingly, the Supreme Court could not handle the load, so an intermediate level appellate court was created and that is our court, the Superior Court.

Now, upon its creation it consisted of seven judges. At this point we have a Supreme Court and a Superior Court. In 1968, the Commonwealth Court was created. And I won't go into that other than what we saw in the film here, but that was a special intermediate court dealing with very specific jurisdiction; governmental entities, governmental issues.

As it continued, the state grew. There was further industrialization, further business, further population growth. We were basically manning the entire appellate world in Pennsylvania with the seven from the Supreme, who I will note always sit together. They did not, and to this date, do not sit in panels.

In 1979, our court began to sit in three-judge panels, which is as we sit today. The judges we sat with in your courthouse here, the number of us is three and the reason was to get further work done with the number of judges which we have.

In 1980, the number of judges was increased to 15. That was done by constitutional amendment, amendment of the Pennsylvania Constitution. Now, at that point the caseload mushroomed. We are in the '60s. For the reasons our moderator talked about, the increase in civil liberties, civil rights, but there was also a large increase in industrial and business activity in this state. We were a very, very active state and that resulted in a lot of cases.

And accordingly, we needed more appellate judges. So at this point we sit 15 plus our senior judges, which currently is six, seven, so we basically have maybe 21, 22 judges. We sit in three-judge panels and we handle approximately 8,000 cases a year. We also have a form of original jurisdiction. We do -- we handle wire taps, which is sort of a peculiar area that we have been designated the court to handle that matter.

Just to compare our number of cases to the Supremes, the Supreme Court, they grant allocatur in approximately 120 cases a year. We are handling 8,000 cases a year, so you can see the difference.

The reason we can do that is, one, we sit in three-judge panels. They always sit as a full court. Also, just more of a procedural matter, we also, because we sit in three-judge panels, sometimes three judges here will decide one thing. Three judges here will decide something else. The way we attempt to reconcile that with our own court is called en banc court. There we have nine sit. You might see those televised on PCNC. And we had one last week in Philadelphia, where nine judges sit in an attempt to reconcile differences between our panels and to handle matters that are considered of significance that it should be decided by nine rather than three.

The judges of our court serve ten years. They are elected in a general election in odd-numbered years. In '09, we will be electing three judges to our court. They serve for ten years and if they are -- do a good job, if there are no controversies, they stand for retention at the end of that 10-year term, at which time they don't run against another opponent. They get a general no vote. In the history of Pennsylvania all judges on the state-wide level have been retained with the exception of one, which is Justice Nigro, which, unfortunately, it occurred after the pay raise issue a couple of years ago. We are hoping to put that behind us.

Our court has had a total number of 98 commissioned judges since its beginning in 1895. Judge Orie Melvin is number 83. I am number 87.

Let me talk a little bit about the way that we sit. I've already talked about the fact that we sit in three-judge panels. Those are called merit panels. And this week we are doing A2308 -- I'm sorry -- A3208, which is the 32nd merit panel to sit this year, the year '08. It's a three-judge panel. We have had five en bancs this year. Those are either in Pittsburgh, Philadelphia or Harrisburg. And basically these are the two ways we sit. That's the world of our sessions.

We have two types of sessions. And here I am giving a little background. I am going to hurry through this because I realize we have a lot of other information to give. But there are two types of panels. I am talking three-judge merit panels. There are argue, as there is going on right now with A3208, and there are submit panels. If litigants choose not to argue the case in front of the panel they can simply say, Okay. We are going to submit, which means there is no argument. A submit panel is put together.

Every panel always consists of 45 cases, be it argue or submit. In the submit process the 45 cases are submitted to a three-judge merit panel with no argument. We then read briefs. We make the decision and issue the decision.

Basically our form of authority consists of the most senior judge on the merit panel runs the show. In this case it's Judge Orie Melvin. She is -- as I said, I'm number. She's number 83, so she gets to be in charge and she basically tells us how she wants to do it. They have very, very large amount of discretion on how they want to do it.

We, of course, adapt. We all -- don't adapt. We more conform to a stylized way it's done, but the presiding judge does have the authority to do it pretty much the way they want to do it.

After argument, basically cases are assigned to one of the judges on the panel. That judge drafts an opinion or a memorandum. An opinion is a published document which will appear in Atlantic 2nd or the Pennsylvania Reporter. A memorandum is an unpublished document.

There is some controversy on this technique because people claim -- some people, I'm not -- I don't support this position -- but they claim that there is a shadow law in Pennsylvania. No one knows what it is unless you are on the Superior Court because the memorandum decisions are not published. They are distributed to the parties and they can be obtained, but there is not a reporting system so that they can be cited. They can also not be cited in argument in subsequent cases.

That is one of our points of dispute right now. It's not just in Pennsylvania. It's across the nation.

We attempt to dispose of cases within 60 days of argument or submission. If it's a submit panel, 60 days from the date we get it. If it's an argument panel, 60 days from the date that it's argued.

Now, that's a very short time span to do the work that we have to do. We don't always reach that goal, but that is our goal. If we don't do our work within 60 days, we hear from our president judge, in this case Kate Ford Elliot. She will send us a note and say, Get working.

That's all I am going to say. If there are any questions -- I don't know if we are going to take them now or later; we will be here -- I'm more than happy to talk about the history of the court and any procedural matters.

I would also like to acknowledge -- he just left, but he was with us -- Judge Tamilia has written a very nice history of the Superior Court which is available out in the lobby. It goes into far greater detail than I am here tonight. Thank you for having us here and we thank you, the University, and our hosts.

JUDGE ORIE MELVIN: Our next speaker is Justice James Fitzgerald, who will speak on the important programs the Superior Court offers.

JUDGE FITZGERALD: Thank you very much, Judge, and thank you for introducing me as justice. Not that I want the title, but my wife says she worked very hard for me to get there and she wants me called justice. I just want to thank you for that.

Secondly, I was hoping we would be celebrating a victory here tonight with the Phillys winning, but the weatherman has postponed that for a few nights. There is tickets in Philadelphia. If anybody wants to see a two-and-a-half, three-inning game, I think you can probably find a ticket for tomorrow night.

First of all, I want to humbly say we really appreciate the hospitality that Susquehanna University has given to us, and Snyder County and Northumberland County, because it is our privilege to be here; not your privilege to have us. It's so nice to come to a community where people are happy, where life basically has its trials and tribulations, but the moral strengths are here. And as we try so many cases -- and as I did as a trial judge -- where things are broken down and things are a little bit difficult, it's nice to come here and rejuvenate my spirit and the goodness of America and the future of America.

I want to say, first of all, good evening, President Jay Lemons -- President Judge Kate Ford Elliot was here before -- judge Orie Melvin for your kindness and introduction, and Judge John Bender and other judges and dignitaries and officials here this evening. It is an honor to be with you this evening.

I would like to take this opportunity to thank Allan Sobel, the director of Arlin M. Adams Center for Law and Society for the invitation to present this panel discussion. I would also like to thank Jeffrey Apfelbaum, president of the Northumberland County Bar Association, for his efforts in bringing this evening's panel discussion to fruition.

I would like to give a special welcome to the prelaw students, some of whom we met tonight at the lovely dinner at the president's home. I am certain you are finding the argument sessions of the Superior Court informative and inspirational, hopefully.

Judge Arlin Adams was a distinguished jurist whose legal career includes 17 years on the United States Court of Appeals for the Third Circuit. He is now dedicated to the practice of law and is deeply involved in civic leadership. He personifies the philosophical goals of the center named in his honor.

The involvement of the Arlin Adams Center with the community is a model that serves as a frame of reference for my remarks. The Superior Court strives to look for ways to better serve the litigants who come before it, as well as the public at large, through its innovative programs.

It is an honor to be sitting on the Superior Court and to have been appointed by Chief Justice Ronald Castille, as co-chair of the Commission on Judicial Independence formed by the Supreme Court in 2005. Judge Orié Melvin will be speaking to you about judicial independence.

In fact, the judges of the Superior Court are involved in endeavors which benefit the bench and bar, in addition to deciding cases. For example, President Judge Kate Ford Elliot on the executive committee of the counsel of chief judges of the State Courts of Appeal -- all of the judges are active in assisting lawyers in effective appellate advocacy through their participation in continuing legal education, seminars, and lectures.

Judge Joan Orié Melvin is a member of and chair of numerous committees of the Superior Court. She is newly appointed as chair of the security committee, which oversees the safety of judges, lawyers and litigants.

Several of my esteemed colleagues have written books. Judge Richard Klein wrote a book entitled Trial Communication Skills. Judge Jack Panella wrote the Pennsylvania Sexual Violence bench book. Judge John Bender wrote Pennsylvania Superior Court Ceremonial Sessions.

Judge Bender has told you how busy our court is. Rest assured, being a Pennsylvania appellate court judge entails six or even seven days of work each week. However, this is interesting, rewarding, and important work. I can truly say, after having served on the Philadelphia Court of Common Pleas bench for 17 years, on the Supreme Court for one year, and now on the Superior Court, that being a judge is the best job in the world.

It is our hope that by opening the courts to the public the public will gain firsthand knowledge of how the court system operates, thereby instilling confidence in the judiciary.

The Superior Court holds special sessions throughout the Commonwealth. Normally the court hears arguments in Philadelphia, Pittsburgh, and Harrisburg. In addition to these locations, the courts schedule three special sessions this year in Montgomery County, Northumberland County, and in Chester County.

The Superior Court is accessible to the public through our information website, which includes a schedule of all argument sessions for the calendar year, including the names of the judges who will comprise each panel, our internal operating procedures, detailed statistics which reveal the incredible caseload of the Superior Court, and links to the complete text of all published opinions filed by the court.

Additionally, en banc sessions of the court are televised.

The Superior Court is integrating electronic filing, or e-filing, into the court system. E-filing permits a party to submit documents to the court electronically. E-filing has many benefits. It facilitates access to file documents. Since parties are subject to filing deadlines, e-filing has an immediate benefit. Supposed a party completes a document at 4:00 p.m. on the date that it is due. With e-filing it can be easily transmitted to the court by 5:00 p.m. As soon as the document is filed, it is time stamped.

One of the Superior Court's most important programs is certainly of interest to the community. Former Chief Justice Ralph J. Cappy, recognizing that families and children are our nation's future, designated family court as the most important court in the judicial system. Judges in family court have a daunting job. They have to ensure that the best interest of each child coming before the court is met. It is through their dedication that successful outcomes are reached by promoting cooperation among all the stakeholders, the court, social service agencies, health care providers, the educational system, child advocacy groups, and the community.

Recognizing the need for controlled expedience in matters involving children, in July 2000, the Superior Court instituted the family fast track program to eliminate delays in appellate review. The purpose of the program is to identify and monitor cases involving adoption, custody, visitation, child support, dependency, and involuntary termination of parental rights.

Reproduction of records and briefing schedules are expedited. Presently there is a series of rule changes which have been proposed by the appellate court procedural rules committee of the Supreme Court. To further expedite the appellate process in these cases, Superior Court Judge Maureen Lally-Green chairs the appellate court procedural rules committee and cochairs a subcommittee that developed the rule change proposals. The proposed rules would advance the family fast track cases on appeal before the superior and supreme courts.

For example, 30 days is the allowable period for filing an appeal from a trial court decision. In a case designated as a family fast track case the appeal period would be reduced to 21 days. In a non-family fast track case the record must be transmitted to an appellate court in 60 days. In a family fast track case the record would have to be transmitted to the appellate court in 30 days.

Although family fast track cases are given expedited listings for panel consideration on appeal, they are given the same thorough analysis this court affords all litigants. It is in the best interests of the child to resolve these sensitive issues expeditiously, especially in cases of abuse and neglect.

Family fast track cases reach final disposition within an average of 180 days, exceeding the standards set by the American Bar Association by over three months.

The Superior Court has established an appellate mediation program. Although at first blush appellate mediation might sound like a contradiction in terms, it is a successful tool both for case management and dispute resolution. Once a case reaches the appellate level, although there is the winning and losing party, the stakes are different. Traditionally once the appellate process is initiated, settlement is not considered to be an option. Rather, the parties view the appeal as a last stop on the journey for justice.

In 2006, the Superior Court established an appellate mediation program in the Eastern District of Pennsylvania and now there is a mediation program in the Western District. The mediation program's goal is to provide prompt and effective alternative means of resolving disputes.

The office of court mediation has several advantages for the court, the parties, and the public. Mediation decreases litigation expenses. Successful mediation results in prompt and amicable resolutions. Through mediation, the parties reach an equitable decision that is mutually satisfactory, negating the concept of having a winner and a loser.

The newly instituted mediation program in western Pennsylvania concentrates most heavily on appeals that involve family conflicts and disputes, dovetailing with the goal of the family fast track program to expedite the resolution of these cases. Given the caseload of the Superior Court, one of the busiest in the nation, receiving about 8,000 appeals a year, mediation is certainly advantageous to the court system as a whole. Statistically one out of three cases reach settlement.

The Superior Court of Pennsylvania is truly an innovative court. It continually looks for ways to best serve the litigants who come before it, as well as the general public. Thank you.

JUDGE ORIE MELVIN: The final segment for this evening is on judicial independence. From my experience on the courts, I have found that the rule of law is critical to our system of government. It requires an independent judiciary which is free of and unfettered by politics and outside influences.

Judicial independence as it relates to judges and the courts envisioned decisions based only on legal merits; not on the most popular or expedient course of action. Courts, more than any other institution, conscientiously must resist and withstand the pressures of political and public opinion. Rather, they must rely on the facts of each case, the evidence presented, the applicable statutory authority, and case law which is referred to as precedent.

An independent judiciary is necessary as a separate, coequal partner in the system of checks and balances which is so integral to our system. The purpose behind the system of checks and balances is the protection of the citizens against one branch becoming too powerful and the guarding against the potential for excesses and abuses of power. The intended result is a dynamic tension between our branches from which discord and conflict may flow as a natural consequence.

Judicial independence is a cornerstone in the foundation of our democratic form of government. That foundation attracts interest from judges and court administrators from around the globe.

For instance, there have been several judicial representatives from abroad, from foreign countries, who have recently visited the Superior Court and they have observed and studied how the Superior Court functions as an independent judiciary. Many countries, including those which were once under Communist rule or totalitarian regime, have used our judicial system as a model. I am personally aware that Ireland recently modeled its domestic violence court after the one that I created when I was a judge in Allegheny County.

Most would agree that judicial independence has three characteristics: First, the decisions issued by the judiciary are impartial. The personal interest of the judge have absolutely no bearing on the outcome of the case. Judges consider the facts and the law of each case with an open mind and an unbiased judgment.

Second, judicial decisions are respected. The judiciary has a reputation for impartiality and nonpartisanship.

Third, the judiciary is free from interference such that those with an interest in the outcome cannot influence the judge's decision. Judicial independence includes the independence of individual judges and that of the judicial branch of government.

Advocacy of judicial independence does not mean the court's actions are free from accountability. The judiciary is open to the public. Any citizen can observe a trial taking place in the trial court or attend an appellate argument in the Pennsylvania Superior Court or Pennsylvania Supreme Court.

Our courts also maintain statistics about the management of its case load. Opinions written by the judges are also available to the public. Transparency of the operation of the judicial branch is required if we hope to achieve independence through accountability, as well as instill public confidence.

Judges are constitutional officers and must take an oath of office. By taking the oath of office, judges are promising to interpret and apply the laws of Pennsylvania to the best of their ability.

Judges cannot substitute their personal views and beliefs for the law as promulgated by our legislature. Judges are bound by their oath to interpret the laws as written.

Additionally, judges are bound by the judicial canons of ethics. The canons serve as a guidepost to all judges in the Commonwealth. Under the canons judges are required to uphold the integrity and the independence of the judiciary.

They are to avoid impropriety and the appearance of impropriety in all of their activities. They are also to perform the duties of their office impartially and diligently.

Judges are also encouraged to engage in activities to improve the law, the legal system, and the administration of justice. Judges are also required to regulate extra-judicial activities and to refrain from political activity.

Compliance with the Code of Judicial Conduct increases public confidence in the integrity and the independence of judges.

In closing, it is imperative to recognize that the future of our judicial system and the protection of our rights depend upon the ability of judges to freely and fairly make decisions. Allowing judges to decide cases based upon the law and not based upon political pressures or outside influences allow us to have a strong judicial system that protects our individual rights.

One last word before we take questions from the audience. I would like to recognize, again, Judge Patrick Tamilya. He will be stepping off the Superior Court at the end of this year and I view that -- and so do my colleagues -- when he retires, there will be a void on the Superior Court. He is a legal and judicial expert and, I think, a genius on family law and juvenile justice issues.

So please join me in offering a round of applause to a truly dedicated public servant in this Commonwealth.

I am going to ask Judge Panella and Judge Tamilya to also use their expertise in answering the questions.

MR. SOBEL: If anyone has a question, please step up to one of the aisle mics and give us your name and let the judges know what is on your mind. I'm sure they will be happy to provide you with an answer if they have one for you.

QUESTION: I am going to do what I hate other people doing. I hope you will indulge me. I am going to give a short speech -- very short -- before asking my question.

Sandra Day O'Connor, when she spoke at Chautauqua Institution, said to her audience, All of you coming from a state that elects its judges, go back and change your system."

Urban counties like Allegheny County force their voters to look at long lists of names of candidates for judge. And myself, having been not a trial lawyer in Allegheny County, was as equally estranged from this long list and hard pressed really to make a selection. One who I thought I knew later turned out to take money from people to maintain his high lifestyle.

The Bar Association in Allegheny County started a system of combining funds for judicial elections to filter out the direct relationship between the trial lawyers who donate to those campaigns and the judges who receive those funds to run for office. Maybe a good step.

Former Governor Bill Scranton was interviewed on WVIA recently and he lamented that our political system has become corrupted by money. He and many other lawyer governors proposed forms of merit selection of judges, but apparently to no avail.

The Economist, the magazine, this spring tells of a nasty campaign for the position of Supreme Court of Wisconsin. Five and a half million dollars was spent and 12,000 advertisements were aired in an effort to defeat an incumbent. Accusations were flown about. Someone being soft on pedophiles, someone else being soft on rapists. After that the Justice At Stake group did a survey in Wisconsin and found that 78 percent of the citizens they interviewed felt that campaign contributions influenced judges' rulings.

My question to each of you, if you want to answer it, is if you were to design a system to have a non-electoral system of selecting judges, what would it be?

JUDGE BENDER: Maybe I can go first just because you did mention Allegheny and I am from Allegheny. I sympathize with your position. However, I don't see that the use of the merit selection, or another process, is going to really result in anything better than we have with our current system.

And I didn't always feel that way, but since I have been involved with the judiciary, I find that -- I don't have an explanation as to why this is -- but I do find that the current system produces a very hard-working and dedicated group of judges who are versed.

My fear with merit selection, or some other type of selection other than popular election, is that you are going to lose diversity. You might gain diversity where they intend to be diverse in the sense of maybe racial, sexual, but I don't think you are going to get the same cross-section that you do with our current system.

I personally would never sit on this court in a merit selection process. I know that's the case. I know there's colleagues on this court, on the Supreme Court that would wholeheartedly agree. I was not a large law firm type of lawyer. I was not a business lawyer.

The reality is when you get into merit selection what you are getting, there is going to be power group, a group that are put there and they are going to pick people like themselves. They will try not to do that, but that's what is going to happen.

The people choose judges and they might not always be the best educated, whatever -- I mean, whatever the result is -- but it is a diverse group and they are diverse in their background. They are diverse in their opinions on the court. I think that's a valuable result of the current system.

QUESTION: Your answer is to say this is a good system and I can't think of another system?

JUDGE BENDER: That's exactly right. For instance, when you have appointment to the federal bench, that system appears to be broken. I mean, there are vacancies throughout the United States on the district level where the politicians cannot agree. They are vacant.

QUESTION: It's locked up in the Senate.

JUDGE BENDER: Exactly. At least our system produces a result. It might not be perfect, but at least it works. After your November election --

JUDGE ORIE MELVIN: As we spoke at dinner tonight, as I discovered when I went through the process of running for Allegheny County Court of Common Pleas in 1990 -- you were the chairman of one of the municipalities where I went to speak -- the interesting thing when I ran in Allegheny County in 1990, there was 750 square miles in Allegheny. I lived in one of the northern sub herbs. As a result of having to run, I went to Mount Lebanon. I went to a place called Enola that I didn't even know was in Allegheny County. I went to Scranton. I went to places I wouldn't go.

You have to interact with people. I think it's such a valuable thing.

When I ran for Commonwealth Superior Court, coming from an urban setting, I did have to come to Shamokin. I went to every one of the 67 counties, which I think really showed me something so important with regard to how it's done. The issues that are important in urban settings, in Pittsburgh, in Philadelphia, are so different from other parts of the state -- the middle part of the state. I find that is very valuable in the election process, that you do have to go out and meet the policeman.

Justice O'Connor, which I think on the vote is in Minnesota vs. White case, which opened up the flood gates that when judges are elected they have first

amendment rights and they can speak about hot button issues. I think she has since been going to different bar associations and thinks she regrets her vote with regard to that. Because what you have are judges running for election and stating, you know, Hang 'em high, or whatever, pro death penalty or whatever their issues are on abortion.

What that does, I think, is it takes a lot of the confidence away from the public when they hear judges running for office, as you say, these hotly contested races that have now become almost like legislative. They are running on issues as opposed to qualifications and showing the judiciary to be independent. That takes away, I think, from the election, electoral process.

The bad or evil of the electoral process, as we stated, is the financing. You do have to go out and raise money to get elected. I think maybe some kind of hybrid kind of where you run for election, but there might be some kind of campaign finance in place for judges that they are not aware who is contributing. Some kind of blind trust, maybe something like that.

But taking the election of judges away from the people, I don't know that that's a good thing. I concur with Judge Bender that you see in the federal appointment that there is a litmus test and there are these brutal confirmation hearings that they have to go through. I think what is good for the goose is good for the gander. When these federal judges -- you saw through Justice Alito's confirmation, as well as Justice Robert -- when they asked about, How do you feel about abortion, their answer is, I can't answer that. I may be handling that as a justice on the Supreme Court.

I think that's the same thing for election. What we live by for so many years is that you don't talk about the issues, probably the best thing for the trust and the public confidence in the judiciary.

But as I stated, I don't think the election process is bad with the exception of what you say about financing.

QUESTION: The corruption of money. I gather you have unanimity on this panel.

JUDGE FITZGERALD: I think you have presented a very difficult issue. I know the court stenographer is there, so I will be very careful what I say. You have Lynn Marks from Philadelphia is one of the main proponents of merit selection. Of course, that's a very appealing name because you are using the word "merit" selection.

I think two years ago the House and Senate were kind of enthusiastic to a certain degree on a bill that really left the Governor and the Senate and the House, and other people in Harrisburg, with the main components of this composition of this board that would recommend and select judges. So in reality, you are taking in and leaving in the political process, for better or for worse.

And the judge hit on the real main case, which is changing some points of view. Minnesota vs. White, where a judge -- and most states have adopted their uniform policy -- can give their position on an issue, but cannot say how they are going to rule on a case if it comes before them. With that power, of course, the judge is really committing him or herself to vote a certain way to the public if that case comes before them.

And judges represent really the constitutional rights of individuals, and the legislature and the executive branch represent the will of the people. So we are representing the Constitution, both state and national, and we are also protecting the rights of individuals. That's better -- excuse me. That's different than basically representing the desires of the general public. And I think we are all fearful of what is going on now with judges being given a litmus test and so both should be considered. I think they are now working on the selection process, merit selection, for lack of a better word, making it a more diverse selection group, going through business people, labor union

leaders, lawyers, et cetera, so that it's not balanced in favor of the politicians, for lack of a better word, again.

And I think with all this discussion and people getting involved, now I think there is more people involved with judicial elections than ever before. The general public is aware of them and some years the biggest races -- like next year on the ballot will be for the judiciary. I think next year the district attorneys throughout Pennsylvania are elected. Then the focus is really on the judges after that.

So the educational process is important and the public has to take responsibility if you stay with an elected process. They are responsible for the people who are on the judiciary. If they do their job right and look into the backgrounds of people who are running for judge, then the election process -- elected process is perfect. If they are not, then we are looking for a different form to make sure the quality of the judges meets the expectations and needs of what this nation needs as far as the judiciary is concerned.

So I have not answered your question either. I don't think, as judges, we really can answer your question because I think that gets us involved in the political issue, which is squarely in Harrisburg right now. People such as yourself and other representatives of both sides of the issue are ones who are going to resolve this. We are not, as members of the judiciary, going to resolve it.

QUESTION: Thank you for your response.

QUESTION: My question is elicited by something Judge Bender said regarding memorandum opinions and published opinions. First of all, how is it decided which decision becomes which, either memorandum or a published opinion, and wouldn't it be so that if a decision is good for a particular set of parties that a similar factual situation would also be good for other parties and would also make decisions more consistent? Wouldn't it engage the idea of equal protection where, if you have similar circumstances, you end up with a similar result?

JUDGE ORIE MELVIN: We have internal operating procedures that you can read that state what are the IOPs with regard to publishing opinions. One, it's a case of first impression. Two, it's a new statutory interpretation of a new statute. Another example, if there is a conflict among the Common Pleas and we are aware there is a conflict, that we will publish this to show the way that the Court wants to go.

So we do have specific reasons. We don't publish everything even though there are similar facts because we already have the precedent that you can apply to those facts. Once we have a precedent, we feel that continuing ad nauseam is not the way to go. That's not the way Superior Court has gone.

We do have a new program, relatively new -- it's been in existence for a couple years now -- where lawyers or judges who have appeal before us, that once we have issued a memorandum on an unpublished opinion you can petition the Superior Court to have that particular memorandum published as an opinion. You will appeal to us and you will state the reasons as to why, under our internal operating procedures, what it fits under and why you think it should be published, why it's important to the Commonwealth, and we will consider that.

We have received numerous petitions and probably overwhelmingly most of the ones who have petitioned the court for publication, they have been published.

It's interesting that we even have Common Pleas judges who will petition the court and say, Hey, we need guidance in our county. Could you please publish this? So we are there to serve and we do.

So there is a way to do it if you think there is a specific reason as to why your appeal should be published.

QUESTION: Or somebody else's and we found --

JUDGE ORIE MELVIN: It only applies to the lawyer involved, the parties involved in the case, and the trial judge who sat on that case that can petition. It has to be petitioned, obviously, in a timely fashion so we can withdraw the memorandum and issue it as a published opinion.

QUESTION: Okay. But at this point in time where can you find a memorandum opinion, maybe not your own, that would be useful for your case?

JUDGE ORIE MELVIN: What cases are cited in that memorandum? Whatever cases are cited in there are what you can use.

JUDGE FITZGERALD: I think I would like to answer that question. On the Supreme Court last year -- I think Chief Justice Castille said it in Judge Panella's video -- you look for clarification of the law, is what Chief Justice Castille said. Sometimes it's even changing the law. That's a pretty bold statement to make. But the Supreme Court does that.

So as a justice looks at a case, they realize the decision they make in interpretation of the law is not governing just the case before them, but all other cases which have an issue in it for the future. And that's a big responsibility. There is no question about that. So you look away from the case itself per se.

In the Superior Court you have a chance to deal with each case pretty individually as a case, applying the law to the facts of that case. In one respect that gives you a little more freedom in the decision, but also, I think, if you are going to publish 5,000 opinions a year from the Superior Court, it's going to be a mishmash and it's going to be repetition. Also, there is also going to be some law that applies to the case before you that shouldn't apply to other cases possibly that have that same issue.

So it's best to let the Supreme Court do that and be the court that publishes and sets the law for the Commonwealth. And our first responsible is to follow the law of the Supreme Court in our decisions and then, of course, if there is not an interpretation from the Supreme Court, then, I think, an opinion which is published is a rightful thing to do, and no doubt one side will appeal it to the Supreme Court and the Supreme Court will either agree with what happened or say, This area of the law needs clarification. Grant the allocatur. Hear the case and interpret the law to clarify the law.

MR. SOBEL: Judges, I have a question for you and that is, at least one state has attempted to address the problem creating by the White decision, which allows judicial candidates to give an opinion about a legal matter so long as they don't make a pledge or promise about how they would decide a case that actually came before them by implementing a rule that disqualifies any judicial candidate who gives an opinion about a legal matter from sitting on a case in which that topic is at issue.

Has there been any discussion in Pennsylvania about a similar rule?

JUDGE ORIE MELVIN: Not that I'm aware of. That's my position with regard to that, is once you state what your opinion is to a public group, those individuals feel that you are vested in that position, that that's what you are going to decide. That's why I feel that people -- when you state your opinion, I suppose that that's the opposing group then can ask you to recuse on those types of issues. But I am not aware that they have done that in Pennsylvania.

As I have always stated, Minnesota vs. White offered judges First Amendment rights with regard to issues, but it didn't mandate it. It doesn't mean if you are running for office you must tell people. You can take your position and say, I choose not to because I feel that I will take away from the public trust and the confidence in the courts by stating what my opinions are with regard to this. I will apply the law as it is to be interpreted.

So I am not aware of any of my colleagues know of anything in Pennsylvania like that, but it would seem to me that that's probably the appropriate thing.

JUDGE FITZGERALD: Well, I think if one candidate is saying that case might come before me so I am not going to tell you what my opinion is and the other candidate knows a hot button issue and makes sure that they answer those questions so that the public knows their position, I think it's difficult to win an election under those circumstances.

And then earlier we talked about money in Supreme Court races. I read The Appeal this summer by Grisham. I'm sure a lot of people here have read that. It was really about a Supreme Court justice being elected in some fictional state. A case came before him where his vote was the one that was going to decide whether a corporate interest won, which were the big contributors to him, or the personal interest of an injured party. Of course, he battled and he wanted to go one way, but in the end he went with where his contributions came from.

So these are, as I say, difficult issues and I don't think a candidate has much of a chance in a general election where one candidate has money and is putting their position on issues out to the general public and, of course, they are going to take positions which are favored by the general public at that time and another candidate is under the restriction of saying, Well, I really can't answer that question because the case might come before me with this issue.

So that's just my personal opinion.

MR. SOBEL: Are there any other questions for our panel members?

Well, please join me in thanking them for being with us tonight.

(Whereupon, the panel discussion concluded at 8:30 p.m.)