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Project

THE PENNSYLVANIA PROJECT — THE PENNSYLVANIA SUPREME COURT:* PERSPECTIVES FROM WITHIN**

INTRODUCTION

There is public and internal concern over the functioning of the Pennsylvania Supreme Court.¹ The purpose of this Project is to examine the present structure of the Supreme Court and its jurisdiction, in order that some of the problems plaguing the highest

* At the time this Project was begun, and during the time interviews were conducted with the Justices, the following were members of the Supreme Court of Pennsylvania: Michael J. Eagen, Chief Justice, elected, 1959; Henry X. O'Brien, elected, 1962; Samuel J. Roberts, elected, 1963; Thomas W. Pomeroy, elected, 1968; Robert N. C. Nix, Jr., elected, 1971; Louis Lawrence Manderino, elected, 1971; Israel Packel, appointed for interim term, 1977. In November of 1977, Rolf Larsen was elected to the Court to replace Justice Packel. Justice Larsen took his seat on the bench in January, 1978, but was not interviewed for this Project.

** The *Villanova Law Review* would like to express sincere appreciation to the following people, who generously shared their time and their knowledge about the Supreme Court: Judge Alexander F. Barbieri, Court Administrator of Pennsylvania; Norman S. Berson, member, Pennsylvania House of Representatives, chairman, House Judiciary Committee; Anthony Scirica, member, Pennsylvania House of Representatives, member, House Judiciary Committee; David A. Brackoniecki, clerk to Justice O'Brien; Richard Dechambeau, clerk to Justice Manderino; James L. McCann, clerk to Chief Justice Eagen; James Young, former clerk to Justice Pomeroy. The gracious and tireless assistance of Philip J. Katauskas, clerk to Justice Nix, deserves special mention.

1. In 1972, the Supreme Court of Pennsylvania initiated a study of the state appellate court system which was undertaken by the Institute of Judicial Administration. THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE APPELLATE COURTS OF PENNSYLVANIA: AN ANALYSIS OF SELECTED AREAS OF THEIR PROCEDURES AND ADMINISTRATION 62 (May, 1972) [hereinafter cited as IJA REPORT]. The study was concerned with three aspects of the appellate court system in Pennsylvania: 1) whether any of the appellate courts should sit in more than one city; 2) the operations of the prothonotaries' offices of the three appellate courts; and 3) the publication of official reports of the courts. *Id.* at 4. The IJA Report consists of rather detailed description of the situation in the appellate system in 1972, analysis of this situation and recommendations based on this analysis. The report stated: "Among the results of the present system is a far too heavy caseload for most of the judges, and a caseload for the Supreme Court that makes it almost impossible for it to perform properly its law development function." *Id.* at 62 (footnote omitted). For a statistical report of the Court's caseload, see Appendix; see also Potter, *Foreword: The Supreme Court of Pennsylvania in 1974-1975: Some Observations on Appellate Process*, 37 U. PITT. L. REV. 217 (1975).

It should be noted that the number of opinions filed by the Court reflects only a portion of the total burden on the justices. In addition to the numerous petitions for allocatur and miscellaneous petitions which must be handled, the justices have various administrative and rulemaking duties which consume much of their time. See text accompanying notes 97-110 *infra*.

In a recent series of critical editorials, the Philadelphia Inquirer accused the Court of unaccountability, secrecy, unforgivable delay in deciding cases, misuse of its

court in Pennsylvania may be illuminated.² As there have been previous articles and studies discussing the Court in a comprehensive fashion,³ the approach of this Project will be to focus on the views expressed by the justices in interviews with several members of the *Villanova Law Review* staff.⁴ It is believed that the view from the inside can provide both a practical and a necessary understanding of the issues, and it is felt that the views of the justices have not been adequately disseminated to the legislature or to the public⁵ in a

rulemaking power, inadequate statistics, and lack of leadership. *The Supreme disgrace: Pennsylvania's top court*, Philadelphia Inquirer, Feb. 19, 1978, § L, at 6, col. 1; *The Supreme disgrace: A paralysis of justice*, Philadelphia Inquirer, Feb. 21, 1978, § A, at 10, col. 1; *The Supreme disgrace: Delays Mock Justice*, Philadelphia Inquirer, Feb. 23, 1978, § A, at 10, col. 1; *The Supreme disgrace: Failing to meet standards*, Philadelphia Inquirer, Feb. 27, 1978, § A, at 8, col. 1; *The Supreme disgrace: Riding the Chaos Circuit*, Philadelphia Inquirer, Mar. 1, 1978, § A, at 6, col. 1; *The Supreme disgrace: Secret and Unaccountable*, Philadelphia Inquirer, Mar. 3, 1978, § A, at 6, col. 1; *The Supreme disgrace: A Superior example*, Philadelphia Inquirer, Mar. 6, 1978, § A, at 6, col. 1; *The Supreme disgrace: Leadership by endurance*, Philadelphia Inquirer, Mar. 8, 1978, § A, at 10, col. 1.

It should be noted that this Project does not purport to either support or refute these criticisms.

2. As a result of its study of the appellate courts of Pennsylvania, the Institute of Judicial Administration concluded:

[I]t became clear during the course of the study that the entire appellate process in Pennsylvania, including court structure, jurisdiction, number of judges, place of sitting, financing, facilities, personnel, statutes and rules regulating appeals, and internal operating procedures of the appellate courts, is badly in need of a comprehensive review and revision.

IJA REPORT, *supra* note 1, at 3.

3. See, e.g., S. SCHULMAN, TOWARD JUDICIAL REFORM IN PENNSYLVANIA (1962); IJA REPORT, *supra* note 1; Amram & Schulman, *The New Judicial Article and its Implementation*, 42 PA. B.A.Q. 9 (1970); Meyer, *Court Administration in Pennsylvania*, 11 DUQ. L. REV. 463 (1973); Potter, *supra*, note 1; Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173 (1976); Comment, *Appellate Court Jurisdiction Act of 1970*, 75 DICK. L. REV. 465 (1970-71).

4. Personal interviews with the six associate justices were held during October and November of 1977 while the Supreme Court was in session in Philadelphia. Interviews with the justices' clerks were conducted in the same time period. The interview with Chief Justice Eagen was conducted by correspondence due to the additional restraints placed upon his time by administrative duties. Questions on selected topics were asked orally of the justices. The responses of the justices were written down by the authors as accurately as possible and later reconstructed and transcribed for permanent referral. A copy of the transcription is on file at the *Villanova Law Review*, Villanova, Pennsylvania. For the reader's convenience, information in the text that was obtained from several of the justices will be cited to "Interviews with the Justices." Information that emerged from the interviews with the clerks will be treated likewise. Where the text explicates the response of an individual justice, citation will be to, e.g., "Interview with Justice Nix." The first citation to an interview will indicate its date parenthetically.

5. The lack of understanding of the Court's predicament was demonstrated by an article in a Philadelphia newspaper. Amidst a critical view of the court, William Ecenbarger wrote:

Any honest lawyer will tell you that the Supreme Court takes a long time to dispose of cases, and when it finally does make a decision it doesn't always

way that encourages understanding and correction of the problems of the Court.

Pennsylvanians cannot realistically expect a faultless system. However, when some of the chief concerns of the justices themselves are examined, it becomes apparent that certain structural changes are possible which could lead to vast improvement in the functioning of the Pennsylvania Supreme Court.

Many of the issues considered herein engender well-supported but diverse viewpoints. This Project does not purport to present all sides but rather to relay some of the various arguments to which the interviewers have been exposed in the hope that dialogue and debate will be generated with respect to possible changes, and that understanding will be enhanced.

This Project consists of two parts. Part I contains an historical and structural account of the Supreme Court to provide a context for the views of the justices. Part II focuses on the perceptions and perspectives of the justices concerning various aspects of the Supreme Court and court system in Pennsylvania.

have an accompanying opinion to explain it. A suspicious taxpayer might logically infer that the Supreme Court, and many of the lesser tribunals in Pennsylvania, don't always put in a full day's work.

Ecenbarger, *the State Judiciary is "more equal,"* Philadelphia Inquirer, Jan. 23, 1978, § A, at 7, col. 2. In a later editorial in the same newspaper, the lack of adequate dissemination of information was vehemently criticized:

[The Court] is a disgrace of maladministration, a swamp of self-protective secrecy, a chaos of indifference to the needs of private citizens and the legal community alike.

Secrecy prevails over the court's entire operation. Little information is provided to the public about the court's administration, its backlog or the performances of individual justices.

The Supreme disgrace: Pennsylvania's top court, Philadelphia Inquirer, Feb. 19, 1978, § L, at 6, col. 2.

The legislature may be somewhat hampered in its ability to act by the fact that several of the justices feel restrained in presenting their opinions to the legislature. In their view, the doctrine of the separation of powers renders it inappropriate for the justices themselves to take their case to the legislative branch. Interviews with the Justices.

Justices Manderino and Pomeroy, however, expressed a desire for increased interaction between the court and the legislature to discuss their common concerns. Interview with Justice Manderino (Nov. 15, 1977); Interview with Justice Pomeroy (Nov. 17, 1977).

PART I

*The Development and Structure of the
Pennsylvania Supreme Court*

I. THE COURT IN THE EIGHTEENTH AND NINETEENTH CENTURIES

The "Supream Court" of Pennsylvania, as it was called in its establishing Act of 1722,⁶ consisted of three justices⁷ and was empowered to issue "writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process."⁸ The concept of limiting a high court strictly to an appellate review function was foreign to the colonial province's orientation; the Supreme Court served as the superior trial court⁹ and retained the power to remove cases from lower courts for trial through the issuance of writs of *certiorari*.¹⁰ The judges of the high court were also charged with the duty of trying capital offenses¹¹ in their capacity as judges of oyer and terminer and general gaol delivery.¹² The Act of 1722 also allocated an appellate function to the Supreme Court by giving it the authority to "examine and correct all manner of errors of the Justices and Magistrates of this province, in their judgments, process and proceedings."¹³ Cases could also be brought up by various writs including the writs of error, *certiorari*, and *habeas corpus*.¹⁴

6. Act of May 22, 1722, ch. 255, § 11, 1 SMITH'S LAWS 131. See Surrency, *The Court's Place in History*, 43 PA. B.A.Q. 440, 441 (1972).

7. Act of May 22, 1722, ch. 255, § 11, 1 SMITH'S LAWS 131. The justices were to be "of known integrity and ability, commissioned by the Governor, or his Lieutenant for the time being . . . under the great seal of this province." *Id.*

8. *Id.*

9. A statute was adopted by the colonial legislature in Pennsylvania in 1727 that prohibited the issuance of any original process by the Supreme Court. See Act of Aug. 27, 1727, ch. 298, § 8, 4 PA. STAT. 84; Surrency, *supra* note 6, at 442. The statute was disallowed by the Privy Council in England which had the power to repeal colonial legislation. See 4 PA. STAT. 421, App. VIII, § 1. The statute was revived by the Pennsylvania General Assembly in 1731 and was not further acted upon by the Crown. See Act of Nov. 27, 1731, ch. 327, 4 PA. STAT. 229.

10. See Surrency, *supra* note 6, at 442.

11. See *id.* at 443. The justices of the Supreme Court remained triers of serious criminal cases until the task was delegated to the judges of the Court of Common Pleas by the constitution of 1790. PA. CONST. of 1790, art. 5, § 5. It is interesting that at least one contemporary Supreme Court justice, while in favor of relieving the high court of direct appeals in felonious homicide cases, maintains that the Court should retain its direct appeal function in capital offenses. See text following note 200 *infra*.

12. See Surrency, *supra* note 6, at 443, citing J. B. LINN, CHARTER TO WILLIAM PENN AND THE LAWS OF THE PROVINCE OF PENNSYLVANIA . . . 1682-1700, 392 (1879).

13. Act of May 22, 1722, ch. 255, § 13, 1 SMITH'S LAWS 131.

14. See text accompanying notes 6-8 *supra*. The 1722 Act gave any two judges of the Supreme Court the power to hold court and "hear and determine all manner of pleas, complaints and causes, which shall be removed or brought there from the respective

The earliest legislative mandate requiring the Supreme Court to travel from Philadelphia, the capital of Pennsylvania at that time, is found in the Act of 1767 by which the Court was directed and "enjoined, if occasion require[d], to go the circuit twice in every year, into the several counties within this province."¹⁵ The structure and jurisdiction of the Court was little affected by the Revolutionary War, and the change in government that resulted. The Act of 1777 specifically incorporated the Judiciary Act of 1722 and the circuit-riding mandate of the Act of 1767.¹⁶

In the last two decades of the eighteenth century, the Court underwent a number of expansions of its jurisdictional powers. The expansions included appeals from decisions of the Comptroller General settling accounts due to the Commonwealth,¹⁷ and the authority to supply any defects in deeds.¹⁸

Under the Act of 1786, the Court was given concurrent civil trial jurisdiction with the Philadelphia Court of Common Pleas.¹⁹ This expanded trial function continued until the constitution of 1873.²⁰ The Act of 1799 established circuit courts for trials in the counties and required that one or more justices sit in each circuit two times a year.²¹ The creation of circuit courts relieved the Court of its burdensome en banc trial function in the counties by giving the justices on circuit full power to render judgments and pass decrees.²²

General Quarter Sessions of the Peace, and Courts of Common Pleas . . . of Philadelphia, Chester and Bucks [counties] by virtue of any of the said writs." Act of May 22, 1722, ch. 255, § 13, 1 SMITH'S LAWS 131.

15. Act of May 20, 1767, ch. 560, § 1, 1 SMITH'S LAWS 274. This statute repealed the portion of an earlier act that required the Court to sit in Chester and Bucks counties on specific dates. See Act of May 22, 1722, ch. 255, § 12, 1 SMITH'S LAWS 131. The legislature thought it necessary to "enjoin" the Court to ride circuit twice a year because "a practice has been introduced of trying all issues in fact . . . at the city of Philadelphia, which has often obliged the parties, jurymen and witnesses, to attend from the most remote parts of the province . . . to their very great, and unnecessary expense and aggrievance." Act of May 20, 1767, ch. 560, § 1, 1 SMITH'S LAWS 274.

16. Act of Jan. 28, 1777, ch. 726, § 4, 1 SMITH'S LAWS 429. The act was prefaced as "[a]n ACT to revive and put in force such and so much of the late laws of the province of Pennsylvania, as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice . . ." *Id.* (preamble).

17. Act of Feb. 18, 1785, ch. 1133, § 1, 11 PA. STAT. 435. "This was the first administrative appeal authorized by statute in the state." Surrency, *supra* note 6, at 446.

18. Act of Mar. 28, 1786, ch. 1221, § 1, 12 PA. STAT. 216.

19. Act of Sept. 25, 1786, ch. 1246, § 3, 12 PA. STAT. 308.

20. See PA. CONST. of 1873, art. 5, § 3.

21. Act of Mar. 20, 1799, ch. 2032, §§ 1, 2, 16 PA. STAT. 199. See Surrency, *supra* note 6, at 448.

22. See Surrency, *supra* note 6, at 448-49.

The circuit courts were suspended in 1809,²³ reestablished in 1826,²⁴ and abolished in 1834.²⁵ Once it was relieved of its circuit court duties, the Supreme Court became, with one exception, solely a court of judicial review. The exception was for Philadelphia, where members of the Court continued to sit on courts of *Nisi Prius*²⁶ until 1874.²⁷

The suspension and final abolition of the circuit courts did not completely free the Court from the rigors of statewide travel.²⁸ The Acts of 1806 and 1834 established the peripatetic responsibilities of the Supreme Court in its appellate role. Under the 1806 Act, the Court was to hold one appellate term in Pittsburgh and two in Philadelphia.²⁹ Harrisburg, which became the capital of the Commonwealth in 1812, was added as a seat in 1834.³⁰ This tri-city duty continues to the present day.³¹

The enlargement to a seven justice Court was effected in the constitution of 1873.³² This constitution gave the Supreme Court appellate jurisdiction over the entire state and original jurisdiction to issue writs of habeas corpus and mandamus to courts of inferior jurisdiction and the writ of quo warranto to all commonwealth officers whose authority extended throughout the state.³³ The appellate jurisdiction of the Court was to be exercised by means of appeal, certiorari, or the writ of error "in all cases, as is now or may hereafter be provided by law."³⁴

The latter part of the nineteenth century saw a great increase in the workload of the Court.³⁵ To relieve this burden, in 1895 the legislature created the Superior Court³⁶ which was to function as an intermediate appellate court.³⁷ The size of the Superior Court was

23. Act of Mar. 11, 1809, ch. 3043, § 5, 18 PA. STAT. 962.

24. Act of Apr. 8, 1826, ch. 88, 1825/26 Pa. Laws 263.

25. Act of Apr. 14, 1834, 1833/34 Pa. Laws 341.

26. Act of Apr. 14, 1834, §§ 16, 17, 1833/34 Pa. Laws 341. This provision was carried over from an earlier act which provided that "no issues in fact in the Supreme Court shall be tried in bank; but all issues of fact in causes then pending in the said Supreme Court, shall be tried at courts of *Nisi Prius*, to be held in the city of Philadelphia." Act of Feb. 24, 1806, ch. 2634, § 1, 4 SMITH'S LAWS 270.

27. PA. CONST. of 1873, art. 5, § 3 (effective 1874).

28. See notes 135-41 and accompanying text *infra*.

29. See Act of Feb. 24, 1806, ch. 2634, § 4, 4 SMITH'S LAWS 270.

30. Act of Apr. 14, 1834, § 5, 1833/34 Pa. Laws 341.

31. See text accompanying notes 135-41 *infra*.

32. PA. CONST. of 1873, art. 5, § 1. The Court originally consisted of three justices. See text accompanying notes 6 & 7 *supra*.

33. PA. CONST. of 1873, art 5, § 3.

34. *Id.*

35. Surrency, *supra* note 3, at 189.

36. See note 68 *infra*.

37. Act of June 24, 1895, 1895 Pa. Laws 212. See note 69 and accompanying text *infra*.

later set at seven in the constitution.³⁸ The jurisdiction of the Superior Court included final jurisdiction in "all actions, claims, and disputes of every kind" where the amount in controversy was not greater than \$1,000.00.³⁹

II. THE DEVELOPMENT OF THE UNIFIED COURT SYSTEM

A. *The System Prior to 1968*

A great variety of independent courts grew out of the early common law courts in Pennsylvania.⁴⁰ These courts were retained by the constitution of 1873 and hence enjoyed constitutional immunity against abolition or basic reorganization. By the early twentieth century, in addition to constitutional courts, there were a large number of courts created by legislation, such as the Superior Court,⁴¹ the Juvenile Court, the Allegheny County Court, and the Municipal Court of Philadelphia, which had extensive civil, criminal, and domestic relations jurisdiction.⁴² This nonsystematic growth of Pennsylvania's judiciary took place during a period in which the population of Pennsylvania more than doubled⁴³ with a parallel increase in the number of cases. The resulting pressure on the established structure produced the same type of fragmented and inefficient court operation that had prompted Dean Roscoe Pound to call for the institution of unified state court systems.⁴⁴

The situation in Pennsylvania, prior to the 1968 amendment to the judiciary article of the constitution,⁴⁵ had deteriorated into disorganization. Specifically, each of the sixty-six counties of the commonwealth operated its own court system, had its own budget

38. See note 69 and accompanying text *infra*.

39. Act of June 24, 1895, § 7(c), 1895 Pa. Laws 212. The jurisdictional amount has gradually been raised to \$10,000. Act of Aug. 14, 1963, § 2, 1963 Pa. Laws 819.

40. See S. SCHULMAN, *supra* note 3, at 143.

41. See note 68 *infra*.

42. See S. SCHULMAN, *supra* note 3, at 1-2.

43. The population of the state grew from 3,521,951 in 1870 to 8,720,017 in 1920. 17 ENCYCLOPAEDIA BRITANNICA 568, 569 (1971).

44. See R. POUND, ORGANIZATION OF COURTS (1940). In this classic treatise on judicial reform in America, Dean Pound observed that the physical and economic conditions in pioneer America, along with the rapid growth of urban areas, resulted in the proliferation of local courts which failed to be organized under a responsible administrative head. *Id.* at 256. State courts that had concurrent and overlapping jurisdiction were increasingly confronted with the problem of undoing each others' work. *Id.* In response to these unsatisfactory conditions, Dean Pound formulated the idea that the whole judicial power of each state be vested in "one great court," of which all tribunals would be branches, departments, or divisions. *Id.* at 273-74. The business, as well as the judicial administration of the court, would, according to Dean Pound, be thoroughly organized "so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public." *Id.* at 274.

45. See notes 52-54 and accompanying text *infra*.

and exercised complete autonomy.⁴⁶ There was no central agency or court to supervise the judicial business of the commonwealth.⁴⁷ No provision existed for a court administrator or similar office to assist the judges in the purely operational functions of the judicial system.⁴⁸ In addition, the existing constitution and statutes created overlapping and concurrent jurisdiction.⁴⁹ Significant demands for judicial reform in Pennsylvania in the early 1960's⁵⁰ culminated in the calling of a limited constitutional convention in 1968 and the repeal of the old⁵¹ and the adoption of a new judiciary article.⁵² The new article created a unified judicial system⁵³ with the Supreme Court at its head.⁵⁴

46. See S. SCHULMAN, *supra* note 3, at 4.

47. *Id.*

48. *Id.*

49. For example, in both Philadelphia and Pittsburgh there was overlapping and coordinate jurisdiction in both civil and criminal matters. See generally S. SCHULMAN, *supra* note 3, at 140 n.4.

50. One commentator, Sidney Schulman, introduced his study in court reorganization with this criticism of the state of the judiciary:

Our present judicial system in Pennsylvania suffers from a number of major deficiencies: (1) Structural deficiencies in the organization of its courts; (2) An outmoded, archaic minor court system; (3) Lack of efficient supervision and administration over the non-judicial aspects of the business of the courts; (4) Inefficient use of judicial personnel; (5) A system of selection of judges which has made them dependent on political leaders for their appointment, election and continuance in office; (6) An antiquated system of discipline of judges which uses tools inadequate to the task — namely impeachment and address — and (7) the lack of an integrated Bar.

S. SCHULMAN, *supra* note 3, at 1. See also REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION 93 (1964). See generally Freedman, *The Organization of a New Judicial Structure for Pennsylvania*, 35 TEMP. L. Q. 373 (1962).

In recommending that a constitutional amendment would better remedy the deficiencies of the Pennsylvania judicial system than legislative action, Schulman noted a number of constitutional "roadblocks" to a legislative solution including the detailed provisions for the creation of separated courts, the detailed provision for creation of separated judicial districts based on arbitrary population figures rather than need, the detailed provisions for the selection of presiding judges by seniority rather than ability, and the difficulties of reorganization imposed by the uniformity clause of the constitution. S. SCHULMAN, *supra* note 3, at 6.

51. Proposal No. 7, adopted by the Constitutional Convention, and approved by the electorate on Apr. 23, 1968, provides in § 1 as follows: "Article five of the Constitution of Pennsylvania is repealed in its entirety, and those provisions of Schedules No. 1 and No. 2 (at end of constitution) are repealed to the extent they are inconsistent with this Article and attached Schedule." PA. CONST. art. 5, § 1 (historical note).

52. PA. CONST. art. 5, §§ 1-18.

53. The Pennsylvania Constitution provides in part: "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 . . . [and] such other Courts as may be provided by law and justices of the peace." PA. CONST. art. 5, § 1.

54. The constitution as amended provides: "The Supreme Court (a) shall be the highest court of the Commonwealth and in this Court shall be reposed the supreme judicial power of the Commonwealth; (b) Shall consist of seven justices, one of whom shall be the Chief Justice; and (c) Shall have jurisdiction as shall be provided by law." PA. CONST. art. 5, § 2.

B. *The Unified System*

The unified statewide court system was created in Pennsylvania to unify, integrate, and simplify the court structure.⁵⁵ Instead of instituting the "one great court" idea proposed by Dean Pound,⁵⁶ the new judicial article put the Supreme Court at the apex of the court system⁵⁷ and gave that Court broad rulemaking powers to govern the practice, procedure, and conduct of all courts in the state.⁵⁸

Prior to the 1968 amendment, the Supreme Court had rulemaking power over civil procedure of courts of record, but not over the minor court system, or over appellate procedure for appeals to itself.⁵⁹ The Court had shared power to make rules of criminal procedure with the Superior Court.⁶⁰ Two legislative acts — the Act of 1722⁶¹ and the Civil Procedural Rules Act of 1937⁶² — had given the Supreme Court extensive rulemaking power,⁶³ but the power was never fully explored or utilized, perhaps because of the Court's reluctance to abuse a legislatively delegated function and its belief

55. See generally S. SCHULMAN, *supra* note 3, at 146-69.

56. See note 44 *supra*; S. SCHULMAN, *supra* note 3, at 142, citing R. POUND, ORGANIZATION OF COURTS 273 (1940).

57. PA. CONST. art. 5, § 2. For the text of this section, see note 54 *supra*.

58. PA. CONST. art. 5, § 10. Section 10(c) establishes the Supreme Court's rulemaking powers as follows:

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require . . . if such rules are consistent with the Constitution and neither abridge, enlarge or modify the substantive rights of any litigant

Id. § 10(c).

For a description of the reorganization of the lower courts of the state under the new judiciary article, see Comisky & Krestal, *Analysis of New Judiciary Article*, 40 PA. B.A.Q. 68 (1968).

59. See S. SCHULMAN, *supra* note 3, at 149-50. Pursuant to its broadened rulemaking power, the Court has promulgated rules of appellate procedure. See PA. R. APP. P.

60. See S. SCHULMAN, *supra* note 3, at 150, 153.

61. Act of May 22, 1722, ch. 255, 1 SMITH'S LAWS 131. This act presumably gave the Court the same supervisory powers enjoyed by the English common law courts of King's Bench. See S. SCHULMAN, *supra* note 3, at 150. According to Schulman:

This King's Bench power has been assumed by some to be the basis of the Court's inherent rule-making and supervisory power, but it is, in fact, no more than a legislative delegation, and the extent of the Supreme Court's inherent rule-making power and the conflict between judicial supremacy and legislative control has never been fully determined in Pennsylvania.

S. SCHULMAN, *supra* note 3, at 150.

62. Act of June 21, 1937, 1937 Pa. Laws 982, as amended by Act of Aug. 25, 1959, 1959 Pa. Laws 751 (codified at PA. STAT. ANN. tit. 17, § 61 (Purdon 1962)).

63. See note 61 *supra*.

that the legislature and local courts were better equipped to solve local problems of congestion and delay.⁶⁴

Constitutional delegation of the rulemaking power under sections 10(a) and 10(c)⁶⁵ of the 1968 constitutional amendment gave the Court the broad authority necessary to manage the new unified court system. One notable example of the use of section 10(c) as a workload management tool was the Court's delegation of its equity jurisdiction to the Superior Court in 1975.⁶⁶ Section 10(b) provided for the appointment of a court administrator to coordinate the business of the Court.⁶⁷

In order to facilitate further the unified court system plan in Pennsylvania, the adoption of the new judicial article in 1968 invested the Superior Court⁶⁸ as a constitutional court consisting of seven judges with its jurisdiction to be provided by law⁶⁹ and created a Commonwealth Court with both its jurisdiction and the number of judges to be provided by law.⁷⁰

64. See S. SCHULMAN, *supra* note 3, at 150-51. Schulman noted in his 1962 study of the Pennsylvania judicial system that the Court was content with legislative delegation of rulemaking authority except in connection with the admission and discipline of attorneys. In that area, whose regulation the Court considers an inherent and not derivative judicial function, the Court has refused to be bound by legislation not consonant with its rules. He observed that "[i]n all other respects, [the Supreme Court's] rule-making power is a delegated one which can be revoked by the Legislature or nibbled away piecemeal by legislation inconsistent with the rules." *Id.* at 149.

65. See note 58 *supra*.

66. See 5 PA. BULL. 103 (1975). Former rule 73 of the Pennsylvania Supreme Court Rules was promulgated on Jan. 7, 1975 and effective on Apr. 17, 1975. The rule was incorporated into the rules of appellate procedure with no change in substance. See PA. R. APP. P. 702(b) (note); note 202 and accompanying text *infra*.

67. PA. CONST. art. 5, § 10(b) provides: "The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace."

68. The Superior Court had been created in 1895 by an act which provided: [A] court of intermediate appeal is hereby established to be called The Superior Court, and to be composed of seven judges learned in the law, who shall be elected by the qualified electors of the State, except as they may be appointed by the Governor under the provisions of this act. Act of June 24, 1895, 1895 Pa. Laws 212. See text accompanying notes 36-39 *supra*.

69. The Pennsylvania Constitution provides: "The Superior Court shall consist of seven judges, one of whom shall be the president judge, and its jurisdiction shall be as provided by law." PA. CONST. art 5, § 3. The Superior Court was created to relieve the Supreme Court of the intolerable burden of appeals. See S. SCHULMAN, *supra* note 3, at 153-54.

The jurisdiction of the Superior Court was prescribed by the Appellate Court Jurisdiction Act of 1970. Act No. 223, 1970 Pa. Laws 673 (codified at 42 PA. C.S.A. § 761 (Purdon Pamphlet 1977)). See text accompanying notes 89-91 *infra*.

70. PA. CONST. art. 5, § 4. On Jan. 6, 1970, the legislature passed the Commonwealth Court Act which provides:

[A] court of record of statewide original and appellate jurisdiction, to be known as the Commonwealth Court, is established to be composed of seven judges who shall be citizens of the Commonwealth and members of the bar of

C. *The Appellate Court Jurisdiction Act of 1970*

The 1968 amendment to the Pennsylvania Constitution established a framework for a reformed judiciary. The Appellate Court Jurisdiction Act (ACJA)⁷¹ was enacted on July 31, 1970 by the General Assembly to give substance and detail to the new judicial article.

The ACJA gave the Supreme Court original,⁷² but not exclusive jurisdiction over all cases of habeas corpus,⁷³ mandamus or prohibition to courts of inferior jurisdiction,⁷⁴ and quo warranto as to any commonwealth officer with statewide jurisdiction.⁷⁵ The direct appeal jurisdiction of the Supreme Court was made to include appeals from final orders of the Courts of Common Pleas in the following cases: felonious homicide;⁷⁶ right to public office;⁷⁷ matters decided in the Orphans' Court division;⁷⁸ actions or proceedings in equity other than those delegated to the Commonwealth Court or elsewhere pursuant to statute;⁷⁹ direct criminal contempt in the Court of Common Pleas and other contempt proceedings in the Court

the Supreme Court of the Commonwealth and who shall, for a period of one year preceding their election or appointment and during their continuance in office, reside within the Commonwealth.

Pa. Stat. Ann. tit. 17, § 211.2 (Purdon Cum. Supp. 1977-1978). For a historical resume of the Commonwealth Court, see Comisky, *Commonwealth Court Investiture*, 42 PA. B.A.Q. 25 (1970). See also Comment, *The Commonwealth Court of Pennsylvania: Jurisdiction and Jurisdictional Questions*, 47 TEMP. L. Q. 86 (1973).

71. Act No. 223, 1970 Pa. Laws 673.

72. 42 PA. CONS. STAT. ANN. § 721 (Purdon Pamphlet 1977) provides: "The Supreme Court shall have original but not exclusive jurisdiction of: (1) All cases of habeas corpus; (2) All cases of mandamus or prohibition to courts of inferior jurisdiction; (3) All cases of quo warranto as to any officer of statewide jurisdiction." *Id.*

The ACJA's grant of original jurisdiction to the Supreme Court failed to conform to recommendations put forward by at least two quarters. The American Bar Association recommended in its *Draft of a Model Judiciary Article for State Constitutions* that a Supreme Court be given no original jurisdiction and that it only be permitted to issue writs necessary or appropriate to its appellate function. ABA MODEL STATE JUDICIAL ARTICLE, § 2, ¶ 2(A) (1962). The reasoning behind the ABA's suggestion was that original jurisdiction involves fact-finding tasks which are inappropriate for a high court. *Id.* The validity of this argument has been challenged. See Comment, *supra* note 3, at 473. In addition, Sidney Schulman's study suggested that the Court be given no original jurisdiction so that the Court would be able to regulate its caseload in accordance with the needs of the times. See S. SCHULMAN, *supra* note 3, at 8.

73. 42 PA. CONS. STAT. ANN. § 721(1) (Purdon Pamphlet 1977).

74. *Id.* § 721(2).

75. *Id.* § 721(3).

76. *Id.* § 722(1).

77. *Id.* § 722(2).

78. *Id.* § 722(3).

79. Act of July 31, 1970, § 202(4), 1970 Pa. Laws 673. This section was dispensed with when the Supreme Court through its rulemaking power delegated its equity jurisdiction to that court. See note 66 and accompanying text *supra*.

of Common Pleas relating to orders that are appealable directly to the Supreme Court;⁸⁰ suspension or disbarment from the practice of law;⁸¹ supersession of a district attorney by an attorney general or by a court;⁸² matters where the right or power of the commonwealth or any political subdivision to create or issue indebtedness is drawn in direct question;⁸³ and matters

where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any act of Assembly of, this Commonwealth, or any provision of any home rule charter.⁸⁴

The Supreme Court was given exclusive jurisdiction of appeals from all final orders of the Commonwealth Court in matters that were originally commenced in the Commonwealth Court and that were not an appeal to that court,⁸⁵ as well as appeals from orders of the Commonwealth Court in cases that were appealed to that court from the Board of Finance and Revenue.⁸⁶ Finally, the Supreme Court was given allocatur, *i.e.*, permissive jurisdiction⁸⁷ upon allowance of appeal by any two of the seven justices.⁸⁸

The ACJA relieved the Supreme Court of direct appeals in assumpsit and trespass matters by delegating such matters to the Superior Court.⁸⁹ The Superior Court was given exclusive appellate

80. 42 PA. CONS. STAT. ANN. § 722(4) (Purdon Pamphlet 1977).

81. *Id.* § 722(8). Provision is also made for direct appeal from Common Pleas Court decisions concerning other disciplinary orders or sanctions relating to the practice of law. *Id.*

82. *Id.* § 722(5).

83. *Id.* § 722(6).

84. *Id.* § 722(7).

85. *Id.* § 723.

86. *Id.*

87. The nature, function and scope of allocatur jurisdiction is set out in the Pennsylvania rules of appellate procedure. PA. R. APP. P. 1112-1123. An appeal may be taken from any final order of the Commonwealth Court which is not an appeal as of right from the Commonwealth Court, or from any final order of the Superior Court. As a general rule, a petition must be filed with the Prothonotary of the Supreme Court within thirty days after the entry of the order of the Superior Court or Commonwealth Court sought to be reviewed. Under rule 1114, review of a final order "is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor." PA. R. APP. P. 1112.

For a discussion of the manner in which the petitions are handled by the Pennsylvania justices, see note 181 *infra*.

88. 42 PA. CONS. STAT. ANN. § 723(9) (Purdon Pamphlet 1977).

A similar provision had appeared in 1895 Pa. Laws 212, but had required the allowance of only one justice. *Id.* § 7(c).

89. 42 PA. CONS. STAT. ANN. § 742 (Purdon Pamphlet 1977).

jurisdiction of all appeals from final orders of the Common Pleas Court regardless of the nature of the controversy or the amount involved.⁹⁰ The Superior Court was given no original jurisdiction by the ACJA except in actions of mandamus and prohibition to courts of inferior jurisdiction where the actions are ancillary to matters within its appellate jurisdiction.⁹¹

Even though the enactment of the ACJA in 1970 increased the Superior Court's jurisdiction by adding assumpsit and trespass cases, that court was relieved of its former jurisdiction involving appeals from state and local administrative agencies divisions. The ACJA transferred these appeals to the Commonwealth Court⁹² and gave this new court original jurisdiction over all civil actions against the commonwealth or any of its officers acting in their official capacity, except 1) proceedings under the Eminent Domain Code and 2) "actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court."⁹³ In addition, the Commonwealth Court was given direct exclusive appellate jurisdiction over appeals from administrative agencies of the commonwealth, with several exceptions.⁹⁴ In general, all matters involving local government, home rule charters or ordinances and criminal violations thereof became appealable to the Commonwealth Court under the ACJA,⁹⁵ except those matters involving the right of the commonwealth in a political subdivision to create or issue indebtedness which were made directly appealable to the Supreme Court.⁹⁶

D. *Administrative Duties*

The Supreme Court, in its capacity as overseer of the unified court system,⁹⁷ has various administrative responsibilities which

90. *Id.*

91. *Id.* § 741. For a discussion of the statutory and constitutional origins of the Superior Court, see notes 35-39 & 68-69 and accompanying text *supra*.

92. The Commonwealth Court was created by the 1968 revision of the judicial article. See note 70 and accompanying text *supra*.

93. 42 PA. CONS. STAT. ANN. § 761(a)(1)(i) (Purdon Pamphlet 1977).

94. *Id.* § 763. The exceptions include appeals from revocation or suspension of motor vehicle operators' licenses, Liquor Code appeals, and Workmen's Compensation, which go first to the Common Pleas Courts and then to the Commonwealth Court. *Id.* § 763(1).

95. *Id.* § 762(4).

96. *Id.* § 722(6).

97. The Supreme Court is endowed with "general supervisory and administrative authority" over the court system in Pennsylvania by § 10(a) of the Judiciary Article, which provides: "The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including the

occupy the time of the justices.⁹⁸ The power granted in the constitution to promulgate "rules governing practice, procedure and conduct of all courts"⁹⁹ is the vehicle by which the Court administers, supervises, and manages the court system in Pennsylvania.

As head of the unified court system, the Court exercises authority over all courts in the system, as well as numerous magistrates and justices of the peace.¹⁰⁰ The court administrator,¹⁰¹ appointed by the Court, is also subject to the Court's direction,¹⁰² as are the system's support personnel such as the prothonotaries.¹⁰³ Additionally, the budget of the system requires the attention and approval of the Court.¹⁰⁴

A court system the size of Pennsylvania's necessarily requires a panoply of rules¹⁰⁵ to enable both the courts and system alike to function effectively. Thus the Court has appointed and presides over nine rules advisory committees,¹⁰⁶ and has enacted, *inter alia*, rules

authority to temporarily assign judges and justices of the peace from one court or district as it deems appropriate. PA. CONST. art. 5, § 10(a).

In § 10(b) of the same article, the Court is given the responsibility to appoint the necessary and proper administrative personnel to run the business of the court system. For the text of § 10(b), see note 67 *supra*.

98. See note 4 *supra*; text accompanying notes 181-84 *infra*.

99. PA. CONST. art. 5, § 10(c). For the text of this section, see note 58 and accompanying text *supra*.

100. PA. CONST. art. 5, § 10.

101. The first responsibility assigned to the Court Administrator by the Supreme Court was to take charge of the reorganization of the courts of initial jurisdiction of the state. See Meyer, *supra* note 3, at 465. This need for reorganization was precipitated by the substantial reforms brought about by the constitutional revision. *Id.* Beginning in 1970, the administrative office started issuing annual statistical reports — reports which made possible, for the first time, intelligent appraisal of the caseloads of the courts, the state of delay and congestion, and the trend in case inventory. *Id.* at 472-73. The prothonotary — not the court administrator — keeps statistics on the Supreme Court. See note 289 *infra*.

The Court Administrator's assigned responsibilities also include serving, since 1973, as secretariat for the Pennsylvania Conference of State Trial Judges; devising a system for reimbursement and disbursement of funds appropriated by the state legislature to compensate counties for costs incurred by each county in the administration and operation of its courts; surveying and studying the auditing of financial transactions connected with the courts of the Commonwealth except for the Pennsylvania Supreme Court; and establishing a liaison with legislative leaders. In connection with this last duty, the Administrative Office regularly reviews all bills introduced in the legislature that may affect the judicial system. The general functions of the Administrative Office are set out in PA. R. JUD. ADM. 504.

102. PA. CONST. art. 5, § 10(b). For the text of § 10(b), see note 67 *supra*. See PA. R. JUD. ADM. 501, 504.

103. See note 139 *supra*; note 289 *infra*.

104. Carrol v. Tate, 442 Pa. 45, 274 A.2d 193, cert. denied, 402 U.S. 974 (1975).

105. For a list of the rules enacted by the Court, see note 259 *infra*.

106. See PA. RULES OF COURT at XV-XVIII (West Pamphlet 1977).

prescribing how the system is to be administered, rules establishing the practice and procedure for the various courts in the system, and codes of conduct for judges and lawyers. In addition to the procedural rules committees, the Judicial Inquiry and Review Board,¹⁰⁷ the Judicial Council of Pennsylvania,¹⁰⁸ and the Disciplinary Board of Pennsylvania¹⁰⁹ are under the aegis of the Court, along with the State Board of Law Examiners.¹¹⁰

III. JUDICIAL SELECTION IN PENNSYLVANIA

Judges in Pennsylvania are selected in one of two ways — by popular election,¹¹¹ or, in the case of a vacancy, by appointment.¹¹² Justices of the Supreme Court serve ten year terms¹¹³ and may be reelected at the conclusion of each term.¹¹⁴ Judges of the intermediate appellate courts and the lower courts also serve ten year terms¹¹⁵ followed by retention elections.¹¹⁶ Any justice or judge who is seated pursuant to interim appointment may, at the conclusion of his or her term of office, file a declaration of candidacy and seek retention by the electorate.¹¹⁷

107. PA. CONST. art. 5, § 18.

108. PA. R. JUD. ADM. 301.

109. PA. R. SUP. CT. 205.

110. PA. R. SUP. CT. 7.

111. The constitution provides: "Justices, judges, and justices of the peace shall be elected at the municipal election . . . by the electors of the Commonwealth or the respective districts in which they are to serve." PA. CONST. art. 5, § 13(a).

112. PA. CONST. art. 5, § 13(b). See notes 86-90 and accompanying text *infra*.

113. PA. CONST. art. 5, § 15(a).

114. *Id.* § 15(b).

115. *Id.* § 15(a).

116. *Id.* § 15(b).

117. *Id.*

The present system of judicial selection in Pennsylvania has an unsettled past and an uncertain future.¹¹⁸ The call¹¹⁹ for overall

118. This unsettled past parallels the changing attitudes toward judicial selection throughout American history. For a discussion of the history of judicial selection processes in the United States, see A. ASHMAN & J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 7-11 (1974) [hereinafter cited as ASHMAN & ALFINI]; Nelson, *Variations on a Theme — Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4 (1962); Winters, *Selection of Judges — An Historical Introduction*, 44 TEX. L. REV. 1081 (1966).

In colonial Pennsylvania, as in colonial America, judges were usually appointed by the governor. See Keefe, *Judges and Politics: The Pennsylvania Plan of Judicial Selection*, 20 U. PITT. L. REV. 621 (1959).

Under the never-ratified Pennsylvania Constitution of 1776, which was drafted at the suggestion of the Continental Congress, the Supreme Executive Council — an elected body — appointed the various judges of the various courts of record. PA. CONST. of 1776, §§ 19, 20. See LEGIS. REF. BUREAU, *CONSTITUTIONS OF PA. AND THE U.S.* 219-39 (1916). The constitution of 1790 transferred the appointment power to the governor. PA. CONST. of 1790, art. 2, § 8.

The demand for an elective system came later in the commonwealth's history — undoubtedly in response to the wave of Jacksonian Democracy, which swept the country in the 1830's, and was characterized by a violent swing towards the democratization of government which was to be implemented through the power of the ballot box. Arensberg, *Election of Judges — 1850 Style*, 38 PA. B.A.Q. 56, 57 (1966). The elective system was adopted by constitutional amendment in 1850. PA. CONST. of 1838, amend. 1850, art. 5, § 2. This proved to be impregnable to the major assaults on the popular election system in the early twentieth century. See ASHMAN & ALFINI, *supra*, at 10-11.

Opponents of the elective system argued that the elective system diminished the freedom of the judiciary from political pressures by interest groups and party organization. See Keefe, *supra*, at 622. Abuses in the elective system sparked a national movement for progressive judicial administration at the turn of the century. One of the major assaults on the popular election system came from then University of Nebraska law professor, Roscoe Pound, who noted that popular judicial elections were a major cause of public dissatisfaction with the administration of justice. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 46 J. AM. JUD. SOC'Y 55, 66 (1962). Pound's assault on popular elections was carried on by William Howard Taft, the ex-President of the United States and future Chief Justice of the U.S. Supreme Court. ASHMAN & ALFINI, *supra*, at 10. In response to Pound's criticisms, Albert M. Kales proposed a plan — the Kales Plan — for a system of judicial selection which consisted of the appointment of judges by an elected chief justice from a list of names submitted by an impartial nonpartisan nominating body. Under the Kales Plan, judges would be required to go before the voters on the sole question of their retention. See Nelson, *supra*, at 17, 18; Winters, *supra*, at 1084. The Kales Plan was amended in 1926 by political scientist Harold Laski who proposed that the Governor be substituted for the chief justice as the appointing agent. ASHMAN & ALFINI, *supra*, at 11. This Kales-Laski proposal became the prototype for many subsequent judicial plans and was endorsed by the American Bar Association in 1937. *Id.* The well-known "Missouri Plan" was the first such plan to be adopted when it was added to Missouri's constitution in 1940. MO. CONST. of 1875, amend. 1940, § 1. Section 29(a) of the current Missouri constitution provides in pertinent part:

Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court [and] the courts of appeals . . . , the governor shall fill such vacancies by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided.

MO. CONST. art. 5, § 29(a). For a discussion of the Missouri nonpartisan plan, see Bundschu, *The Missouri Non-Partisan Court Plan*, 16 U. KAN. CITY L. REV. 55 (1948); Hall, *Missouri Nonpartisan Court Plan*, 33 U.M.K.C. L. REV. 163 (1965); Rooks,

judicial reform in the 1960's included severe criticisms of the manner in which judges were selected and retained.¹²⁰ Virtually unchanged since 1873, the constitution has provided for partisan election of Supreme Court justices¹²¹ and other judges and the filling of vacancies by appointment of the governor.¹²² This system was condemned by reformers as one that maximized irrelevant political considerations and minimized meaningful judicial qualifications.¹²³

Missouri Court Plan; Judicial Selection and Tenure, 13 J. MO. BAR 166 (1957); Williamson, *Nonpartisan Court Plan: Opposition View*, 25 J. MO. BAR 213 (1969).

In 1947, the Pennsylvania Bar Association endorsed a compromise method of selection for vacancies based largely on the successful "Missouri Plan." See Keefe, *supra*, at 623. The so-called "Pennsylvania Plan" sought to accommodate both the appointment and election principles into a single plan by combining popular control with merit selection. *Id.* at 622. Under that plan, the governor would be empowered to fill vacancies on the Supreme Court, Superior Court and courts of record of Philadelphia and Allegheny Counties by appointment, but the governor's choice would be restricted to a panel of persons nominated by a nonpartisan judicial selection commission consisting of seven members. *Id.* at 622-23. The commission would be composed of one judge who would be selected by a plan formulated by the Supreme Court, three lawyers and three lay citizens appointed by the governor. *Id.* at 623.

Under the Pennsylvania Plan, the governor would have the power to reject the panels of nominees and demand new panels until he made the final appointment — a concession made under the Pennsylvania Plan to accommodate political parties and the prerogatives of the governor. See S. SCHULMAN, *supra* note 3, at 50. After appointment, the judge or justice would serve a full term at which time he or she would file a notice of intention to seek reelection. *Id.* at 49. The judge's name would then appear on a separate judicial ballot at the next election for confirmation or rejection by the voters. *Id.*

Legislative proposals that would have led to a constitutional amendment implementing the Pennsylvania Plan were repeatedly unsuccessful. See Keefe, *supra*, at 623. In 1959, the Pennsylvania Commission on Constitutional Revision stated:

This type of voting is foreign to us; it is a procedure copied from a different type of 'democracy.' However, it is reasonable to assume there would be virtually no rejections [of judges on retention ballots]. Where officials are 'elected' on a 'yes' or 'no' vote, approval is nearly unanimous. You cannot lick somebody with nobody is a tried and accepted political slogan even in America.

S. SCHULMAN, *supra* note 3, at 53 n.68, quoting REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 215 (1959).

119. See note 118 *supra*.

120. See generally S. SCHULMAN, *supra* note 3, at 18-58.

121. The 1873 constitution provided that the Supreme Court judges should "be elected by the qualified electors of the State at large." PA. CONST. of 1873, art. 5, § 2 (historical note).

122. PA. CONST. of 1873, art. 5, § 25 provided that "[a]ny vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor." *Id.* See S. SCHULMAN, *supra* note 3, at 18. In his study on court reorganization, Schulman stated that "[u]nfortunately, our political traditions in Pennsylvania have rarely exalted the judicial office above the grasp of the political party spoils system and the pragmatic demands of political life." *Id.* at 22. He also observed that the elective system had become, as of the time of his study, a combination appointive-elective system, since the great majority of judges were reaching the bench by interim appointment by the governor. *Id.* at 20. The governor's increasing control concerned Schulman because "independent Governors sensitive to the high needs of the judicial system are usually transitory." *Id.* at 21.

123. See S. SCHULMAN, *supra* note 3, at 18.

The limited constitutional convention of 1968 responded to such criticism by recommending the adoption of a judicial selection plan whereby the governor would select justices and judges from a list of persons submitted by a judicial qualifications commission.¹²⁴ This proposal was submitted to the voters in the May, 1969, primary election, but was narrowly defeated.¹²⁵ Thus, except for the filling of vacancies¹²⁶ by gubernatorial appointment under the voluntary Pennsylvania Plan,¹²⁷ partisan election is the present mode of judicial selection in Pennsylvania.¹²⁸

The Pennsylvania Plan,¹²⁹ which has thus far failed to find its way into the state constitution,¹³⁰ has been implemented by

124. The proposed § 13(d) of article 5 was adopted by the convention on April 23, 1968. See PA. CONST., art. 5, § 13 (historical note). The section reads as follows:

(d) At the primary election in 1969, the electors of the Commonwealth may elect to have the justices and judges of the Supreme, Superior, Commonwealth and all other statewide courts appointed by the Governor from a list of persons qualified for the offices submitted to him by the Judicial Qualifications Commission. If a majority vote of those voting on the question is in favor of this method of appointment, then whenever any vacancy occurs thereafter for any reason in such Court, the Governor shall fill the vacancy by appointment in the manner prescribed in this subsection. Such appointment shall not require the consent of the Senate.

PA. CONST. art. 5, § 13(d) (proposed). The merit selection question, placed on the ballot pursuant to a referendum provision in the 1968 Constitution, was unsuccessful. PA. CONST. sched. art. 5, § 28.

The Judicial Qualifications Committee was to be 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 of the commission could belong to the same political party and each member would serve a term of seven years. PA. CONST., art. 5 § 14(a) (proposed).

125. See PA. CONST. art. 5, § 13 (historical note); text accompanying note 277 *infra*. Interestingly, the plan rejected by the Pennsylvania voters in 1969 was somewhat similar to the method of selection employed in the Commonwealth in the 18th century. See note 121 *supra*.

126. See note 112 and accompanying text *supra*.

127. See note 118 *supra*.

128. PA. CONST. art. 5, § 13(a). For the text of this sections, see note 111 *supra*.

129. See note 118 *supra*.

130. See notes 124 & 125 and accompanying text *supra*; see also text accompanying note 278 *infra*. The plan nevertheless remained popular with a number of judicial reformers in the state. See S. SCHULMAN, *supra* note 3, at 10. In 1964, the plan became the official position of a citizens' group whose chairman was the present Supreme Court Justice Thomas W. Pomeroy, Jr. See CITIZENS' CONFERENCE ON MODERNIZATION OF PENNSYLVANIA'S JUDICIAL SYSTEM, THE CONSENSUS OF THE PENNSYLVANIA JUDICIAL SYSTEM 3 (1964).

The debate over judicial selection continues in Pennsylvania as it does in other states. At one pole are those who would extend the merit selection plan to initial selections and rid the state of partisan judicial selections completely. At the other pole are those who contend that judicial accountability is possible only under an elective system. A reconciliation may yet be found. The final goal, however, is as uncontested today as it was in 1790 when John Jay opined, "Next to doing right, the great object in the administration of public justice should be to give public satisfaction." Nejelski, *The Tension of Popular Participation*, 1 STATE COURT J. 9 (1977).

executive order.¹³¹ Under this voluntary plan, which provides for vacancy appointments and retention by popular vote for appellate and general trial courts, the governor appoints an Appellate Court Nominating Commission¹³² and a Trial Court Nominating Commission¹³³ "to assist the Governor in carrying out his desire and intention to appoint to judicial office only those members of the Bar who are, by virtue of their learning, experience, character and temperament, best fitted therefor."¹³⁴

IV. THE PERIPATETIC COURT

In addition to the increased responsibilities imposed upon the Supreme Court that result from the Court's stewardship of the new unified court system,¹³⁵ the time of the justices is further consumed by their continuing obligation to "ride the circuit."¹³⁶ In 1977, the Court held argument sessions in Philadelphia in January, April, October and November; in Pittsburgh in March and September; and in Harrisburg in May.¹³⁷ Most cases are heard in the district in which they are filed except for felonious homicide cases and other cases of special importance which are heard at the first argument session after briefs are filed, without regard to district.¹³⁸

The Supreme Court maintains separate offices in each of their three districts. Practically speaking, Harrisburg and Pittsburgh

131. Executive Order No. 1973-6, § 7.111 (as amended March 6, 1975), *cited in* 5 PA. BULL. 711 (1975).

132. The Appellate Court Nominating Commission consists of three members of the Bar of the Supreme Court of Pennsylvania; three lay persons and the Justice of the Supreme Court "longest in continuous service and not eligible to file a declaration of candidacy for retention election . . . to serve as Chairman." 5 PA. BULL. 711, 712 (1975).

133. Each trial court nominating commission consists of one area member who is a member of the Bar of the Supreme Court of Pennsylvania and is actively practicing law in the nominating area; one lay member and a third member who may be an attorney or layman as the governor determines. *Id.*

134. *Id.* at 711.

135. See notes 55-76 & 97-110 *supra*.

136. As used here, "riding the circuit" refers to the fact that the Court travels between three designated cities — Philadelphia, Pittsburgh, and Harrisburg — to hold its sessions. Although the justices' duty to hear appeals in three different cities is commonly known as "riding the circuit," it differs from the circuit riding done by the Supreme Court of Pennsylvania from 1799-1809, and 1826-1834, when the Court travelled to perform a general trial function. See notes 21-27 and accompanying text *supra*.

Currently, Pennsylvania is divided by statute into districts in which the Supreme Court sits. PA. STAT. ANN. tit. 17, §§ 11, 12 (Purdon 1962). The Court is statutorily empowered to adjust the districts and the court sessions there. *Id.* § 16. For the justices' views of the peripatetic court, see notes 235-55 and accompanying text *infra*.

137. PA. RULES OF COURT at ix (West Pamphlet 1977).

138. See IJA REPORT, *supra* note 1, at 10.

serve as suboffices and Philadelphia is considered the principal office of the Court.¹³⁹ Individual justices do not, for the most part, maintain their principal offices in Philadelphia.¹⁴⁰ Each resident county of an appellate court judge is required by statute to supply an office in the county and a majority of the judges use these facilities as their principal offices.¹⁴¹

PART II

Views from the Bench

This portion of the Project is a study of the Supreme Court as perceived by the justices. The topics of discussion — excess caseload, jurisdiction reform and its impediments, effects of the peripatetic court, rulemaking, and judicial selection — were chosen as a result of background research which suggested that these factors were most interrelated with the Court's ability to provide prompt justice and advance the development of the law, without sacrificing thorough deliberation of the cases before it.¹⁴²

I. THE CASELOAD OF THE COURT

There is no disagreement among the justices with the proposition that the workload in general, and the caseload in particular, of the Supreme Court is unrealistically heavy.¹⁴³ Justice Nix pointed

139. IJA REPORT, *supra* note 1, at 14. The Supreme Court, pursuant to statute, is authorized to appoint a separate prothonotary for each district. PA. STAT. ANN. tit. 17, § 18 (Purdon 1962). See IJA REPORT, *supra* note 1, at 16. The current practice is that one prothonotary is appointed as the Supreme Court Prothonotary who then appoints a deputy prothonotary to each of the districts. See *id.* at 16. The Supreme Court Prothonotary has many duties not directly connected with the appellate function including: 1) preparation of the budget for the Supreme Court and for the prothonotary's offices in Pittsburgh and Harrisburg; 2) preparation of the budget and serving as treasurer of the State Reporter and various committees and boards appointed by the Supreme Court such as the Civil and Criminal Procedure Rules Committee, State Board of Bar Examiners, and several others; and 3) keeping special dockets relating to civil and criminal rules, Supreme Court rules, and the business of the Judicial Inquiry and Review Board. *Id.* at 16-18.

Philadelphia maintains seven court personnel in addition to the deputy prothonotary. *Id.* at 16. These seven persons are paid by the City of Philadelphia, but are subject to the supervision of the Supreme Court Prothonotary. *Id.* at 17. In Pittsburgh, the prothonotary staff is shared by the Supreme and Superior Courts; the staff includes a deputy and four personnel, who handle the paperwork, recordkeeping and financial work. *Id.* at 18. Harrisburg maintains one clerk in addition to the deputy prothonotary. *Id.* at 19.

140. *Id.* at 14.

141. *Id.*

142. See note 4 *supra*.

143. Interviews with the Justices. All the justices used words such as "unquestionably" and "indubitably" when queried as to whether their caseload was too heavy. See also Potter, *supra* note 1; note 204 *infra*.

out that the jurisdiction in Pennsylvania far exceeds the comparable jurisdiction of the highest courts in New York, New Jersey, and California.¹⁴⁴

One cause of the heavy caseload is the large number of direct appeals which the Court must hear.¹⁴⁵ A more subtle source of the excessive number of cases results from time constraints on the Superior Court causing it to produce an inordinate amount of per curiam affirmances or reversals.¹⁴⁶ This dearth of articulated opinions inevitably results in more appeals to the Supreme Court.¹⁴⁷ Furthermore, the proliferation of per curiam opinions¹⁴⁸ means that the Superior Court is not functioning as a general law court in the development and determination of law and precedent.¹⁴⁹ The ensuing unpredictability and uncertainty of the law encourages and requires lawyers to press appeals to the Supreme Court for a determination of the law upon which their clients must base their behavior. Thus, the Superior Court is often a mere way station along the route to the Supreme Court, rather than a final stopping place.¹⁵⁰

Justice Roberts indicated that for the past several years, the members of the Pennsylvania Supreme Court have been assigned more than twice, and in some cases more than three times, the number of cases assigned to members of the highest courts of the

For a comparison of the caseload of the Pennsylvania Supreme Court to recent caseloads of the New Jersey Supreme Court and the New York Court of Appeals, see note 152 *infra*; Appendix *infra*.

144. Interview with Justice Nix (Nov. 28, 1977). For example, the New Jersey Constitution provides the following jurisdictional scope for that state's highest court:

1. Appeals may be taken to the Supreme Court:

(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) In capital causes;

(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the County Courts and the inferior courts; and

(e) In such causes as may be provided by law.

N.J. CONST. art. 6, § 5. For the current jurisdiction of the Pennsylvania Supreme Court, see notes 72-88 and accompanying text *supra*.

145. See note 171 and accompanying text *infra*.

146. Interviews with the Justices; interviews with the clerks. See also note 204 *infra*.

147. Interviews with the Justices; interviews with the clerks.

148. This practice generally has been condemned. See P. HARRINGTON, D. MEADOR, & H. ROSENBERG, JUSTICE ON APPEAL 32 (1976) [hereinafter cited as JUSTICE ON APPEAL].

149. For a discussion of the justices' views on the proper role of the Supreme Court and intermediate appellate courts, see notes 156-72 and accompanying text *infra*.

150. Interviews with the Justices; interviews with the clerks.

most populous states.¹⁵¹ He listed as examples New York, New Jersey, Ohio, Illinois, Michigan, Massachusetts, Florida, Texas, and Wisconsin,¹⁵² noting that the same comparison held true *vis à vis* the

151. Interview with Justice Roberts (Nov. 21, 1977). This may perhaps be linked to the fact that Pennsylvania has the fewest intermediate appellate judges of the eight largest states in the United States. See text accompanying note 205 *infra*.

152. See Michael Eagen, C.J., State of the Judiciary Message, May 11, 1978, reprinted in 49 Pa.B.A.Q. 323 (1978). Chief Justice Eagen noted in his address that in 1976 the Pennsylvania Supreme Court filed a total of 583 opinions, whereas the Supreme Court of California filed 191 opinions in that year, the Supreme Judicial Court of Massachusetts filed 256 opinions, and the Supreme Court of New Jersey filed 167 opinions. *Id.* Furthermore, the number of opinions filed by the Supreme Court in Pennsylvania increased to over 700 opinions in 1977. *Id.* For a further look at Pennsylvania statistics, see Appendix, *infra*.

In their September 1, 1976 to August 31, 1977 term, the New Jersey Supreme Court decided 151 appeals and 24 disciplinary matters. The participation of the justices of the New Jersey Supreme Court and judges sitting by designation was broken down by the N.J. Administrative Division of Courts as follows:

	OPINIONS FILED					Total
	Majority	Concur	Concur in Part Dissent in Part		Per Curiam	
			Dissent			
Hughes, C.J.	4	1		6		11
Mountain, J.	15	1	1		3	20
Sullivan, J.	14	7	1	4	15	41
Pashman, J.	18	3	2	12	1	36
Clifford, J.	3	1	1	8	8	21
Schreiber, J.	14	2	2	8	11	37
Handler, J.	1				1	2
Conford, J.	11	3	5	12	14	45
Kolovsky, J.	1					1
Carton, J.	1			1		2
Opinions Below	18					18
	100	18	12	51	53	234

N.J. ADMIN. DIV. OF COURTS ANN. REP. A-3[1976-1977].

During the 1976 calendar year the New York Court of Appeals filed 592 opinions:

Opinions by Type and by Author
January 1, 1976 through December 31, 1976

Author	Type of Opinions			
	Majority Opinions	Concurrences	Dissents	Total
Breitel	24	8	10	42
Jasen	32	5	29	66
Gabrielli	36	3	12	51
Jones	32	3	11	46
Wachtler	33	1	8	42
Fuchsberg	26	13	14	53
Cooke	32	3	18	53
Per Curiam	34	0	0	34
Memorandum	205	0	0	205
Total	454	36	102	592

N.Y. JUD. CONF. ANN. REP. 46 (1977).

For a survey of the Pennsylvania Supreme Court's 1977 opinions organized by justice and prepared by the Villanova Law Review, see Appendix, Table II, *infra*.

United States Court of Appeals for the Third Circuit.¹⁵³ Expanding upon the theme expressed by Justice Nix, Justice Roberts reported that the caseload of the Court in Pennsylvania is twice that of these jurisdictions.¹⁵⁴

The justices concur that change must be forthcoming.¹⁵⁵ Their views on the direction these changes should take depends largely upon their perceptions of the appellate function of the Supreme Court.¹⁵⁶

A. *The Proper Role of the Court*

The impact of time burdens on the Supreme Court can only be understood by reference to the role ascribed to the state court of last resort. Given the practical and finite limitations to the resources, energy and time of the justices, the role of the Court in its appellate capacity must be clearly identified so that its resources may be allocated in the most efficient and rational way.

Although there are diverse opinions about the proper role of a court of last resort,¹⁵⁷ recent literature has focused on “the development of law” functions and the “maintaining of uniformity” function of the highest court in a three-tier system.¹⁵⁸ The correcting function, that of assuring justice to individual litigants in all cases,

153. In 1977, the U.S. Court of Appeals for the Third Circuit filed 27 signed opinions per judge and 8 per curiam opinions per judge. ADMIN. OFF. OF U.S. COURTS, MANAGEMENT STATISTICS 3 (1977). In comparison, the average number of opinions per Pennsylvania Supreme Court justice, based on the 740 opinion total referred to by Chief Justice Eagen in his 1978 State of the Judiciary message (see note 152 *supra*) would approximate 105 opinions each. See also note 198 and accompanying text *infra*; Appendix, Table II, *infra*.

154. See note 152 *supra*.

155. Interviews with the Justices. For a discussion of the justices' views regarding the need for change and the possible avenues of its implementation, see text accompanying notes 143-203.

156. Justices Nix, Manderino, and O'Brien alluded in various ways to the relationship between one's perception of the role of a court of last resort and the proper scope of its jurisdiction. Interviews with Justice Nix and Manderino; see generally Interview with Justice O'Brien (Nov. 17, 1977). R. POUND, APPELLATE PROCEDURE IN CIVIL CASES (1940); Joiner, *The Function of the Appellate System in JUSTICES IN THE STATES — ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY* (1971).

157. See, e.g., R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 1 (1976). The question may be posed whether an appellate court exists merely to correct error in the lower court or whether the highest court's principal function is to clarify, expound upon and develop law. For the applicability of this question to the United States Supreme Court, see P. FREUND, THE SUPREME COURT OF THE UNITED STATES 183 (1961).

158. See JUSTICE ON APPEAL, *supra* note 148, at 3; R. LEFLAR, *supra* note 157, at 4, 12; D. MEADOR, APPELLATE COURTS 2-3 (1974); Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975); ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS §§ 3.00, 3.01. Commentary (Approved Draft, 1977) [hereinafter cited as ABA STANDARDS].

is thought best allocated to an intermediate appellate court.¹⁵⁹ The intermediate court also serves the institutional purpose of hearing the bulk of all appeals, thereby freeing the top court to perform its lawmaking task.¹⁶⁰

The perceptions of the justices of the proper role of their Court have naturally influenced their judgments about its most desirable structure;¹⁶¹ their perceptions also provide explanation for their conclusions that they do not have sufficient time to do justice to their task.¹⁶²

Justice Nix elaborated upon why the court's present jurisdiction is not commensurate with the purpose of a court of last resort. In his view, there are two purposes for appellate review. At the first stage of appeal, or intermediate level, the main concern should be fairness to the individual by operation of the correcting function.¹⁶³ Uniformity is not as necessary at this point as is review of the trial court's use of the law as given. Beyond this stage, the purposes shift to resolving conflicts of law and developing the law. At this second stage of appeal, the court therefore need not be involved with day to day review, but with the more general process of establishing the law of the state and the creation of uniformity. As will be discussed later,¹⁶⁴ this analysis has led Justice Nix to conclude that the

159. R. LEFLAR, *supra* note 157, at 12, 63-64. The author estimates that one-half of the states have established intermediate appellate courts. *Id.* at 63.

160. *Id.* at 64. See also Fair, *State Intermediate Appellate Courts: An Introduction*, 24 W. POL. Q. 415 (1971), wherein the author concludes, after studying the operation of state intermediate appellate courts, that the one common aspect of the varying intermediate courts is their reduction of the top court's caseload. *Id.*

161. In 1925, the debates concerning the role of the United States Supreme Court culminated in the enactment of the Judges' Bill, Act of February 13, 1925, ch. 229, 43 Stat. 936, (codified in scattered sections of 11, 28, 48 U.S.C.) which put an end to appeal as of right from all cases in the courts of appeals. This was a result of the prevailing view that the Supreme Court must have control over its docket to provide uniformity and develop the law of the land. See JUSTICE ON APPEAL, *supra* note 148, at 3-4.

In language which is applicable to a state court system, then Chief Justice Taft presented the following argument to Congress in 1922:

No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country . . . [and] to preserve uniformity of decision among the intermediate courts of appeal.

Hearings Before the House Comm. on the Judiciary, 67th Cong., 2d Sess., sec. 33, at 2 (1922), reprinted in B. BATOR, P. MISHKIN, & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1603-04 (2d ed. 1973). The ABA would apply the same notion to all appellate courts. ABA STANDARDS, *supra* note 158, at §§ 3.00, 3.10.

162. Interviews with the Justices.

163. Interview with Justice Nix. See text accompanying note 159 *supra*; R. LEFLAR, *supra* note 157, at 62.

164. See note 201 and accompanying text *infra*.

Pennsylvania Supreme Court must become more like the United States Supreme Court through recognition that the highest court cannot feasibly take all cases to redress injustice,¹⁶⁵ but must concentrate on those involving important or unsettled questions of law.

Justice Manderino has recognized that as a court of last resort there is a limit to the number of cases that the Supreme Court can consider. He also believes that the Court would be able to correct miscarriages of justice through allocatur petitions¹⁶⁶ which, in the aggregate, would involve less time than direct appeals.¹⁶⁷ He does not, however, subscribe to the theory of "grand cases" — those of potential importance for all — followed by the United States Supreme Court, but sees the proper balance for a state supreme court as somewhere between granting allocatur petitions in every case and taking only the most compelling. Justice Packel holds the parallel view that the Court should not restrict itself to matters of grave importance but must rectify injustice.¹⁶⁸ As are several of the justices, he is convinced that the proper balance between the two goals could be struck if the Supreme Court of Pennsylvania, acting in a capacity of a certiorari court,¹⁶⁹ were to use less stringent criteria for accepting cases than the justices of the United States Supreme Court.¹⁷⁰

Justice O'Brien expressed the view that the Court presently does not have enough time to consider new and novel problems; he further explained that, due to the direct appeal in all felonious

165. It should be noted that Justice Nix is confident that injustice would be adequately averted through the allocatur process. Interview with Justice Nix. He is joined in this view by Justice Manderino.

166. Interview with Justice Manderino. For a discussion of allocatur petitions, see notes 87 & 88 *supra*; note 181 *infra*.

167. By monitoring the decisions of the lower courts through the allocatur process, the Court has the discretion to choose to accept for review only those cases which involve important or unsettled questions of law or those involving injustice, thereby reducing the time spent on less significant cases. Time is saved by the practice of assigning each allocatur petition to only one justice for research, review and report of recommendation.

On Pennsylvania's Supreme Court, only the affirmative votes of two justices are needed to grant review on an allocatur petition. The Appellate Court Jurisdiction Act, 42 PA. CONS. STAT. ANN. § 724(a) (Purdon Pamphlet 1977). See notes 87 & 88 and accompanying text *supra*.

168. Interview with Justice Packel (Nov. 28, 1977).

169. As this term is used for purposes of this project, "certiorari court" means one that is given a general grant of permissible jurisdiction from which it may choose which petitions for allowance of appeal to accept for review, thereby achieving control over the volume and nature of its caseload.

170. The dangers of overly strict standards include the likelihood that "the highest Court will tend to exercise too little influence over the behavior of lower courts." JUSTICE ON APPEAL, *supra* note 148, at 151.

homicide cases,¹⁷¹ much of the justices' time is consumed by repetitive work required by cases where the law is already settled.¹⁷² He envisions the function of the Court as comparable to the United States Supreme Court, but with the difference that the state court could be more precise and definite in its opinions since they apply only in one state.

B. *The Effect of a Heavy Caseload*

While affirming the right of all Pennsylvanians to file appeals and miscellaneous petitions, Chief Justice Eagen admitted that the present volume of work is beyond the capacity of the seven justices adequately to consider and resolve.¹⁷³ Justice Pomeroy indicated that there is not enough time for writing or consideration of cases. He acknowledged that sometimes opinions are not written or are not as comprehensive as they might be and that lawyers are properly troubled by this.¹⁷⁴ According to Justice Pomeroy, the need to garner a majority and produce opinions within a reasonable period of time operate together to create a practical barrier to comprehensive opinions. He also said that in cases where issues are repetitive,¹⁷⁵ no jurisprudential value would be served by full treatment in an opinion. Therefore, summary opinions should not be construed as an indication that adequate study was not accorded these issues.

As noted above,¹⁷⁶ Justice O'Brien is concerned that the Court does not have enough time to deal with new and unique problems that continually emerge in our everchanging society. He, too, believes that the result of the time pressures on the Court is that he cannot give the cases the necessary and vitally important attention and study they deserve.¹⁷⁷ He also provided some insight into the

171. Interview with Justice O'Brien. In 1974-1975, 46% of the Court's docket was comprised of felonious homicide cases entitled to direct appeal under § 202(1) of the ACJA, 42 PA. CONS. STAT. ANN. § 722(1) (Purdon Pamphlet 1977). Potter, *supra* note 1, at 218. See also JUSTICE ON APPEAL, *supra* note 148, at 6, wherein the authors contend that criminal appeals tend to be easier to decide and are more accurately characterized as invoking the correcting function of the court, which function properly belongs to an intermediate court. See text accompanying note 159 *supra*.

172. Most of the clerks interviewed also complained about the repetitive nature of the issues in criminal cases. Interviews with the clerks.

173. Interview with Chief Justice Eagen (letter of Mar. 2, 1978).

174. Justice Pomeroy indicated that he, too, would be troubled if he were a practicing attorney. Interview with Justice Pomeroy.

175. See note 172 and accompanying text *supra*.

176. See *id.*

177. Interview with Justice O'Brien. See JUSTICE ON APPEAL, *supra* note 148, at 6. The authors state: "These heavy increases in workload threaten the ability of the appellate courts to perform their functions. Adequate performance . . . requires personal involvement and attention to detail by the judges which cannot be provided by judges whose attentions and energies are divided among too many cases." *Id.*

effect of the time problem on the individual justices, whose free time is almost entirely eroded by the demands of the job and their own sense of duty.¹⁷⁸

Corroborating Justice O'Brien's concern, Justice Nix proclaimed that it degrades a court of last resort to have to decide cases of no moment which he described as the run-of-the-mill and repetitious cases wherein the law is already settled. Nonetheless, cases such as these are destined to result from the right of direct appeal in specified cases, predominantly criminal.¹⁷⁹ He revealed his dislike for per curiam opinions from a Supreme Court, but contended that they are the inevitable by-product of the increased caseload and repetitious cases, which do not call for a published opinion.¹⁸⁰ Justice Nix explained that in these situations, neither the time of the Court nor space in the case reporters should be consumed further.

In the course of his discussion about the general workload of the justices, Justice Nix emphasized that much of what the Court does is not visible — the reports on allocatur petitions which involve a significant amount of time,¹⁸¹ dispositions of miscellaneous petitions,¹⁸² the consideration of rules¹⁸³ which entails much background

178. Several of the justices, including Justice O'Brien, mentioned that they had little or no leisure time or social life remaining after they performed their work. Interviews with the Justices.

179. See note 172 and accompanying text *supra*.

180. Justice Nix's raising of this problem comports with what Justice Pomeroy indicated. Due to the repetition, the court is burdened with certain cases or issues which do not warrant the additional time involved in producing a final opinion. This does not mean that adequate time has not been spent in consideration of these cases, but, according to the justices, merely represents a decision about priorities in time allocation. Interviews with the Justices.

181. See notes 87-88 & 167 *supra*. Each justice, on a rotating basis, is assigned the task of writing a report on an allocatur petition, with a recommendation that the petition be granted or denied. The research and work involved in writing the reports were said to be roughly equivalent to that required for a full-scale opinion. The only significant difference mentioned is that no time need be spent perfecting and adapting the language of an opinion to suit all members of the majority. All the justices agreed that these reports are quite time consuming. Interviews with the Justices. Justice Manderino estimated that each justice is responsible for 150 reports per year. Interview with Justice Manderino.

182. The miscellaneous petitions are filed pursuant to the jurisdictional grants to the Supreme Court as specified in the text accompanying notes 72-75 *supra*.

Justice Manderino estimated that the Court receives about 20 miscellaneous petitions per week, requiring about two hours of reading a day in preparation for a vote in a weekly phone conference. Justice Pomeroy affirmed the importance of the miscellaneous petitions, but stressed that they require a good deal of time. Interviews with Justices Manderino and Pomeroy.

183. For a discussion of the Court's rulemaking power, see notes 256-66 and accompanying text *infra*. Justice Manderino estimated that ten percent of the Court's time is occupied by rulemaking; he said that this important function is deserving of more time than this, but any additional allocation is not feasible. Interview with Justice Manderino.

reading, the administrative chores¹⁸⁴ and the like. Thus, along with his brethren, he has concluded that there is not enough time in the day, and finds himself working nights and weekends to remain current.

Justice Manderino asserted the practical impossibility for a court of last resort to hear in excess of 200 cases per year.¹⁸⁵ He pointed out that, to obtain accreditation by the Association of American Law Schools (AALS), a law school must not, in recognition of the need for adequate preparation in and study of the law, allow its faculty to exceed a maximum number of teaching hours per week.¹⁸⁶ Justice Manderino suggested that an analogy be drawn to apply to the allocation of the justices' time from the AALS' implementation of its awareness that a sufficient quantum of time must be reserved for study and reflection.¹⁸⁷ He is confident that a great contribution could be made if attention were to be focused on how many hours should ideally be reserved to the justices for time in chambers.¹⁸⁸ As he characterized it, for every week spent hearing cases on the bench, there is a geometric loss of the time remaining to consider cases in chambers as well as to continue the never ending task of legal education.

Justice Manderino alluded to the problem of the unavailability of time to refine issues and polish language in an opinion.¹⁸⁹ One result of this is less unanimity on the Court.¹⁹⁰ Far more important is

184. For a discussion of administrative duties, see notes 97-110 and accompanying text *supra*. Justice O'Brien characterized their administrative burden as a "heavy" one. Interview with Justice O'Brien.

185. This is consistent with the view expressed in JUSTICE ON APPEAL, *supra* note 148, at 144. While each justice is responsible for approximately 70 opinions per year, it has been forcefully argued that

[n]o appellate court judge can write more than one full-scale opinion per week, on the average, or intelligently participate with his colleagues in more than 300 substantial cases per year. No appellate judge should be expected to write more than 35, or conceivably 40, full-scale publishable opinions per year. Even the most learned and facile judge could not write more without the risk of writing shoddy opinions and shirking other duties . . .

R. LEFLAR, *supra* note 157, at 9.

186. BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, art. 6, § 6-1(a)(i), (ii). Justice Manderino espoused the view that there is a great deal of work to be done by law school faculty, and judges as well, if they are to be able to keep up with the law. Interview with Justice Manderino.

187. See notes 285-86 and accompanying text *infra*.

188. See note 177 *supra*.

189. See note 185 *supra*. All the justices except Justice Roberts believe that refinement of opinions would be facilitated if the Court had a permanent home, enabling the justices to meet on a daily basis. See notes 235-55 and accompanying text *infra*.

190. Justice Manderino told us that the lack of time spent honing opinions often leads to a concurrence in the result; in his view, this might be avoided if enough time could be allocated to hashing out the ideas and language contained therein. Interview with Justice Manderino.

the deleterious effect upon the Court's authority which he fears may emerge from too many per curiam opinions. Justice Manderino proclaimed his theory of the "three M's," each of which supplies the necessary authority to enforce obedience to the three branches of government. In the case of the executive, commands are backed up by *might*. The legislature achieves control through its disposition of *money*. In contrast, the court must rely on *morals* or moral persuasion. If a court merely announced — without justifying — a result, its integrity and moral persuasion would thereby be weakened, and the requisite faith in the system endangered.¹⁹¹ Citizens must know that the court properly accords sufficient time and care to matters that affect their rights. The medium by which this may be communicated to the public is a well-written opinion, evidencing profound thought underlying a decision. Justice Manderino also emphasized that a tightly reasoned opinion is not apt to engender as much additional litigation as one that is loosely worded; ambiguities should be eliminated wherever possible to avoid unanticipated consequences.¹⁹² Nonetheless, Justice Manderino did profess a belief that the saving grace of all this was that individual *results* — as opposed to reasoning — would not be changed,¹⁹³ although he reiterated his view that justice suffers if imprecise opinions eventuate from inadequate time.

As with imprecise opinions, issuance of a decision with no opinion is a matter of concern to the Court. The justices seem to be in agreement that the announcement of results without explanations and supportive reasoning, whether in a per curiam opinion or in a concurrence or dissent noted without opinion, is a disservice to the legal community, present and future.¹⁹⁴ Yet the present court is

191. See JUSTICE ON APPEAL, *supra* note 148, at 31, wherein it is stated: The integrity of the process requires that courts state reasons for their decisions. Conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision. Furthermore, litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify.

Id.

192. Justice Manderino recounted the story of one opinion, from which one sentence provided advocates and judges with a string of conflicting meanings. Subsequently, a similar case involving the same person and facts also found its way to the Supreme Court, which reversed that case as well — in effect for a second time. He believes that, given adequate time to spend on each opinion, problems such as this could be averted. Over the long run, much time and money would be spared if ambiguities were removed at the outset. Interview with Justice Manderino.

193. Justice Manderino noted that each opinion was read by 28 legal minds, including the justices and their law clerks. Interview with Justice Manderino.

194. One commentator has stated that a concurrence or dissent noted without supporting reasons "is almost always meaningless and useless." R. LEFLAR, *supra* note 157, at 56.

responsible for a good many opinionless concurrences in the result and dissents without opinion.¹⁹⁵

The various justices analyzed this problem as a function of time. Chief Justice Eagen isolated the volume of work as one reason. Justice Nix attributed the proliferation of concurrences or dissents without opinion to time pressures, but affirmed his belief that a justice should articulate the reasons why he is in disagreement with the majority or plurality. Justice Manderino pronounced it the duty of the court's members to elaborate upon their stance in the pursuit of justice, noting that in the natural evolution of law dissenting opinions often become the majority view.¹⁹⁶ However, he did qualify this duty with his recognition that sometimes the tyranny of time interferes with the fulfillment of a justice's duty of articulation. As an example, he explained that the situation arises wherein a justice anticipates agreement with the majority opinion. Upon reading the majority opinion, however, he may find, for a variety of reasons,¹⁹⁷ that he cannot put his imprimatur upon the majority opinion. If the justice were then to decide to draft a concurrence, rather than merely to note a concurrence in the result, the majority opinion must be held back from release until the concurrence is written — this could be a matter of weeks. Therefore, if the justice decides that the matter of difference is not terribly significant, he might choose not to hold up the release of the majority opinion and thereby eliminate any further time delay in publication. While this lengthy example may explain the lack of opinion supporting a concurrence or dissent, it cannot be gainsaid that where there is no majority, but only a plurality opinion declaring the result, the law remains in an uncertain state and further litigation on the issue is likely to ensue.

195. Based upon statistics compiled for this project, the Justices concurred in the result 125 times without explanation; 42 dissents were noted without opinion. See Appendix, Table II, *infra*. One author reported that for the term 1974-75, a "concur in the result" supported the decision in 35 cases in which there were no majority opinions. Potter, *supra* note 1, at 224. In a table revealing the actions of the individual justices, the statistics reveal a total of 200 concurrences in the result. *Id.* at 231. In the same year, 102 dissents were noted without explanation. *Id.*

196. For an interesting discussion of the long-range influence of minority opinions, see Aikin, *The Role of Dissenting Opinions in American Courts*, 33 *POLITICO* 262 (1968); Musmanno, *Dissenting Opinions*, 15 *DICK. L. REV.* 152 (1955-56).

197. Justice Pomeroy also acknowledged this situation and suggested the following explanations: a justice's theory of granting relief may differ from that of the majority; a justice may think the majority opinion goes too far or does not go far enough; or the majority opinion may have relied on cases to which a justice does not care to lend support. Justice Packel added mistake of law as a reason for a concurring justice to differ from the majority. He also expressed his view that a justice should not dissent on the basis of his personal view of the facts. Interviews with Justices Pomeroy and Packel.

Justice Manderino compared the standards of assigning opinions on the Pennsylvania Supreme Court to that of other state supreme courts. While some courts take account of concurring and dissenting opinions in assigning the workload of each individual justice,¹⁹⁸ Pennsylvania counts only majority opinions drafted by a justice. Thus there is, in his view, a subtle but coercive influence against dissent in Pennsylvania because no credit is given for the time spent on writing one. In other words, a concurrence or dissent is on the justice's own time. While this may serve to explain the large number of dissents and concurrences without opinions, it is submitted that neither this explanation nor more general time constraints supplies an excuse for not elucidating points of departure from the majority.

II. THE INEVITABLE SOLUTION — BECOMING A CERTIORARI COURT

The justices are in agreement that appeal to the Supreme Court, as a general proposition, should not be as of right but should be in the discretion of the justices.¹⁹⁹ The justices believe that control over their own docket is necessary if they are to be able to manage and perform their job. However, they are not unanimous as to whether any portion of their jurisdiction should be retained on a direct appeal basis, nor do they concur as to when they will be able to divest themselves of their direct appeals.²⁰⁰

Justice Pomeroy believes that, while there is no need for direct appeal in all criminal cases, appeal as of right should at a minimum continue to exist in capital cases and perhaps whenever a life sentence may be imposed.

198. In New York and New Jersey the members of the highest court are statistically credited with their dissenting and concurring opinions. See note 152 *supra*.

199. Interviews with the Justices. The creation of a certiorari policy was the solution invoked in 1925 to rescue the United States Supreme Court from an unwieldy docket. See Harlan, *Manning the Dikes*, 13 N.Y.B.A. REC. 541, 558 (1958); note 161 *supra*.

In 1969, Judge Robert Woodside of the Superior Court testified before the Pennsylvania Senate Judiciary Committee that the Supreme Court would be more valuable if it functioned as a certiorari court. *Hearing on S. 4160 Before the Senate Judiciary Comm. of the Pa. Gen. Ass.* (Jan. 8, 1969).

This is also the view taken in JUSTICE ON APPEAL, *supra* note 148, at 135-36. The authors argue that appeal as of right to the highest court is not necessary. In a three-level court system, the intermediate court can be expected to provide adequate protection for the individual litigant. They are "prone to accept the view that successive appeals of right should be sparingly authorized." *Id.* at 136, citing Sunderland, *The Problem of Double Appeals*, 17 J. AM. JUD. SOC'Y 116 (1933). See also ABA STANDARDS, *supra* note 158, at § 3.10, Commentary.

200. See notes 201-03 & 215-34 and accompanying text *infra*.

Justice Nix asserted a strong conviction that the Supreme Court must be a court of discretionary appeal if it is to perform the responsibility of a state court of last resort. He noted that this is especially true where the justices have such a full administrative load of budgeting, administering the unified court system, and rulemaking,²⁰¹ and advocated a transfer of all direct appeal jurisdiction except in cases where the death penalty has actually been imposed. Justice Packel also opined that to the extent there is a death penalty statute in effect in Pennsylvania, each case involving a death penalty should come to the Supreme Court by direct appeal. All other cases should be channeled through the intermediate appellate courts. Justice Manderino recommended "absolutely" a purely discretionary docket. Noting that the Pennsylvania Supreme Court hears more appeals than any other court of last resort or circuit court, he stressed the inability of any court to carry the present burden of the court.

In 1975, the Supreme Court exercised its rulemaking authority to reallocate jurisdiction pursuant to the constitution and the ACJA²⁰² and relieved itself of equity jurisdiction.²⁰³ There is no question that this power could be exercised today to alleviate the present congestion of the Supreme Court's docket. There remains one perturbing question: where would the cases go?

III. THE DIVISION OF LABOR BETWEEN THE INTERMEDIATE APPELLATE COURTS AND THE SUPREME COURT

The most serious weakness of the Pennsylvania unified court system, which inhibits the Supreme Court from relieving itself of any of its caseload, is the small number of intermediate appellate

201. See notes 183 & 184 and accompanying text *supra*.

202. The Pennsylvania Constitution gives the Court the "power to provide for assignment and reassignment of classes . . . of appeals among the several courts . . ." PA. CONST. art. 5, §10(c). The ACJA provides that the Court may do so by general rule, thereby suspending all laws "to the extent that they are inconsistent with such general rules." 42 PA. CONS. STAT. ANN. § 503 (Purdon Pamphlet 1977). This power was originally modified as follows: "[S]uch rules shall take effect upon the expiration of ninety days . . . unless the General Assembly . . . signifies its legislative intent to the contrary." PA. STAT. ANN. tit. 17, § 211.505 (Purdon Cum. Supp. 1977-78). As currently codified, "[s]uch rules shall take effect if they are approved by a majority vote . . . of each house during such 120 day period, or may be disapproved by either house during that period by a majority vote. . . ." 42 PA. CONS. STAT. ANN. § 503(b)(3). Section 503 also provides that "[u]pon the expiration of the 120-day period [if the two houses fail to act], such rules shall become effective." *Id.* at § 503(b)(4).

203. See note 66 *supra*.

court judges.²⁰⁴ In his State of the Judiciary Message on May 13, 1977, Chief Justice Eagen emphasized the need for more judges when he said:

In this connection, may I call to your attention that Pennsylvania has the fewest number of intermediate appellate

204. There is presently a bill before the senate which proposes an amendment to article 5, § 3 of the Pennsylvania Constitution, to increase the number of judges on the Superior Court. S. 1088, Pa. Legis. (1977).

In a letter to members of the senate urging support of S. 1088, Judge Alexander F. Barbieri, Court Administrator of Pennsylvania, spoke of "the emergency need for more Superior Court Judges" and quoted § 1 of S. 1088:

The 1975 Report of the Administrative Office of Pennsylvania Courts states that for the calendar year 1975 there were filed in the Superior Court of Pennsylvania, which is presently fixed at a constitutional complement of seven judges, 2996 appeals and 5448 other miscellaneous petitions and other matters. The report reveals that the filings for such year represent a continuation of a trend of increasing judicial business in that court. The constant increase in the judicial business of the Superior Court has imposed unmanageable burdens upon its judges. The failure to act decisively by permitting an increase in the number of Superior Court judges threatens to result directly in a breakdown of the administration of civil and criminal appellate justice in this Commonwealth. The General Assembly finds and determines that there presently exists a critical need to provide for an increase in the number of Superior Court judges, that existing conditions meet the requirements of Article XI, section 1(a) of the Constitution of Pennsylvania, and that the safety and welfare of the Commonwealth require prompt amendment of the Constitution of Pennsylvania in the manner herein provided.

Letter from Judge Alexander F. Barbieri to members of the Pennsylvania Senate (Oct. 17, 1977), quoting S. 1088, § 1, Pa. Legis. (1977) (copy on file at *Villanova Law Review*, Villanova, Pa.) [hereinafter cited as Barbieri letter]. Describing the "emergency need," Judge Barbieri wrote:

But the critical situation described in Section 1 [*supra*] has worsened, and now has reached the breaking point. In 1976, the total of appeals was 3631, plus the staggering burden of 6223 petitions; and already in 1977, more than 3600 appeals have been filed, with the certainty that the total for the year will reach the utterly impossible load of 4500. This increase, at the rate of 25% per year, demonstrates that by the end of 1979, unless emergency relief is granted, the threatened increase of 50% would swamp the Court with 6750 appeals, not to mention a commensurate increase in petitions filed.

Judge Barbieri further stated:

In conclusion, I submit that when a court's chronic overburden reaches the breaking point, you have an emergency of crisis proportions. Clearly, the Superior Court has reached and passed its maximum level of capacity to fulfill, or even cope with, its constitutionally and legislatively mandated responsibilities, and this situation will worsen drastically. The citizens of Pennsylvania, particularly the litigants are entitled to the consideration which I urge that you give to this proposed legislation. If the Superior Court is sufficiently enlarged so that it can properly manage its caseload, the resultant capability to give more attention to the arguments of the litigants and to opinions which express appellate views, are bound to reduce the caseload and responsibilities now being borne by the Supreme Court of Pennsylvania. Inevitably, this will result in more intermediate appellate declarations of precedential value to all litigants, which in turn, I believe, will tend to reduce the caseloads of all appellate courts to manageable numbers.

Barbieri letter, *supra*.

court judges of the eight most populated states in the nation. Although Pennsylvania has a larger population than Illinois, Illinois has thirty-four intermediate appellate court judges to Pennsylvania's fourteen. Ohio with less people than Pennsylvania has thirty-eight intermediate appellate court judges to our fourteen. And New Jersey, with sixty-five percent less people than Pennsylvania has twenty-two such judges to Pennsylvania's fourteen.²⁰⁵

It is striking to note that the Superior Court of Pennsylvania, whose membership is set at seven in the constitution,²⁰⁶ has remained static in size for its entire eighty-two year existence, while the number of judges of the Common Pleas Courts, from which appeals are taken to the Superior Court, has been increased 350 percent.²⁰⁷ In 1895, the Common Pleas judges numbered 83 throughout the state and presently number 285.²⁰⁸ In this time period, the population of Pennsylvania has increased from 5,258,000²⁰⁹ to 11,793,909.²¹⁰ Despite the creation by constitutional amendment of the Commonwealth Court in 1968, its jurisdiction is generally limited to cases involving the state government²¹¹ and has not yet been used to alleviate the burdens of either the Supreme or Superior Courts. Fortunately, unlike the constitutionally prescribed Superior Court membership, the number of judges comprising the Commonwealth Court is statutorily determined and may thus be changed with greater ease.²¹² Further compounding the size problem on the Superior Court was its refusal or debatable lack of authority²¹³ to sit in panels rather than en banc, thus inhibiting responsiveness to its staggering docket.²¹⁴

Since jurisdiction must ultimately be divided among the appellate courts, the ability of one court to change is interrelated

205. Michael J. Eagen, C. J., State of the Judiciary Message, May 13, 1977, reprinted in 48 PA. B.A.Q. 339, 340-41 (1977). See also IJA REPORT, *supra* note 1, at 62.

206. PA. CONST. art. 5, §3. For the text and explanation of §3, see note 68 and accompanying text *supra*.

207. Barbieri letter, *supra* note 204.

208. *Id.*

209. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, pt. 1, at 33 (Bicentennial ed. 1975) (based on 1890 census figures).

210. THE WORLD ALMANAC 278 (1977) (based on 1970 Census figures).

211. See notes 92-96 and accompanying text *supra*.

212. See notes 38 & 68 and accompanying text *supra*; text accompanying notes 219 & 220 *infra*.

213. See notes 219-220 & 225-226 and accompanying text *infra*; notes 231-34 and accompanying text *infra*.

214. See note 204 *supra*.

with the other courts' abilities to absorb the effects of the change.²¹⁵ The justices expressed varying degrees of concern over the ability of the present appellate structure to withstand any attempt by the Supreme Court to cast off a part of its caseload. The evaluation of this ability consists, *inter alia*, of the following considerations: 1) whether or not the Supreme Court can become a certiorari court unless and until the Superior and Commonwealth Courts are restructured; 2) whether, pending a constitutional amendment increasing its size, the Superior Court will sit in panels to ameliorate the present logjammed situation of both courts;²¹⁶ 3) whether the Commonwealth Court should be changed to encompass a broader scope of jurisdiction; and 4) what are the most feasible short- and long-term solutions.

Justice Roberts emphasized that as long as the Superior Court remains burdened with an already unmanageable and ever-expanding caseload, the problem of excessive caseload for the Supreme Court will remain. He has always maintained that the Pennsylvania court system needs an expanded Superior Court, sitting in panels, with a sufficient number of judges to afford appropriate intermediate appellate review responsive to the needs of the citizens of Pennsylvania. Justice Roberts advocated a panel system for the intermediate courts in Pennsylvania similar to that of the federal courts of appeal,²¹⁷ thus making it possible for the Supreme Court to move toward becoming a certiorari court. This would then enable the Court to limit its caseload to a volume comparable to that of other major jurisdictions.

215. The rulemaking power of the Court includes "the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts." PA. CONST. art. 5, § 10(c). The only time the Court used this power to modify its jurisdiction was to divest itself of equity jurisdiction. See note 66 *supra*.

216. See notes, 219-220, 225-226, & 231-34 and accompanying text *infra*. Unlike the United States Circuit Courts of Appeals, which sit in panels of three, the Superior Court continued to sit en banc in the face of a rising caseload. Interviews with the Justices. The justices of the Supreme Court expressed a belief that the Superior Court should, and a hope that the Superior Court would, sit in panels to enable it better to manage its unwieldy docket as well as the overflow from the Supreme Court. *Id.* Subsequent to the interviews with the justices the Superior Court was ordered to sit in panels. See notes 231 & 232 and accompanying text *infra*. Some of the justices and their clerks speculated that a desire for enhanced prestige was the motivation for the Superior Court's choice not to sit in panels. Interviews with the Clerks. Although an argument had been raised to the effect that the Superior Court is required by the constitution to sit as a court of seven (see text following note 223 *infra*) the justices seemed to doubt the existence of a real constitutional problem. Interviews with the Justices. See notes 231-34 and accompanying text *infra*.

217. The eleven federal courts of appeals are organized on a geographical, as opposed to a subject matter basis. 28 U.S.C. § 41 (1970). Cases generally are heard only by a portion of the court, a panel of three judges. See 28 U.S.C. § 46(c) (1970).

Justice O'Brien suggested that in order to enable the Court to select its cases as the United States Supreme Court decided to do in 1925,²¹⁸ the Superior Court should be increased to approximately fifteen members and sit in panels, operating in a manner analogous to the United States Circuit Courts of Appeals. He is convinced that the Pennsylvania Supreme Court should be writing better opinions, which he feels would be possible if these changes were made to reduce the volume of cases.

Justice Manderino expressed his concern that the problems of the Supreme Court cannot be alleviated until the intermediate appellate judiciary is expanded. A minimum of fifty appellate judges is necessary to the court system in his view. Interestingly, Justice Manderino raised the question whether the size of the Superior Court, which appears fixed at seven by the constitution,²¹⁹ may nevertheless be expanded by the legislature through exercise of its constitutional power to create "other courts and divisions of courts."²²⁰ He pointed out that even if the number of superior court judges is set at seven by the constitution, the legislature is free to create new appellate courts, perhaps along the lines of the United States Circuit Courts of Appeals. Justice Manderino did say, however, that he does not like the idea of divided, specialized courts.²²¹ He further opined that the Supreme Court, by exercise of its rulemaking power, can and should become a certiorari court even prior to any increase in the capacity of the other courts.²²² Estimating the Supreme Court's mandated appeals at 325, he does not believe that the addition of these cases to the Superior Court's load of 3500 cases would be so significant as to militate against such a divestiture. He is convinced that one must start somewhere to cure the problems.

Justice Nix also expounded upon the fact that the Supreme Court can accomplish a great deal through its rulemaking power. However, he believes that the move to rid the Supreme Court of its direct jurisdiction should be forestalled until there is greater manpower in the intermediate courts to absorb a heavier burden. He also finds it inconsistent with the purpose of an intermediate court

218. Interview with Justice O'Brien. See note 161 *supra*.

219. See PA. CONST. art. 5, § 3.

220. See *id.* § 1.

221. By "divided courts," Justice Manderino was referring to a method of court organization which creates specialized courts according to subject matter, as is presently the case with the Superior and Commonwealth Courts, or geographical area. For a discussion of methods of organizing intermediate courts, see JUSTICE ON APPEAL, *supra* note 148, at 152-84; R. LEFLAR, *supra* note 157, at 68-78.

222. Supreme Court rules affecting the assignment of cases may be repealed by the General Assembly within 120 days. 42 PA. CONS. STAT. ANN. § 503 (Purdon Pamphlet 1977).

for it to sit en banc. He emphasized that where uniformity is not the main concern,²²³ a court can and should sit in panels. Although he acknowledged a possible argument that the constitution requires the Superior Court to sit with all seven members, Justice Nix is convinced that the Superior Court should sit in panels as the Commonwealth Court does. He further expressed his opinion that both intermediate courts should be enlarged to at least nine to twelve members.

Justice Pomeroy described the shifting of the court's equity jurisdiction²²⁴ to the Superior Court as unfair to an already overloaded court. He could not countenance any further casting off of cases in the direction of the Superior Court until that court is expanded and sits in panels, like a circuit court. He believes that fifteen members would suffice if the court were to sit in panels. Stressing the necessity for a constitutional amendment of the limit of seven, Justice Pomeroy stated that the limit is a disservice to the cause of efficient judicial appellate administration. As to the ability of the Superior Court to sit in panels, he referred to a recent rule, effective July 1, 1976, which defined a quorum of the Superior Court as three.²²⁵ He therefore found no obstacle to the Superior Court's present ability to sit in two panels, despite the fact that the Superior Court had not chosen to do so. Although he admitted the possibility of a constitutional problem,²²⁶ Justice Pomeroy thought this should at least be put to the test.

Justice Packel reiterated the views of the other justices that the whole arrangement of appellate jurisdiction must be changed. Alluding to the benefits that have resulted from the fact that the Commonwealth Court sits in panels, he stated that the Superior Court should do likewise,²²⁷ and that he believed the likelihood of a constitutional problem is minimal.²²⁸

223. See generally text accompanying notes 163 & 164 *supra*.

224. See note 66 and accompanying text *supra*.

225. PA. R. APP. P. 3102(a). The explanatory note of the Advisory Committee on Appellate Court Rules states that the committee was cognizant of the argument that a constitutional amendment was required to enable the Superior Court to sit in panels, but concluded to the contrary based upon its research. *Id.* (explanatory note).

On May 9, 1978, Chief Justice Eagen ordered that "consistently with Rule 3102 of the Pennsylvania Rules of Appellate Procedure, all appeals in the Superior Court be heard by a three-judge panel . . ." See notes 231-33 and accompanying text *infra*. It would seem that this renders moot any constitutional problems.

226. Interview with Justice Pomeroy. See note 225 *supra*; text following note 223 *supra*.

227. Justice Packel sat on the Superior Court during 1972; at that time he was a proponent of that court's sitting in panels. Interview with Justice Packel.

228. *Id.* See note 225 *supra*; notes 231-34 *infra*.

Chief Justice Eagan believes that the Supreme Court should be a certiorari court, but only after the addition of a sufficient number of intermediate appellate judges.²²⁹ The Chief Justice asserted that it would be "sheer folly" to shift jurisdiction from the Supreme Court to the Superior Court until the personnel of the latter is increased, noting the inability of the Superior Court, sitting en banc,²³⁰ to give adequate attention to the 3500 appeals filed in that court in 1977. Thus, a premature shift of jurisdiction would only relocate, not alleviate, the problem.

On May 9, 1978, Chief Justice Eagan issued an order that the Superior Court, consistent with the rule defining a quorum,²³¹ sit in panels of three.²³² Although the order should provide some relief in the court system, Chief Justice Eagan, shortly after the order was issued, said that "[i]f the jurisdictions of the Superior Court and the Commonwealth Court are to be increased and if litigants are to receive a fair and adequate appellate review, additional personnel for these courts is mandatory."²³³ Thus, while the order may stem some of the appeals which result from the frequency of per curiam opinions from the Superior Court,²³⁴ it would not seem that the Supreme Court is able to divest itself of any portion of its jurisdiction.

IV. THE JUSTICES VIEWS ON THE PERIPATETIC COURT

An interesting vestige of an era gone by²³⁵ is the "riding of the circuit" by the Supreme Court in 1977. The many disadvantages of a travelling court were well-documented in a study of the Court which reached the conclusion that the disadvantages far outweighed the supposed advantages.²³⁶ This anachronism results in unnecessary

229. See generally text accompanying note 205 *supra*.

230. See note 216 *supra*; text accompanying notes 231-34 *infra*; note 225 *supra*.

231. See note 225 *supra*.

232. 8 PA. BULL. 1392 (1978). The order provides:
and now, this 9th day of May, 1978, in view of the exceedingly heavy volume of appeals coming to the Superior Court, presently at the rate exceeding 3000 per year, and the emergency created thereby, it is ordered & directed that on or before September 1, 1978, and consistently with Rule 3102 of the Pennsylvania Rules of Appellate Procedure, all appeals in the Superior Court be heard by a three-judge panel, unless in a given case the Superior Court, by special order, directs otherwise; this order to remain in effect until further order of this Court.

Id.

233. Michael Eagan, C.J., State of the Judiciary Message, May 11, 1978, reprinted in 49 PA. B.A.Q. 323 (1978).

234. See notes 145-50 and accompanying text *supra*.

235. See R. LEFLAR, *supra* note 157 at 98; notes 135-41 *supra*.

236. IJA REPORT, *supra* note 1, at 52-61. See also Wright, *Are Peripatetic Supreme Courts Passing?* 30 TEMP. L.Q. 303 (1957).

expenditures of time, money, and resources as well as inadequate facilities.²³⁷ Many of the justices feel that their time is unproductively consumed by the obligation to hold Court sessions in three cities of the commonwealth.

Justice Pomeroy informed us that riding the circuit did not pose too great a time problem, but acknowledged a loss of one or two days travelling, as well as the nuisance of packing one's clothes and papers for transport. He also contended that the peripatetic Court is an expensive proposition for all concerned. Furthermore, he pointed out the drawbacks inherent in a statewide court relying on the sufferance of individual counties for the provision of courtroom facilities and offices; he sees a strong need for a building facility with a library, clerical space and meal service. This would be a vast improvement over the present situation he described. Currently, Justices O'Brien and Manderino have no offices in Philadelphia²³⁸ and no one except Justice O'Brien has an office in the court building in Pittsburgh. Justice Pomeroy complained that it was very difficult to get any constructive work done in Pittsburgh or Harrisburg, where the facilities are not adequate for writing opinions.²³⁹ He further indicated that increased interaction among the justices would benefit all.

Justice Packel has concluded that the efficiency of the peripatetic Court is impaired, and that this is not outweighed by the inefficiency of forcing lawyers to travel to a single seat. He is convinced that enough time would be saved and benefits achieved thereby to justify the impact on lawyers of a permanent home for the Court. He also revealed that his location preference is Philadelphia, primarily because it would result in inconvenience to the fewest lawyers.²⁴⁰

Justice Packel indicated that he did not always find phone conversations with the other justices satisfactory and would find more conferences beneficial. He also described problems that result from the release of opinions from varying locales,²⁴¹ adding that this

237. IJA REPORT, *supra* note 1, at 55, 56.

238. Interviews with the justices were held in Philadelphia. See note 4 *supra*. Justice Manderino was obliged to meet with us in the courtroom; Justice O'Brien met with us in the Court's conference room.

239. Interview with Justice Pomeroy. See IJA REPORT, *supra* note 1, at 57.

240. Interview with Justice Packel. *Accord*, IJA REPORT, *supra* note 1, at 61. In 1978, the Court's calendar provides for 30 days in Philadelphia, 14 days in Pittsburgh, and 5 days in Harrisburg; these numbers reflect the relative volume of cases stemming from each area. *But see* text accompanying note 252 *infra*.

241. Interview with Justice Packel.

creates unnecessary complication. Although he feels unaffected by the lack of interaction, he agreed that greater personal contact among the justices would improve the situation on the Court.

Justice Manderino also favors an end to the court's roving, although the situation, as he sees it, is not clear cut. At the commencement of his tenure on the Court, he was of the firm belief that the Court was in need of one "ivory tower." Despite an admitted weakening of his conviction, he is still certain that the advantages of a permanent home would outweigh the accompanying disadvantages. Justice Manderino, relating his experience on the Commonwealth Court,²⁴² characterized the ongoing dialogue among the justices and clerks as a feature of positive value. He anticipates that greater interaction and fraternalism would lead to more unanimity on the Court. He suggested that, with regard to the circulation of opinions, a justice would be more likely to walk across a hall to show to and discuss with another justice the draft of an opinion than he is to use the phone for the same purpose.²⁴³ He also pointed out that, in this way, revisions could be made while ideas are still fresh in the minds of the justices.

To Justice Nix, preparation of materials for transport is highly disruptive;²⁴⁴ he estimated that it takes from two to three days to get his office functioning smoothly again after the trip so that he may focus on his legal tasks. And in his opinion, the purpose for the circuit no longer exists in an age of modern communications and transportation.²⁴⁵ He believes that Pennsylvania should have a legal center and finds Philadelphia appropriate because it is the source of the majority of cases.²⁴⁶ In addition, as a major city, it is the most convenient and accessible destination.

He also believes that the court would benefit from increased face-to-face communication among the justices, although he maintained that the conference calls and other utilization of the telephone were adequate. Nevertheless, he views the ability to discuss opinions and problems personally, in comparison to waiting for a draft by mail, as

242. Interview with Justice Manderino. Justice Manderino served on the Commonwealth Court from 1970-72.

243. Interview with Justice Manderino. One commentator recommends that the office suites of judges be in close proximity "for the judges and their staff members to visit and check with each other easily." R. LEFLAR, *supra* note 157, at 106.

244. Justice Nix indicated that it takes one day to pack and one day to unpack. Interview with Justice Nix. Needless to say, it is not possible to transport the entire office and hence the justice may find himself hampered in his attempt to maintain sufficient continuity.

245. Interview with Justice Nix. See IJA REPORT, *supra* note 1, at 53-54; R. LEFLAR, *supra* note 157, at 98.

246. Interview with Justice Nix. See note 240 *supra*.

facilitating the accumulation of a majority, as well as the understanding and reconciliation of varying views.

Justice O'Brien repeated the other justices' perception that more daily interchange among the justices would foster understanding and save time, noting the limitations of the telephone as the major source of interjustice communication. He lent support to the concept of an appellate court building, advocating an historical location, Independence Square in Philadelphia, where the first court in Pennsylvania sat in 1722.²⁴⁷ He buttressed his historical choice with the fact that the greatest volume of the Court's business originates in Philadelphia.²⁴⁸ Chief Justice Eagen also disclosed a preference that the Court sit only in Philadelphia, characterizing as desirable increased interaction among the justices.²⁴⁹

In contrast to his fellow justices, Justice Roberts is of the opinion that the benefits of the peripatetic court are worth preserving. Among these, he cited an increased understanding on the part of the justices of the public to be obtained by sitting in more than one part of the state and by maintaining offices in their home communities. His preference for the present system also reflects his belief that there is value in having the justices work in scholarly isolation; he finds the current amount of interaction among the justices adequate.

Justice Roberts views the present system as efficient and economical and fears that new and centralized physical facilities for the Court, staff, and justices would require unnecessary, enormous capital expenditures without in any way advancing the quality of justice.

One common contemporary justification for the peripatetic court is that it enables the justices to retain and replenish local perspective.²⁵⁰ It is submitted, however, that it is unwise for justices of a supreme court to maintain a constituency. Surely the justices should endeavor to stay in touch with the people of this state as a whole — without regard to regional distinctions.

Another rationalization for the anachronistic system is the inconvenience and cost to attorneys that a single seat would entail.²⁵¹ It would seem that this would not be so great in modern times, especially in view of the present burden it places on taxpayers — as well as its taxing effect on the court system itself. It is also

247. Interview with Justice O'Brien. See note 15 *supra*.

248. See note 240 *supra*.

249. Interview with Chief Justice Eagen.

250. See IJA REPORT, *supra* note 1, at 53.

251. See *id.*

significant that the greater percentage of the Court's cases, those of felonious homicide, are not heard in the district where filed, but at the first session after filing.²⁵²

It would appear that the synergistic effect of face-to-face exchanges of views by the justices could only foster more incisive and developed reasoning in decisions.²⁵³ There are times when the whole is greater than the sum of its parts — in this case, the parts of the Court isolated in their chambers.²⁵⁴ Furthermore, considering the increasing need for modern resources and facilities, the concept of a judicial center is one whose time has come.²⁵⁵

V. RULEMAKING — THE INEVITABLE OVERLAP BETWEEN SUBSTANCE AND PROCEDURE

Much to the chagrin of law students, lawyers, judges, and legislators, all of whom have attempted to delineate substance (the province of the legislature) from procedure (often the delegated province of the courts) in rulemaking, the line is forever a wavering and elusive one.²⁵⁶ Hence it is not surprising that the court has been criticized for exceeding its rulemaking powers and wandering into

252. IJA REPORT, *supra* note 1, at 54-55. One commentator reported that in 1974-75, 46% of the cases heard were felonious homicide appeals. Potter, *supra* note 1, at 218.

253. The ABA recommends a "collegial" decisional process, with personally attended conferences. ABA STANDARDS, *supra* note 158, at § 3.36, Commentary.

254. See R. LEFLAR, *supra* note 157, wherein the author makes a cogent argument for adjacent offices:

Much in the way of efficiency is gained if all the judges on a court . . . live in the same community and share the same office building. Conferences, especially nonroutine ones can be arranged more easily; less time is lost in travel; opinions circulate faster; and suggestions for changes in opinions can be effected more readily, thus decreasing the risk of one-man opinions. The reasons that require officials of almost any governmental agency to work in close proximity — so that they may have the opportunity to consult with each other and to work as a group almost daily — are equally applicable to judges of an appellate court. Telephone conference calls and WATS-line calls are imperfect substitutes for personal visits and calls between adjoining offices. The best that can be said for them is that . . . these devices help to lessen the disadvantage.

Id. at 97.

255. See IJA REPORT, *supra* note 1, at 53, 59. Interestingly, one section of the ACJA has been "reserved" for a judicial center. Section 3701 provides: "Pennsylvania Judicial Center (Reserved)." 42 PA. CONS. STAT. ANN. § 3701. (Purdon Pamphlet 1977). Another section provides that "[t]he regular sessions of the Supreme Court be held in the facility specified in section 3701 [and] as prescribed by general rule." 42 PA. CONS. STAT. ANN. § 504 (Purdon Pamphlet 1977).

256. See, e.g., C. WRIGHT, FEDERAL COURTS 256, 272-77 (1976). Justice Nix noted that there is always the question of substance versus procedure, with those who are in favor of the Court's rulemaking power taking a broad view of procedure. He also suggested the question is apt to be raised whenever the legislature does not like a particular rule. He further stated that, in time, the legislature would become accustomed to the concurrent power of the Court. Interview with Justice Nix.

the forbidden realm of substantive legislation.²⁵⁷ As recounted above, the court's authority to promulgate rules is limited to "rules governing practice, procedure and the conduct of all courts"²⁵⁸ that do not "abridge, enlarge nor modify the substantive rights of any litigant."²⁵⁹ The present members are confident that they have acted within the boundaries of their rulemaking authority.

257. For a discussion of the Court's rulemaking powers, see notes 258-61 and accompanying text *infra*. It is interesting to note that the newly elected member of the Court, Rolf Larsen, accused the court, during the recent election, of legislating. See Fox, *High Court and the Law*, Philadelphia Inquirer, Oct. 13, 1977, § B, at 1, col. 1, quoting then candidate Larsen:

"The State Supreme Court has too much rule-making power," he says, "so much so that it can now supersede legislative acts.

The Six-Hour ruling (requiring arraignment of a suspect within six hours of arrest) is one example. The 180-Day ruling (requiring a trial within 180 days) of arrest is another. What's so magic about six hours or 180 days? The time is arbitrary.

The Constitutional Convention of 1968 gave the court the power to make rulings without legislative authority. The voters didn't know what they were voting for.

If the voters did, do you think they would have approved a constitutional amendment that, among other things, empowered the State Supreme Court to release first-degree murderers under the 180-day ruling?

The court is supposed to interpret and apply the law, not legislate it. But with its present powers, the court is legislating — and not only in the area of violent crime.

Now and then the court will render a decision, saying, in effect, 'Surely, the legislature couldn't have meant that' and then substitute its own ruling to replace plain English."

Judge Larsen, the son of a Norwegian immigrant, says that the legislature should initiate a constitutional amendment to reduce the rule-making power of the State Supreme Court.

"Justice," Judge Larsen says, "must emanate from the community, from the culture, from the cultural sense of justice.

When you isolate the judges and the commissions from the people — wherein the State Supreme Court, in this particular case, is answerable to nobody — then the judges begin substituting their sense of justice for the community's sense of justice.

And," Judge Larsen says, "that's what you call a dictatorship."

Id. See also *The Supreme disgrace: Pennsylvania's top court*, Philadelphia Inquirer, Feb. 19, 1978, § L, at 6, col. 1; *The Supreme disgrace: Secret and unaccountable*, Philadelphia Inquirer, Mar. 3, 1978, § A, at 6, col. 1.

258. PA. CONST. art. 5, § 10(c); for the text of § 10(c), see note 58 *supra*.

259. *Id.* The language used therein to grant the power is comparable to the Enabling Act, which authorizes the Supreme Court of the United States to promulgate rules. See 28 U.S.C. § 2072 (1970). For a discussion of the controversy stirred by the power granted in the Enabling Act, see generally C. WRIGHT, *supra* note 256, at 272-77.

Pursuant to the authority established in art. 5, § 10, the Court has enacted Rules of Judicial Administration, Rules of Procedure governing the Judicial Inquiry and Review Board, Rules of Appellate Procedure, Rules of the Supreme Court, Rules of Civil Procedure, Rules of the Orphans' Court, Rules of Criminal Procedure, Rules for Justices of the Peace, Rules of Courts of Common Pleas (Philadelphia County), Rules of the Philadelphia Municipal Court, Code of Judicial Conduct and Code of Professional Responsibility. PA. RULES OF COURT (Purdon Pamphlet 1977).

Justice Pomeroy declared that the court has made prudent and cautious use of its rulemaking power, engaging thereby in what he termed very constructive work,²⁶⁰ that of creating the "tools of the trade" for lawyers.

Justice Nix spoke of the practical necessity of the rulemaking power for the Supreme Court if it is to perform its role at the top of the pyramid of the unified court system,²⁶¹ but indicated that the legislature is wary of encroachment into its legislative domain. However, the court, not the legislature, was invested with rulemaking authority,²⁶² and therefore no encroachment exists.

Justice O'Brien acknowledged that the Court used its rulemaking power to "legislate." Stressing that the court does not and should not seek to legislate, he too confirmed the importance of the procedural power to the court system. As did the other justices, he conceded that some overlap between substance and procedure is inevitable.

Justice Packel raised another problematic area of overlap — that between rulemaking and a rule of decision in a case. He expressed concern that the court has occasionally departed from precedent in a case, when it should have utilized the rulemaking channels, thereby affording the practicing bar the opportunity to participate in the formation of the rule.

Although no specific questions about individual rules were asked in the course of the interviews, several of the justices and clerks

260. Justice Pomeroy also mentioned the very time-consuming nature of this work, which is performed by a good many people. Interview with Justice Pomeroy. There are presently 10 rules advisory committees, with members who provide the initial draft of the rules. Interviews with the Justices. Justice Nix also indicated that much background reading is required if the Court is to be able to give comprehensive and adequate consideration to the various rules. Interview with Justice Nix.

Justice Manderino also reported that a great deal of time is involved in the promulgation of these rules, estimating that about 10% of the justices' time is so allocated. He further stated that the Court should give more attention to this important task, but does not have the time. Interview with Justice Manderino.

261. Interview with Justice Nix. In an address delivered before the New York University Law Alumni Association, United States Supreme Court Justice William J. Brennan stated:

The administration of the business of the courts must be under rules governing that administration. Is it not time that our profession unite behind those who rightly insist that the formulation of those rules is not for the legislature, but for the courts? Can one imagine a business corporation operating under procedures devised, not by its board of directors, but by someone else? Can anyone possibly defend denial of the rulemaking power to the top court of the state? /

Address by Justice William J. Brennan, Jr., March 11, 1957. For an interesting summary of rule-making, *see generally* J. PARNES & C. KORBAGES, *A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES* (Am. Jud. Soc'y Rep. 1973).

262. *See also* note 64 *supra*.

raised rule 701 of the Pennsylvania Rules of Judicial Administration as illustrative of the grey area between substance and procedure. Rule 701 reduced the number of years a judge must have served prior to the mandatory retirement age of seventy before he may retire as a senior judge and continue to participate in the court system.²⁶³ Justice Nix explained that the issue involved was procedural because the participation as a senior judge in the system is a question of administration and operation of the unified court system, *not* of the qualifications of the judge.²⁶⁴ However, Justice Roberts dissented from the rule, maintaining that the Court was encroaching on the exclusive right of the legislature to "evaluate the manpower needs of the judicial branch and create new judgeships."²⁶⁵ Echoing the critics of the Court, Justice Roberts found that the Court was operating in an area that belonged exclusively to the legislature.²⁶⁶

VI. THE JUSTICES' VIEWS ON JUDICIAL SELECTION

Although the initial mode of judicial selection in America was appointment by the executive or legislative branches,²⁶⁷ in the mid-1800's an increasing number of states adopted an elective system as

263. Rule 701(a) reads, in pertinent part: "(a) Certification of availability for assignment by former or retired judges. . . . In order to be qualified for assignment, such judge shall not have been defeated for re-election and shall have served as a judge . . . by election or appointment for an aggregate of at least six years." PA. R. JUD. ADM. 701(a). Prior to amendment on Oct. 5, 1977, the rule required service for at least ten years. This was consistent with a statute which provided that a former judge would be eligible for temporary assignment if he has served at least one term. 1966 PA. LAWS 47. One term is ten years. *Id.*

The inconsistency between the rule as amended and the statutory provision led Justice Roberts to dissent from the amendment of the rule. See notes 265 & 266 and accompanying text *infra*.

264. Justice Nix opined that, having been elected, a judge is presumptively qualified. Interview with Justice Nix.

265. Order of the Supreme Court, *amending* PA. R. JUD. ADM. 701(a) (Oct. 5, 1977) (Roberts, J., dissenting and *citing* PA. CONST. art. 5, § 5). Justice Roberts argued that the Court was creating new judgeships "under the guise of creating eligibility requirements." *Id.*

266. *Id.* Justice Roberts contended that the Court should have retained the requirement which was consistent with the statute. See note 263 *supra*. Interestingly, at the time the Court amended rule 701(a), there was pending before the legislature a bill concerning senior judges. S. 234, Pa. Legis. (1977).

267. After the American Revolution, "eight states vested the power of appointment in one or both houses of the legislature. Two states allowed appointment by the governor and his council." ASHMAN & ALFINI, *supra* note 118, at 8. In the remaining three states, the power of appointment was vested in the governor but subject to the consent of the council. *Id.*

At the federal level, responsibility for judicial appointment was vested in the executive branch subject to certain safeguards which were adopted to assure judicial independence. U.S. CONST. art. III, § 1. Before 1846, the only deviations from the principle of judicial appointment were the elections of justices of the peace and probate judges in some states. See Nelson, *supra* note 118, at 15.

an expression of the prevailing Jacksonian philosophy that all public officials — including judges — should be elected if they are to be held accountable.²⁶⁸ Dissatisfaction with the elective system began to emerge with the increase of industrialization and the proliferation of political machines in major cities,²⁶⁹ as opponents of the system argued that judicial elections diminished the freedom of the judiciary from political pressure exerted by various interest groups and party organizations.²⁷⁰ Then, as now, the tension was between greater freedom for the judiciary on the one hand, and public accountability on the other.

Although the controversy as to which system will produce the most competent, independent and fair judiciary remains unsettled, criticism of election of judges led to the development of judicial selection plans based upon merit, using the Kales-Laski proposal as a prototype.²⁷¹ To date, twenty-one states²⁷² have incorporated a merit selection plan into their court systems at some level and in varying degrees;²⁷³ Pennsylvania has adopted merit selection only

268. See Arensberg, *supra* note 118, at 56-57. One writer on the Jacksonian legacy has said that the adoption of the system of popular election was arrived at almost completely without regard for the particular considerations of policy and principle which arise out of the nature and functions of the judicial arm of the government. He suggested that the system of popular election was adopted as the result of three primary forces: 1) Jefferson's belief that the power given to judges to nullify legislation without fear of losing their posts if their action was disapproved was inconsistent with democratic principles; 2) the idea that American judges were invested with legislative functions and should therefore be brought under popular control; and 3) a growing distrust of the legal profession. E. HAYNES, *SELECTION AND TENURE OF JUDGES* (1944), *cited in* Nelson *supra* note 118, at 15-16. By the time of the Civil War, judges were chosen by election in 24 of the 34 states. ASHMAN & ALFINI, *supra* note 118, at 9.

269. Winters, *supra* note 118, at 1083.

270. Other charges included assertions that successful lawyers were reluctant to set aside their practices for the vicissitudes of political life; primary and secondary election campaigning took judges away from their normal work; party machines were more interested in finding either a party regular and/or a good campaigner to run for office than a well-qualified lawyer; and, where the parties are weak, judicial elections are little more than popularity contests between candidates whose judicial qualifications are left unappraised. Keefe, *supra* note 118, at 622.

271. See note 118 *supra*.

272. The states are Alabama, Arizona, Alaska, Kansas, New York, Iowa, Nebraska, Colorado, Idaho, Oklahoma, Utah, Vermont, Maryland, Massachusetts, Georgia, Tennessee, Florida, Indiana, Montana, Wyoming and Pennsylvania, plus Puerto Rico and the District of Columbia. See S. ESCOVITZ, *JUDICIAL SELECTION AND TENURE* 9, 10 (Am. Jud. Soc'y Rep 1975).

273. There are currently nearly a dozen methods of selecting and retaining judges. Appointment to judicial office by the governor is the most basic plan. Some plans employ:

Gubernatorial appointment with confirmation by 1) the state senate, 2) the governor's council, 3) an ex-officio confirming commission, 4) an executive council elected by the general assembly, or 5) a council popularly elected by the voters. Some states employ screening bodies at the very beginning of the appointive process. These screening commissions may be composed of bar

on a voluntary basis for gubernatorial appointments to fill vacancies, maintaining a general system of popular election.²⁷⁴

Justice O'Brien, expressing a view shared by many, said that neither merit selection nor judicial elections are without problems.²⁷⁵ Any institution, run by human beings with predisposed views, is bound to be of a political nature.

Justice Manderino, aware that politics can never be eliminated from the selection process, is nonetheless of the opinion that Pennsylvania is now ready for a merit-based appointment system. Nevertheless, he espoused the view that, given the political history of Pennsylvania, with its great diversity and an entrenched establishment, the election process has been the best way to insure democratization of the system.²⁷⁶ He does have reservations about the constitutionality of the present system's restrictions upon the judicial candidates,²⁷⁷ which he also finds inconsistent with democracy and debate. On balance, he believes that a merit selection apparatus would remove the unconscious obligations that result from campaign contributions; judges should be free of gratitude to those who have helped them get elected.

association members or political "friends" of the executive. . . . Under a merit selection plan, the governor appoints from a list of nominees prepared by an official, non-partisan ballot Judicial offices may also be filled by election by the state legislature or appointment by another judge. Popular judicial elections can be conducted on a non-partisan basis, or by partisan ballot following slate-making in open primaries, party conventions, or caucuses.

S. ESCOVITZ, *supra* note 272, at 11. For a state by state breakdown of judicial selection methods, *see id.* at 17-42.

274. For a discussion of judicial selection in Pennsylvania, *see* notes 111-34 and accompanying text *supra*.

275. Interview with Justice O'Brien. Cf. ABA COMM. ON JUDICIAL SELECTION, TENURE AND COMPENSATION, MODEL BY-LAWS FOR STATE AND LOCAL BAR ASSOCIATIONS (1971).

276. Interview with Justice Manderino. This, of course, is the Jacksonian view. *See* notes 118 & 268 and accompanying text *supra*. Justice Manderino suggested that the Missouri Plan works well in Missouri in part because Missouri is a more homogeneous state. Interview with Justice Manderino.

277. Interview with Justice Manderino. *See* ABA CODE OF JUDICIAL CONDUCT, CANON 7. For a discussion of this problem, *see* Anderson, *Ethical Problems of Lawyers and Judges in Election Campaigns*, 41 DEN. L. CENTER J. 123 (1964). The author argues, consistent with Justice Manderino, that a conflict exists between election politics and the ethical standards. *See also* Fox, *High Court and the Law*, Philadelphia Inquirer, Oct. 13, 1977, § B, at 1, col. 1, analyzing the Nov. 1977 contest for a Pennsylvania Supreme Court seat: "[T]he State Judicial Inquiry and Review Board's Guidelines on ethical conduct have taken the zip and flavor out of the election." The writer went on to complain that "the Commonwealth voters would be hard pressed to even name the candidate." The article reported the criticism and active discouragement, through the issuance of guidelines by the State Judicial Review Board, of the use of television advertisements by candidates and characterized the commercials as "exercises in free speech" which enabled the voter to make a "philosophical choice." *Id.*

Justices Pomeroy and Packel were the most adamant in their disdain for the current system of judicial selection. Justice Pomeroy informed us that, as an advocate of merit selection for the past twenty years, he was very disappointed when the proposal was defeated in 1969,²⁷⁸ when it lost by 1900 votes statewide. He is firmly convinced that the change to merit selection would make a difference — if only in the way people think about courts. In his opinion, the complexion of the court should be apolitical — there should be no talk of Democratic or Republican control of the court.²⁷⁹ The public must be assured that the courts are not engaged in political business;²⁸⁰ in addition, he hopes that partisan pressures could be discouraged.

Justice Packel would replace the current system with appointment by the governor, based on recommendations from a judicial selection panel.²⁸¹ He emphasized his belief that senate approval is inappropriate, but suggested that a provision for retention elections to be held approximately every ten years might be a good idea if appointments were not for life. Acknowledging that the system would remain political, he is convinced it would be significantly less political than the present process.

Alone among the justices, Justice Nix affirmed a faith in the elective process of judges. He has discerned an overwhelming desire of the people of the commonwealth to have their judges stand for partisan election in the first instance. However, he disagrees with the concept of retention elections. He perceives the need to reacquire popular approval as a danger to judicial independence;²⁸² a judge, according to Justice Nix, must be unfettered and able to render

278. Interview with Justice Pomeroy. See notes 124 & 125 and accompanying text *supra*.

279. Interview with Justice Pomeroy. This was the case in the Nov. 1977 election of a justice to the Supreme Court; when Democrat Rolf Larsen won his bid for a seat on the Court, the news media announced that the Democrats had attained control over the Court. See *Philadelphia Inquirer*, Nov. 9, 1977, § A, at 1, col. 4; *Evening Bulletin* (Phila.), Nov. 9, 1977, at 4, col. 1. Of course, nonpartisan elections are one possible alternative.

280. Judging from a recent article, the Supreme Court of Pennsylvania has an image problem — that of being political: “[F]or the time being, judges are products of the political system, and thus it is not surprising that once elevated to the bench they continue to behave like politicians. In fact, there is no more political court in Pennsylvania than the Supreme Court.” Ecenbarger, *The State Judiciary is “more equal,”* *Philadelphia Inquirer*, Jan. 23, 1978, § A, at 7, col. 2.

281. Interview with Justice Packel. Cf. notes 131 & 132 and accompanying text *supra*.

282. Justice Nix warned that in a city where the political leaders are strong (he cited Philadelphia as an example) the party in power could easily defeat a judge who had ignored their wishes, in a retention election. He also warned that a judge must not be deterred in his pursuit of justice by fears that a decision might be unpopular with the voters. Interview with Justice Nix.

opinions without outside — especially political — influences. Thus Justice Nix has concluded that tenure should be awarded a judge, inasmuch as there exists enough flexibility in the present process for removal or discipline of judges.²⁸³ The allegiance of Justice Nix to the elective process is based on his perception of the ever increasing influence exercised by the judicial branch over the quality of life. Because of this influence, the people who live in the society affected by it deserve to have power over the selection of the judiciary.

VII. CONCLUSION

As demonstrated in several contexts, the most persistent problem for the Court is that the Justices do not have adequate time to do all that they feel is necessary — to do justice to the cases, to remain intellectually current, and to produce better-written and more finely honed opinions.

During the course of the interviews, it became apparent that something must be done if the justices are to carry on in the tradition of the common law and its scholarly pursuit of the law leading to its principled evolution. Our legal system is more than a sum of individual results, but consists of reasoned law development. Unlike Blackstone, most authorities today do not believe the “law” is merely lurking everywhere, waiting to be found.²⁸⁴ Instead the concept of our system entails legal reasoning and judicial legislation. The law consists of the development and elaboration of broad maxims which are derived and deduced from specific situations and statutes, as well as prior principles. These maxims are then applied, induced, and modified to deal with the ever changing situations that confront the legal system in a changing society. Thus, there must be constant extrapolation from the old to the new and if the reasoning behind the result in the old is not adequately articulated, one cannot properly induce or reason to the result in the new. The role of a justice in this development is not mechanical but involves careful thought and deliberation, meticulous reasoning, and introspection — in short, it requires time.

283. Noting that apparatus now exist to monitor, to a much greater extent than previously possible, the conduct of a judge during his term, Justice Nix expressed his faith in the ability of the Judicial Board of Review and Inquiry to remove a judge for incompetence, without need to resort to impeachment. Interview with Justice Nix. The Judicial Board of Review and Inquiry and standards of removal were established in the Pennsylvania Constitution. PA. CONST. art. 5, § 18.

284. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 124 (1921); Pound, *The Application of Law*, reprinted in J. FEINBERG & H. GROSS, *PHILOSOPHY OF LAW* 65 (1975); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

Time is needed not only to perform the various judicial duties but also for personal development. Total absorption in judicial chores is a bit disconcerting.²⁸⁵ It must be borne in mind that the justices are involved in the creation of social policy and they affect the lives of many. It is therefore unfortunate if they are shut off from the mainstream of life by the demands of their high position. Furthermore, it would seem desirable for the justices to have sufficient time to remain well-read and to keep current in social, political and legal thought²⁸⁶ to enable them to bring a broad perspective to their task. The importance of a learned judiciary can not be overestimated.

As noted above,²⁸⁷ the performance of the Court cannot be judged except in relation to the purpose that is ascribed to it. It is submitted that principled development of the law of the state must take precedence over repetitive review of the application of settled law in individual cases. The latter is the function of an intermediate court. As the principled development of the law is the basis of our common law system in the United States and England, a mockery is made of our system of jurisprudence when quality is sacrificed for quantity. Assuming adequate intermediate-level protection of individuals from any injustice,²⁸⁸ the Supreme Court of Pennsylvania must be freed from the shackles on its time that are created by the imposition of jurisdiction in direct appeals and be given control over its docket. Only then can it efficiently allocate its time to build upon the structure of our law. This is not a denigration of the importance of safeguarding individual rights, but only a recognition that all individuals suffer if, at the highest level of our judicial system, there

285. See JUSTICE ON APPEAL, *supra* note 148, at 145-46, wherein the authors persuasively argue:

[I]t is essential to the very nature of the deliberative act of judging that the job not be performed at a frenetic pace. Time for reflection and study is essential. So is mental and physical health. It is undebatably in the public interest that the judge not be compelled to devote every waking minute to his judicial duties. He should be expected to maintain non-legal interests and to participate in non-legal affairs to a reasonable degree. It would be devastating to the longer term welfare of the legal system to accept as a permanent condition of judicial life a substantial burden of evening and weekend work, or to extend the normal judicial working year beyond about 230 work days.

Id. See notes 143-46 and accompanying text *supra*.

286. See, e.g., Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943), wherein the author discusses the taking into account of the social world. In his impressive work *The Nature of the Judicial Process*, Justice Cardozo described methods of decision which require a learned judge: the "method of philosophy," the "methods of history, tradition and sociology," and the "method of sociology." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

287. See notes 157-72 and accompanying text *supra*.

288. See notes 163-72 & 199-201 and accompanying text *supra*.

is no reasoned development of the laws which ultimately affect all Pennsylvanians.

The need for reform is manifest. It is submitted, however, that before ameliorative action can be intelligently taken with respect to the Supreme Court and the Unified Court System, more comprehensive statistical and empirical information is needed to illuminate further the problem areas.²⁸⁹ This necessity has been recognized by the Institute of Judicial Administration, which indicated in a 1972 report²⁹⁰ that "only if [a comprehensive study of the court system is done] can the appellate process in Pennsylvania adequately serve the people of the Commonwealth."²⁹¹ Chief Justice Eagen has heeded this exhortation by arranging to have the National Center for State Courts carry out an in-depth study of the entire appellate

289. All available statistics for the state are included in the Appendix, with the exception of those gathered in Potter, *supra* note 1, at 228-33. Of particular concern is the lack of statistics measuring the caseload according to the subject matter of the case. See R. LEFLAR, *supra* note 157, at 104, wherein the author deplores the lack of separate statistical records on the individual justices, and the lack of information on disposition of the case. *Id.*

In its series of editorials about the Court, one newspaper decried the statistical vacuum within which the Court is to be judged: "From the meager statistics it releases, it is impossible to determine how long it takes to decide its cases and whether each justice is pulling his own weight." *The Supreme disgrace: Secret and unaccountable*, Philadelphia Inquirer, Mar. 3, 1978, § A, at 6, col. 2. A previous editorial had quoted a court official as saying, "[t]he court is not very liberal in letting its figures out." *The Supreme disgrace: Delays mock justice*, Philadelphia Inquirer, Feb. 23, 1978, § A, at 10, col. 1.

In another editorial the Inquirer revealed the results of its own statistical study of time delays. Analyzing the Court's decisions in 1976, it found that of 337 written decisions, 16% had not been decided for more than a year after oral argument, and 34% had required eight months or more. *The Supreme disgrace: Failing to meet standards*, Philadelphia Inquirer, Feb. 27, 1978, § A, at 8, col. 1. This newspaper estimated that the Court takes an average of 7.5 months to decide a case after oral argument, and reported that the average time of decision in the New York Court of Appeals, that state's highest court, as 4-6 weeks, 5.5 months as the average time for New Jersey Supreme Court, 1.6 months for Maryland, and less than a month for the United States Court of Appeals for the Third Circuit. *Id.*

Statistics, it is felt, "can provide authoritative answers to loose talk and curbstone theories that too often pass, even among judges, for fact." R. LEFLAR, *supra* note 157, at 104. The current importance of statistical reporting is reflected by ongoing projects on Court Statistics by the National Center for State Courts. See NATIONAL CENTER FOR STATE COURTS, REPORT, vol. 1, no. 3 (Jan. 1978). See generally Groose, *The Quality of State Judicial Statistics*, 53 JUDICATURE 160 (1969).

The Prothonotary's office is burdened with the additional task of compiling the statistics in Pennsylvania. See note 139 and accompanying text *supra*. Recognizing its undercapacity for this purpose, the 1972 Report of the Institute of Judicial Administration found that "the Prothonotary of the Supreme Court has been given many duties that do not relate to the appellate function of the Supreme Court but rather to its administrative responsibilities." IJA REPORT, *supra* note 1, at 74. The gathering of statistical data should be the responsibility of the court administrator. R. LEFLAR, *supra* note 157, at 104.

290. See IJA REPORT, *supra* note 1.

291. *Id.* at 4. This report also concluded that "a revision of the entire appellate system in Pennsylvania is necessary." *Id.* at 62.

court system in Pennsylvania and to provide advice for improvement.²⁹² It is greatly hoped that this study can amass sufficient information to yield viable suggestions for the restructuring and enhancing of the appellate court system in Pennsylvania and it is further hoped that those in positions to effect judicial reforms act promptly to do so.

Debra J. Poul

Wendy L. Wallner

292. Interview with Chief Justice Eagen.

APPENDIX

TABLE I¹

(First Working Day in January to Last Working Day in December — Except as Noted by Date.)

OFFICE OF PROTHONOTARY — SUPREME COURT OF PENNSYLVANIA
Eastern District
Western District
Middle District

Year	District	No. Appeals		No. Days of Argument	No. of Cases Argued	No. of Cases Submitted	Total No. Opinions Filed		Petitions With M.P. Numbers*		Petitions for Allocatur	
		Filed 1/1-12/31	Filed 1/1-12/31				(Not Broken Down)	Down)	Numbers*	Allocatur	Allocatur	Granted
1974	Eastern	508	43	352	80	457	1,079	474	79			
	Western	218	9	98	17	139	208	197	26			
	Middle	67	4	40	8	37	120	53	3			
	Total	793	56	490	105	663	1,407	724	108			
1975	Eastern	605	32	246	83	389	1,026	552	52			
	Western	156	10	88	17	137	304	252	32			
	Middle	67	3	28	5	35	70	64	6			
	Total	828	45	362	105	561	1,400	868	90			
1976	Eastern	600	27	194	82	405	817	582	132			
	Western	166	8	75	28	127	290	275	36			
	Middle	64	4	38	7	51	88	49	10			
	Total	830	39	307	117	583	1,195	906	178			
1977	Eastern											
	Western											
	Middle											
	Total											

* Petitions with M.P. Numbers filed in Miscellaneous and Appeal Dockets.
¹ Statistics available as of June, 1978.

TABLE II¹
OPINIONS OF THE COURT²

	Joinder				Joinder				Average PC		Total	Total Opinions			
	MO	LO	CO	DO	DO/CO	DO/CO	IN	CO	CIR	D	NP	MO	LO	PC	MO, LO, CO, DO, DO/CO, PC
Chief Justice Eagen	38	3	6	2	2	15	7	32	17	4	29	70			80
Justice O'Brien	37	6	5	2	0	13	9	6	1	2	29	72			79
Justice Roberts	48	14	39	45	4	9	2	17	1	17	29	91			179
Justice Pomeroy	32	3	25	30	4	4	8	21	5	17	29	64			119
Justice Nix	28	7	17	22	8	15	2	24	11	39	29	64			103
Justice Manderino	35	4	21	44	5	24	5	21	5	6	29	68			133
Former Chief Justice Jones*	10	2	0	1	0	6	3	4	1	128	14.5***	26.5			27.5
Justice Packel**	7	5	2	3	1	2	0	0	1	0	14.5***	26.5			32.5
Total	235	44	115	149	24	88	36	125	42	213	203	482			753

LEGEND

MO — Majority Opinion

LO — Lead Opinion
(not joined by a majority)

CO — Concurring Opinion

DO — Dissenting Opinion

Joinder — Joining in CO, DO, CO/DO

CIR — Concurrence in the result
(noted without opinion)

D — Dissent noted without opinion

NP — Not Participating

PC — Per Curiam

* Former Chief Justice Jones left the Court on February 28, 1977.

** Justice Packel, sitting at the time interviews were held with the Justices, filled the seat vacated by former Chief Justice Jones from June 3 to December 28, 1977.

*** The average number of per curiam opinions was determined by dividing the total of 206 per curiam opinions by 7 Justices. Half of this amount was attributed each to Justice Packel and former Chief Justice Jones.

¹ Based on statistics compiled by the *Villanova Law Review*.² The statistics contained in this table are presented only to provide the reader with a general overview of the workproduct of the Court. It must be noted, however, that much of the story is lost in translation to numbers. For example, many per curiam opinions are justified by the facts of the case. There is a qualitative difference between a CIR that accompanies a one-line per curiam opinion, and a CIR accompanying a plurality opinion. It should also be remembered that the bare number of opinions is indicative neither of length nor quality.