REPORT OF

THE SPECIAL COMMISSION

TO LIMIT CAMPAIGN EXPENDITURES

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EXECUTIVE SUMMARY

SECTION I

INTRODUCTION

> "I believe very strongly that judicial campaigns should be different than other political campaigns because what we as public officials do is different. We don't respond to or influence public opinion. We don't formulate public policy. We don't drive political agendas, and we don't hand out jobs. Rather, we put on black robes and we make very important decisions about other peoples' lives, and we do it one life at a time. And that makes our contact with our constituents very, very personal. In order for our constituents to accept and abide by those decisions, they must believe that they were rendered in a fair and just manner by qualified, independent and impartial judges.
> . . . This is a very fragile covenant we need to protect." Honorable Kate Ford Elliott, Superior Court of Pennsylvania, November 12, 1997.

Judge Ford Elliott's eloquent description of the differences between campaigning for judicial office and political offices had great impact upon the members of the Special Commission to Limit Campaign Expenditures (hereinafter "the Commission"), appointed by the Supreme Court of Pennsylvania. Unfortunately, however, most Pennsylvanians do not believe such distinctions exist in fact, resulting in the erosion of the "fragile covenant." The following is a comparison of anecdotal testimonial information with the findings of a poll of registered voters in Pennsylvania[1] and is supportive of the Commission's finding that the voters of Pennsylvania want change in the way judicial elections are conducted.

> ". . . [M]oney and its impact into every phase of our politics, to a degree that has never been true before, has practically devastated our election system. Now in almost every case the

[1] A poll of registered voters in the state of Pennsylvania was conducted on January 12-14, 1998 by Lake Sosin Snell Perry & Associates and Deardourff/The Media Company (hereinafter "LSSP/Deardourff"). The telephone survey reached 500 adults, 18 years or older. The sample was stratified by gender and region and the data were weighted slightly by age to ensure that the sample is an accurate reflection of registered voters in Pennsylvania. The margin of error for this survey is +/- 4.4%. References to poll data are in italics and can be found in the LSSP/Deardourff Executive Summary, Appendix A, 16-17.

candidate who can raise the most amount of money is the victor. Money has become so involved in every phase of our political system that I say to you, and I mean every word of it, if it is not checked, if it is not reformed, we are opening the door to tyranny. It is that important. And it's high time we did something about it." Honorable William W. Scranton, former Governor of Pennsylvania, December 1995, Meeting of the Pennsylvania Society.

- *"Corruption" is the word that voters themselves use most frequently in describing what is wrong with campaigns and elections today. They believe the problem of money in politics has grown worse in recent years.* LSSP/Deardourff Exec. Summ., Appendix A, 16.

"I know I should have voted [in last Tuesday's election], but I just can't relate to these guys -- they spend millions on t.v., and I'm worried about how to put bread on the table tomorrow night." Anonymous Pittsburgh cab driver, one week after the November 1997 election

- *Voters believe that campaign contributions from special interests dominate the political process, and that the voice of ordinary voters is diminished by large campaign contributions.* Id.

"The current system [of electing judges] is broken, broken, broken, and it desperately needs to be fixed." Honorable Edward Rendell, Mayor of the City of Philadelphia, February 6, 1998.

- *Voters in Pennsylvania strongly believe that the amount of money in judicial elections threatens both the integrity and fairness of those elections, as well as the rulings that judges make in their courtrooms.* Id.

"What we have today is litigants coming into court feeling the courts are for sale." Philip Friedman, Esquire, former President of the Erie County Bar Association, December 11, 1997.

- *Voters are firmly convinced that large campaign contributions lead to special treatment, including from judges. They believe contributors expect -- and receive -- something in return for their largesse, even in the courtroom. This perception may be one cause of the very low voter turnout in Pennsylvania.* Id.

"In order for the justice system to be respected in this Commonwealth, it is paramount that the public have a deep and abiding faith in the principle that justice is not for sale . . . If public perception is that justice can be bought and sold, irrevocable damage to the very fiber of our society may well result." Honorable Peter Paul Olszewski, Jr., District Attorney of Luzerne County, December 4, 1997.

- *Voters overwhelmingly agree that the amount of money in elections and*

campaigns has caused them to lose a great deal of faith in the political system. Id.

This Commission was created for the purpose of determining whether public perception of judicial elections had caused a loss of respect for the judiciary in Pennsylvania, and, if so, what if anything might be done by the Supreme Court to ameliorate this problem. In its efforts to respond to this challenge, the Commission conducted public hearings in Harrisburg, Pittsburgh, Erie, Wilkes-Barre and Philadelphia; traveled to Ohio to meet with officials from both the Supreme Court of Ohio as well as the Ohio Bar Association[2]; commissioned a statewide poll combining the efforts of two national pollsters[3]; and observed a presentation by the principles of both polling groups, Celinda Lake of LSSP by interactive video and John Deardourff of The Media Group in person.

In Ohio, the Commission met with the Honorable Thomas Moyer, Chief Justice of the Ohio Supreme Court; the Honorable Richard McQuade, Chairman of the Citizens' Committee on Judicial Elections and former jurist; the Honorable Herbert Brown, former Justice of the Ohio Supreme Court and a member of the McQuade Commission; and Ohio State Bar Association officials. All of these individuals were extremely helpful in describing: the erosion of public confidence in judicial selection in Ohio, the efforts of the McQuade Commission to define the causes and recommend ameliorative measures, and the Supreme Court of Ohio's

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[2] Ohio's Supreme Court recently enacted sweeping judicial campaign reforms after receiving recommendations from a Commission appointed by the Chief Justice of that Court.

[3] During a breakout session at the PBA midannual meeting on this subject, in which representatives of all three branches of government as well as PBA officials participated, it was urged that the Commission ensure that the poll was conducted in the spirit of bipartisanship. We accomplished that goal by commissioning LSSP, nationally known as a "Democratic" pollster, and Deardourff, nationally known as a "Republican" pollster.

enactment of initiatives designed to improve the elective system through changes in the Code of Judicial Conduct. All concerned were candid with respect to both the pluses as well as the minuses of the enacted changes which are still in the formative stages.

The decision to move forward and recommend changes, according to Chairman McQuade, came about as a direct result of a public poll conducted on behalf of his commission. "The poll", he stated, "told us in no uncertain terms that the public had become alienated to an extent far greater than anyone had imagined." The results "galvanized" his commission and led directly to the recommendations for change that were eventually accepted by the Supreme Court of Ohio. His parting advice to us was, "whatever else you do be sure to take a poll."

The Commission followed this suggestion, and a poll was conducted in Pennsylvania in mid-January of 1998. We, too, found the results of the poll to be invaluable, as they led this Commission to conclude that changes are indeed needed in order to restore confidence in the judiciary.

There is ample anecdotal as well as empirical evidence that Pennsylvanians believe there are serious problems connected with judicial elections -- problems of such magnitude that they have caused an erosion in public confidence, not only in judicial elections but also in the integrity of the courts as well. Comparing the sampling of testimony to the polling results demonstrates that the observations of many of those who came forward to testify genuinely reflect the attitudes of Pennsylvanians in general.

By overwhelming numbers, Pennsylvanians believe that the judicial election system should be reformed, particularly with respect to contributions. Fortunately, also by overwhelming numbers, they believe these changes as they pertain to judicial elections will

work. On this point the LSSP/Deardourff poll determined:

- "There is a strong desire among voters to reform the judicial election system. Voters overwhelmingly support specific reform measures including contribution limits, spending limits, tight disclosure requirements and public financing for candidates. This matches and in some cases exceeds levels of support . . . seen in other states." LSSP/Deardourff Exec. Summ., Appendix A, 17.

- "Voters appear even more anxious to reform the judicial system than other offices and therefore are more supportive of public financing." Id.

- "Voters believe firmly that enacting contribution limits would improve the honesty and integrity of judicial elections by reducing the influence of wealthy campaign contributors and special interests." Id.

- "If contribution limits were enacted, voters believe that the playing field would be more level for all candidates, ordinary people would have more of a voice, and the power of special interests would be reduced. All of these are seen as highly beneficial and likely outcomes. Voters are not worried that candidates would have to spend more time raising money, and they reject the idea that contribution limits would violate anyone's right to free speech." Id.

Having satisfied itself that problems with judicial elections, particularly judicial campaign finance, do in fact exist, the Commission next turned its attention to possible solutions. Because this Commission is a creation of the Supreme Court of Pennsylvania, we focused upon measures which could be effectuated by the Supreme Court by virtue of its power to modify the Code of Judicial Conduct. Judicial election reforms have been accomplished in this manner in other forums.[4]

The ameliorative initiatives which the Commission recommends to the Supreme Court of Pennsylvania range from such major changes as: limits on campaign contributions, limits on campaign expenditures, mandatory recusal related to campaign contributions, and improved

[4] Some of those states include Arkansas, Illinois, Kentucky, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, and West Virginia.

campaign finance disclosure, to less radical measures such as improved public education, restrictions on partisan political activity, and adoption of judicial campaign advertising guidelines. In addition, the Commission heard testimony directed to other changes which could only be accomplished through legislative action. These include public funding for judicial elections, appointive selection, rotation of ballot position, elimination of the county of origin designation on the ballot, and elimination of the prohibition against cross-filing by candidates.[5]

Although this report deals with each recommendation separately in Section II, the Commission believes the major recommendations should be viewed as component parts of a comprehensive scheme designed not only to respond to the deficiencies in the present elective system, but also to address some of the problems that have been identified as the "downside" of elective reform. Despite concerns[6], even those who warned of potential "unintended consequences" urged the Commission to recommend progressive elective reform:

> "Only if it should appear that the possible negative effects of a recommended reform would be serious and beyond the power of the Supreme Court to address at the same time would I consider abandoning the course of partial reform . . . ." University of Pennsylvania Law School professor and Vice President of the American Judicature Society, Stephen Burbank, Appendix F, 91-2.
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> "Despite [my] concerns I still come down in favor of making an effort to restrict the

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[5] Explanation of the suggested changes which require legislative approval can be found in Appendix G.

[6] Professor Burbank described judicial elections as "a polycentric problem, a concept perhaps best understood through the image of a spider web...tension is distributed throughout the web when pressure is applied to one strand." Appendix F, 90.

Mr. Delano similarly testified: "[T]he analogy I would use is that we have in Pennsylvania and throughout the nation sort of a bean bag of money. And if you push at one end, it is going to pop up at another end." Appendix C, 12.

> growth of unlimited dollars into judicial campaigns. Why? Because of all our elected offices in Pennsylvania, none demands a higher level of public confidence in its integrity and the real perception of its freedom from political influence that is characterized by money-giving than our judiciary." Pittsburgh attorney and Carnegie Mellon University professor, Jon Delano, Appendix C, 14.

With respect to limitations on campaign expenditures, the Commission recognizes the existence of at least two major impediments. First and foremost is the decision of the United States Supreme Court in the case of Buckley v. Valeo, 424 U.S. 1 (1976), which held such limitations in congressional races to be constitutionally impermissible restrictions upon free speech. Although Buckley is distinguishable on its facts as it involved a federal congressional race, it would appear its rationale may be broad enough to extend to other types of elections as well.

The Commission was nevertheless moved to urge the adoption of this reform because without it the "dash for cash" identified as a root cause for citizen distrust would not only continue but will increase dramatically.[7] Such skyrocketing campaign expenditures and the apparent disastrous effect upon the perception of judicial integrity caused thereby, have prompted other jurisdictions to move ahead with this concept despite Buckley. See Mich.

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[7] This forecast is based upon the testimony of several witnesses who are highly respected for their political acumen:

"The reality is votes are moved today by broadcast media, television, radio, and that's not going to get less expensive, that's only going to get more expensive and that's just a reality." Alan Novak, Republican State Committee Chair, Appendix B, 24.

"The biggest problem that I see in the electoral process is raising what is becoming enormous sums of money to buy television . . . we are certainly starting to see it in judicial races." Vincent Fumo, Senator, 1st Senatorial District, Appendix F, 114.

"Whereas a candidate in 1980 for statewide appellate court could win an election with a budget of $200,000 or less, that amount of money today is hardly enough to win one of the fifty state senate seats." Jon Delano, Appendix C, 8.

Comp. Laws Ann. § 169.267 (West 1994); Ohio Code of Judicial Conduct, Canon 7C(6); Tex. Elec. Code Ann. § 253.168 (West 1995); Wis. Stat. § 11.31 (1995); Washington Code of Judicial Conduct, Proposed Canon 7(B)(2).

Admittedly analyzing Buckley in an effort to predict its applicability to judicial campaign expenditure reform is a daunting task. Commission members found solace in the knowledge that far more formidable scholars than we, admitted to being at least somewhat baffled by the Buckley court's rationale.[8]

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[8] "The [Supreme] Court views contributions as conduct. Expenditures as speech . . . Sounds absurd to many of us, but, hey, they are the U.S. Supreme Court . . . [M]any of us think they ought to review that case and might have a different outcome given the number of years that have passed and the experience we have had in this country . . . I have read that case a zillion times because I teach this area, and I have a hard time rationalizing what the Supreme Court did. And so I am all in favor of challenging it." Jon Delano, Appendix C, 9, 33.

"Under the First Amendment there is a reluctance to put limitations on what a person spends because money talks, I suppose, and therefore it's part of the First Amendment. Sometimes it talks too much. But there seems to be a disposition to reexamine limitations on expenditures. The Valeo case, which I think was the longest opinion the Supreme Court ever rendered, may also be considered one of the most obtuse that was ever rendered. Its analysis, at least from my perspective, is rather difficult, shallow . . . and since it was given many years ago and the Court that gave it is not the Court that exists today, could well stand reexamination in the next few years." Jerome Shestack, President of the American Bar Association, Appendix F, 24-5.

"Obviously, no one should recommend that the Supreme Court of Pennsylvania implement judicial campaign finance rules that are known to violate the Constitution of the United States. Just as obviously, however, the relevant limitations in this area are not a matter of clear legal or moral imperative. There are important competing considerations vying for dominance in the constitutional calculus, which is one reason why Buckley against Valeo is so unsatisfactory as a decision of the highest court in the land." Professor Burbank, Appendix F, 93.

"Buckley, you will recall, was a case involving general campaign finance expenditures. I believe -- and some people have written who are experts in the area -- that the considerations in judicial campaigns are totally different, that what we're after in judges is something totally different, so that restrictions may very well be permitted by the Supreme Court." Professor John Gedid, Widener University School of Law, Appendix F, 106.

A challenge to judicial election expenditure reform in our neighboring state of Ohio, has spawned what most scholars agree will become the test case on Buckley. The case of Suster v. Marshall, 951 F. Supp. 693 (N.D. Oh. 1996), is currently lodged in the United States Court of Appeals for the Sixth Circuit. Joining in the effort to revisit and reverse Buckley as *amici* are 24 state Attorneys General, 21 Secretaries of State, the United States Department of Justice, the National Voting Rights Institute and the Brennan Center for Justice. The Suster *amici* set forth two primary arguments: a) judicial elections are distinguishable from legislative elections; and b) since the Buckley case, real life experience has demonstrated that simply limiting campaign contributions does not alleviate the appearance of corruption in the election process, at least with respect to judicial races.

The issue of free speech in a judicial setting already differs markedly from free speech in a political election. In judicial elections, free speech is incumbered by Canon 7B(1)(c) of the Code of Judicial Conduct. Judicial candidates are precluded from speaking out on any issue which may come before them as a judge. Thus, even without expenditure restrictions, judicial candidates cannot use paid advertising in the way political candidates use it.

The Buckley court acknowledged that speech may be restricted by campaign expenditure limitations if there is a showing that the state had a compelling governmental interest (i.e., preventing corruption or the appearance of corruption) and used narrowly tailored means to achieve that goal. Thus, evidence demonstrating that limitations on judicial campaign expenditures are essential to maintaining the public's right to an independent, fair judiciary, may be sufficient to cause the Supreme Court to at least distinguish Buckley, where judicial races are involved.

The poll results confirm that twenty-two years after the Buckley decision escalating costs of judicial elections have served to increase the public's perception of corruption. Public confidence in our judiciary seems to diminish with each election cycle. Today, nearly nine in ten voters agree that "the amount of money in elections and campaigns causes many voters to lose a great deal of faith in the political system." LSSP/Deardourff Exec. Summ., Appendix A, 3.

Voters in Pennsylvania overwhelmingly believe that too much money is spent on judicial campaigns. Id. at 4. Many of those polled volunteered that they did not know how much is spent on judicial elections, but still believed the amounts to be excessive. When given a brief description of the actual amounts of money spent, the response that candidates spend too much jumps from fifty-nine percent to eighty-one percent. Id. Contrary to the reasoning in Buckley, unlimited campaign spending has only fueled the public's fire. The perception of corruption in judicial elections and in the judicial process overall is so pervasive that the integrity of the system is at stake.

The second major impediment to judicial campaign expenditure limitations is in the nature of one of those polycentric ramifications referred to by Professor Burbank. See supra note 6. Absent some countermeasure, it seems likely that limiting spending by the candidate may result in an increase in spending by third parties, ostensibly independent from the candidate, but nonetheless determined to aid his or her election effort. This has been the experience in Ohio, where campaign expenditure limitations have indeed spawned an increase in third party spending by such entities as the political state committees, the chamber of commerce and the trial lawyers.

The Commission recommends that the Court adopt what are believed to be

countermeasures designed to impede or prevent this result. The first such recommendation is in the nature of an uncontestable recusal motion at the option of an opponent whenever a lawyer or litigant has exceeded the mandatory contribution limits as set forth in Section II-A. Although the contribution limitation restrains a judicial candidate from accepting contributions in excess of the maximum per individual, legal entity, or PAC, this alone would not preclude a person, legal entity or PAC from attempting to get around this limitation by funding third parties who are dedicated to aiding the candidate's election campaign. The recusal rule would cause such individuals or litigants to risk losing the opportunity to appear before the jurist they had supported as a consequence of such action, where contributions to or on behalf of the candidate in the aggregate exceed the contribution limits.

In addition, the Commission recommends amending the Rules of Professional Conduct to the effect that any lawyer who knowingly attempts to circumvent the contribution limitations violates the rules and is subject to discipline. Thus, a lawyer would commit an infraction if his or her contribution to the candidate and to a third party, who the lawyer knows or reasonably should know intends to support the candidate, in the aggregate exceeds the limits.

The Commission's premise in recommending these adjuncts to contribution limitations is that potential litigants and the lawyers who represent them are the most likely source of the monies that are diverted for the use of third parties. At the very least, it is the monies that come from potential "interested parties", lawyers and litigants, that the public has identified as being the most corruptive influence upon the judiciary. As stated by the Honorable Kate Ford Elliott in discussing the favorable public reaction to her voluntary limit of $100 on lawyer contributions: " I soon discovered I had a great message . . . Unfortunately, what that also told

me was there was a great cynicism among our citizens about their courts, and that is something no justice system can afford to tolerate." Appendix C, 41-2.

SECTION II-A

JUDICIAL CAMPAIGN CONTRIBUTION LIMITS

The Commission recommends that judicial campaign contributions should be limited to $1000 per individual and $5000 per legal entity for statewide races, and $500 per individual and $2500 per legal entity for common pleas races.

The same decision of the United States Supreme Court, which casts doubt upon the constitutionality of campaign expenditure caps, validates limits on contributions. The Buckley case tested both the campaign contribution limitations enacted in the post-Watergate era as amendments to the Federal Election Campaign Act, as well as expenditure caps. The court reasoned that regulating contributions was regulating conduct which was properly within the purview of the Congress, but limiting expenditures involved free speech and thus required constitutional scrutiny.

Approximately two-thirds of Pennsylvania voters believe that limits on judicial campaign contributions will improve the honesty and integrity of judicial elections.[9] The poll

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[9] Question 46 of the LSSP/Deardourff poll read as follows:
"I am going to read two statements that people have made about putting limits on contributions to candidates for judge in Pennsylvania. Please tell me which statement comes closer to your own view:

> ...that putting limits on campaign contributions will improve the honesty and integrity of judicial elections by reducing the influence of wealthy campaign

also demonstrated that an overwhelming number of voters believe the federal contribution limits of $1000 per person and $5000 from legal entities or PACs ought to apply to judicial elections in Pennsylvania.[10]

The Commission believes these limitations should be adopted for all races involving statewide judicial office, but believes the limits for common pleas races should be less, as those races, despite some noticeable exceptions[11], seem to be less demanding financially.

The Commission, thus, recommends aggregate limits in judicial campaign contributions applicable to both individuals and legal entities, including unincorporated associations, partnerships and PACS, similar to what is now required under federal law. The difference is that while federal law places the burden of compliance on both giver and receiver, the burden in Pennsylvania judicial races would rest primarily with the candidate as it is the candidate who is covered by the enforcement mechanism, the Code of Judicial Conduct. The limits would not apply to the candidate or members of his or her immediate family, but legal entities would include prior political campaign committees which raised money on behalf of the candidate for a

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contributors and special interests.
...that putting limits on campaign contributions will NOT improve the honesty and integrity of judicial elections -- it just means that candidates will have to spend even more time raising money from more sources.
Which statement comes closer to your own view?"

Sixty four percent answered that contribution limits will improve the honesty and integrity of judicial elections. LSSP/Deardourff Exec. Summ., Appendix A, 10.

[10] The $5000 PAC/legal entity limitation was favored by 84%. The $1000 individual limitation was favored by 85%. LSSP/Deardourff Exec. Summ., Appendix A, 7.

[11] See infra testimony of Mr. Joseph Persico and the Honorable Trish Corbett, Appendix D, 7-8, 84.

non-judicial office. Furthermore, these limits unlike the federal limitations would cover an entire judicial election cycle, including both the primary and the general elections.

The recommendations are as follows:

FROM	AGGREGATE CONTRIBUTION LIMIT (per candidate/per election cycle)	COURT
Individuals	$500	Courts of Common Pleas
	$1000	Supreme Court Superior Court Commonwealth Court
Legal Entities/PACs	$2500	Courts of Common Pleas
	$5000	Supreme Court Superior Court Commonwealth Court

It is intended that the limitations will include both in kind services as well as direct monetary contributions. Also, as in Ohio, loans to judicial candidates, which are not fully repaid by election day, should be considered contributions for purposes of the above limitations.

SECTION II-B

JUDICIAL CAMPAIGN EXPENDITURE LIMITS

The Commission recommends that judicial campaign expenditures should be limited as follows: $1,000,000 for Supreme Court office, $500,000 for Superior Court and Commonwealth Court office, and $250,000 for Court of Common Pleas office.

> "Many voters willingly admit that a lack of knowledge and a lack of interest keeps them from turning out at the polls for judicial elections. However, they do not believe candidates need more money to get their messages out. They say they are more confused than informed by the television and radio ads that the candidates run." LSSP/Deardourff Exec. Summ., Appendix A, 18.

While limiting campaign spending may be the most controversial recommendation because of the apparent conflict with the United States Supreme Court decision in Buckley v. Valeo and the potential for "unintended consequences," principally in the form of increased spending by third parties, the Commission believes this change is of critical importance. Unlike the Buckley court, we find great difficulty in differentiating between regulating contributions and regulating spending. To us, they are, literally and figuratively, two sides of the same coin.

Over the course of the last decade we have witnessed a dramatic escalation in the costs of both statewide and, at least in some jurisdictions, local judicial races. As alluded to earlier, this expenditure spiral reflects the shift in focus in these campaigns to the broadcast media. See supra note 7. Contests for the Supreme Court of Pennsylvania have resulted in expenditures in excess of seven figures in the last four election cycles in which there was a Supreme Court race: 1989, 1993, 1995 and 1997.

Perhaps more worrisome is the "trickle down" effect of media driven campaigns to common pleas races. In at least two mid-sized northeastern Pennsylvania counties, expensive media driven campaigns appear to have become the norm. Luzerne County Bar President, Joseph Persico, summarized the situation as follows:

> "In light of the intense media exposure which is present in our county, the judges of our Bench are well-known individuals, and the position of judge is coveted by many members of our bar. Judicial elections over the last four years, both in Luzerne County and in our neighboring county to the north, Lackawanna County, have captured the attention of the analysts, particularly in light of the immense expenditures that had been made by those seeking election to judicial office. In 1993, for example, the two major candidates for a judicial opening in Luzerne County spent, in the aggregate, close to $600,000. That election was concluded following the primary in that one candidate garnered both the Democratic and Republican nominations. Similarly, in 1995, the Republican and Democratic candidates for judge spent collectively close to $650,000 in their quest for a judicial position in Luzerne County. The amount spent in Luzerne County was even higher if we take into consideration the amount spent by other unsuccessful primary candidates. In that same year, 1995, two candidates in Lackawanna County, three candidates spent a combined total of $600,000 in the primary races. Appendix D, 7-8.

Mr. Persico went on to conclude:

> "I believe it is safe to say that most members of our [Luzerne County] bar association favor a limitation on judicial campaign expenditures. This limitation would apply to all expenditures, whether underwritten by the candidate, supporters or a political party." Id. at 10.

Mr. Persico and members of his bar association have good reason for concern. Luzerne County is scheduled to fill three Common Pleas vacancies in 1999.

The successful candidate for the Court of Common Pleas in Lackawanna County in 1997, the Honorable Trish Corbett, described to the Commission her apprehension about

entering this race:

> . . . [I]t was my understanding that it would take at least $350,000 to run a successful judicial campaign. I literally had very little, if anything, to start with and did not feel that I was going to be able to compete with that."
> Id. at 84.

It has been reported that the largest financial war chest assembled by any candidate for statewide judicial election prior to 1985 was $350,000.[12] Thus, in just over a decade, what had once been a record amount of money to finance a statewide race was now perceived to be the minimum amount needed to run successfully for the trial bench.

Media driven judicial races are still a relatively new phenomena in Pennsylvania. A look at what has happened in other elective jurisdictions offers a sobering insight at what the future may hold. In a 1994 judicial campaign in the state of Texas involving three seats on the Supreme Court, candidates spent $10.7 million.[13] In a 1996 race in Alabama, with a single seat on the Supreme Court at issue, candidates spent $4.3 million.[14]

Perhaps more ominous is the potential for using unlimited sums to oust a judge or justice for no other reason then to create a vacancy:

> "From what I've seen, you could probably, if someone wanted to, invest maybe $400,000 and are able to unseat a justice with a negative campaign on retention, and there are those that if this process continues the way it is going, if it's going to be financially driven, who will say, 'Gee, there's no vacancy on the Court for another eight or nine years. We need a vacancy. Let's knock out this guy on retention or this woman on retention. That will set us up to win another seat,' and then you're really stuck in a

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[12] See David S. Morrison, The Image of Justice: Report of Special Senate Committee on Judicial Conduct and Administration, November 1984.

[13] Dean Starkman, Ohio Effort to Cap Election Spending in Judicial Races Triggers Challenge, Wall St. J., May 27, 1997.

[14] Id.

> bind. If you're a judge running for retention and you're under the Code of Professional Conduct about speaking out on issues, you can't open your mouth, but some whacko splinter group can say what a bad judge you were and start rolling your decisions on the screen. I don't know how you win that." Senator Fumo, Appendix F, 122.

Senator Fumo's prediction of what may happen in Pennsylvania has already become reality elsewhere. In California in 1986, three state Supreme Court justices running for retention were targeted and defeated. The cost was $11.4 million.[15]

The Commission does not believe that there exists a formula for limiting judicial campaign expenditures that would satisfy every exigency. Even if such a formula existed it would undoubtedly require raising the bar to such an extent that the result would hardly satisfy the purpose. For example, if we attempted to provide sufficient funding to finance a statewide broadcast media campaign, we would be feeding the root cause of the problem.

We believe that the post-Watergate contribution limits were to a large extent arbitrary and yet they have stood the test of time so well that our recommendation on that issue is identical to existing federal law. Though these contribution limits may have initially been arbitrary, the LSSP/Deardourff poll demonstrates that the public perceives these limits to be fair and reasonable. LSSP/Deardourff Exec. Summ., Appendix A, 7.

Chief Justice Moyer candidly admitted that the campaign expenditure limits ultimately enacted in Ohio were similarly somewhat arbitrary as no magical formula for this purpose exists. The Commission, therefore, recommends the following per candidate expenditure limits in amounts similar to what were put in place in Ohio. These limits would be applicable to both

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[15] Weiver, Popular Justice: State Judicial Elections and Procedural Due Process, 31 Harv. C.R. - C.L. L. Rev. 187, 195 (1996).

the primary and general elections combined. The limits would be as follows:

Supreme Court	$1,000,000
Superior Court Commonwealth Court	$ 500,000
Courts of Common Pleas	$ 250,000

We recognize that some may object on the basis that these sums are unrealistic in terms of the cost of paid advertising. The Commission believes that the counterpoint expressed so well by Luzerne County Bar President Joseph Persico is of greater import: "Unlimited expenditures tend to result in negative campaigning and circus advertising, which does nothing more than demean the position of judge." Appendix D, 10-11.

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Commission member Piccone believes the power to limit campaign expenditures is exclusively vested in the legislative branch of government. Thus, he dissents from this recommendation.

SECTION II-C

JUDICIAL CAMPAIGN FINANCE DISCLOSURE AND REPORTING REQUIREMENTS

The Commission recommends that in addition to the campaign contribution and expenditure reporting requirements prescribed by law, candidates for judicial office should:

1. **file a copy of all reports electronically with the Administrative Office of Pennsylvania Courts ("AOPC");**
2. **within the last 10 days prior to election day, report the receipt of any contribution in excess of $249 electronically to the AOPC within 24 hours of receipt.**

All such reports shall be made publicly accessible by publication on a "web page" designed by the AOPC.

Almost every witness who testified before the Commission either advocated more timely and more accessible campaign finance reporting or at least acknowledged the potential efficacy of such change. Republican Party State Chair Alan Novak's reference was typical: "I favor a system where there's full disclosure. I favor a system where voters and opponents have an opportunity to see where the money is coming [from] in a campaign." Appendix B, 22. The Commission, therefore, recommends as an adjunct to current reporting requirements pursuant to

the Election Code[16] establishing an electronic filing system with the AOPC.

Through testimony, the Commission learned that the deficiency in the system of reporting by candidates lies not within the amounts required to be disclosed, but rather with the lack of accessibility to information on a candidate's finances. Given the public cynicism surrounding campaign finance in judicial elections, the Commission urges the Supreme Court to establish a system which is open to review by the public. Electronic filing would certainly accomplish this goal.

The suggested electronic filing system would work as follows: the candidates would be required to submit information on contributions received and expenditures made by their campaign committees, as currently required by statute. However, in addition to the required Election Bureau filings, the candidates would be required to enter this information on a secured "web page" designed by the AOPC. The submission would be time and date-stamped; the candidates would receive confirmation of their submissions, and the "web page" would have a public area, readable only, for review of the candidates' submissions. The Commission, further, recommends an additional requirement be placed on the judicial candidates with respect to reporting monies received within a ten day time period prior to election day: any amount above $249 from any single source would be reportable within twenty-four hours of receipt. Once filed, such contributions would be immediately posted on the Internet to assure public access.

The Commission proposes that the Code of Judicial Conduct, specifically Canon 7, be amended to include these necessary disclosure provisions. Additionally, to ensure that these provisions are more than mere hollow reforms, the Commission urges vigorous investigation of

[16] 25 Pa.C.S.A. §§ 3221 et seq.

alleged violations be undertaken by the Judicial Conduct Board. Prompt investigation of alleged violations of these reporting requirements will surely send a message that anything less than full compliance will not be tolerated.

It is the opinion of the Commission that this recommended system of campaign finance disclosure, in combination with a concerted enforcement effort, will help dispel any misapprehension that justice is for sale in Pennsylvania.

SECTION II-D

RECUSAL

The Commission recommends that a judge or justice should recuse, upon motion of an opposing party, if:

1. **As a candidate for a seat on the Supreme Court, Superior Court or Commonwealth Court, he or she received any contribution in excess of the mandatory contribution limits from opposing counsel or his or her client; or**
2. **As a candidate for a seat on a court of common pleas, he or she received any contribution in excess of the mandatory contribution limits from opposing counsel or his or her client.**

For purposes of this rule, a contribution by a lawyer or litigant to a third party which actively supported the judge or justice shall be considered to be a contribution to the judge or justice.

The Commission has concluded that automatic recusal should be put in place to dispel public opinion that judicial decisions are influenced in some way or other by contributions to judicial campaigns. According to the LSSP/Deardourff poll, nearly nine out of ten Pennsylvanians question judicial impartiality believing that <u>always, most or some of the time</u> campaign contributions buy influence in the courtroom. LSSP/Deardourff Exec. Summ., Appendix A, 6 (emphasis supplied). Presently, Canon 3(c) provides that a judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be

questioned.

In his testimony, Judge Spaeth remarked that judges are placed in an intolerable position when presiding in a matter in which one of the counsel or litigants has contributed to the judge's campaign. He explained the judge's "catch-22" as follows:

> If the judge decides to sit and decide, then one of two things will happen, the judge will decide in favor of the party or lawyer who contributed to the judge's campaign and that inevitably creates an appearance that the judge favored a supporter; or the judge will say, well, I won't, I'll decide against the other -- I'll decide against my contributor, decide in favor of the other, and that raises a question as to whether the judge really was impartial or leaned over backwards. Appendix B, 91.

A mandatory recusal rule would override any questions related to the appearance of impropriety which might arise in situations where a contributor is appearing before a judge to whom he or she gave money. Judge Spaeth went on to explain how such a rule would work:

> . . . if a lawyer or the lawyer's client has made a contribution of a stated amount . . . to a judge before whom the lawyer is appearing, that fact must be disclosed. If the lawyer's opponent, thus advised, asks the judge to recuse herself or himself, the judge must do it. It would be a self-enforcing procedure. Id.

In this regard Judge Spaeth's comments mirrored almost exactly those expressed by former Ohio Supreme Court Justice Herbert Brown, who served as a member of the McQuade Commission. During the Commission's visit to Ohio, he expressed the belief that this reform, not enacted in Ohio, presented the greatest opportunity to prevent abuse or at least the perception of abuse.

It is the Commission's recommendation that the amount of money which would trigger the recusal process should equal the amount recommended as the limit a candidate for judicial

office may accept from an individual or a legal entity. As before stated, the Commission's recommendation is that the limitation on judicial campaign contributions be limited to $1000 per individual and $5000 per legal entity for statewide races, and $500 per individual and $2500 per legal entity for common pleas races.

Therefore, the Commission recommends that recusal would be automatically granted, upon motion of an opponent, if:

1. As a candidate for a seat on the Supreme Court, Superior Court or Commonwealth Court, he or she received any contribution in excess of the mandatory contribution limits from opposing counsel or his or her client; or
2. As a candidate for a seat on a court of common pleas, he or she received any contribution in excess of the mandatory contribution limits from opposing counsel or his or her client.

For purposes of this rule, a contribution by a lawyer or litigant to a third party which actively supported the judge or justice shall be considered to be a contribution to the judge or justice. In addition, if a judge or justice has knowledge that counsel or a party has contributed more than the established contribution limits, he or she must disclose this fact.

Setting a "statute of limitation" on this mandatory recusal provision is viewed as necessary for the continued efficient administration of justice in our Commonwealth. A majority of the Commission expressed the opinion that a ten year period for automatic recusal would be appropriate, as this time period coincides with the term of office to which the judicial candidate was elected. A minority of the Commission expressed the opinion that a five year period would be appropriate, as five years would serve as an adequate deterrent to any appearance of a *quid*

pro quo deal. Judge Spaeth opined that an even shorter period of 3 to 4 years would be sufficient.

SECTION II-E

PUBLIC EDUCATION

The Commission recommends that the Supreme Court should seek the assistance of all parties of interest to undertake a public education program designed to inform the voters of the importance of judicial office and the qualifications of individuals who seek election to judicial office.

Despite the fact that the 1997 election centered around six appellate court races, as well as numerous trial court contests, voter participation fell to an all-time low. Had the southwestern Pennsylvania ballots not contained a controversial referendum question, the statewide turnout would have been substantially worse.

Undoubtedly public cynicism surrounding the role of money in these races was in part responsible for voter turn-off. But the LSSP/Deardourff poll identified at least two other contributing problems as well. Voters know too little about the candidate[17]; and voters fail to appreciate the effect decisions by jurists have on their daily lives.[18]

Accordingly, the Commission advocates that the Court consider developing means to disseminate information about judicial candidates, thereby equipping Pennsylvania voters with

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[17] Twenty-eight percent of voters admitted not knowing enough about the candidates. LSSP/Deardourff Executive Summary, Appendix A, 2.

[18] Fifteen percent of voters admitted not knowing enough about the jobs and functions judges perform. Id.

the necessary tools to make more informed choices. Tearing down the barriers of ignorance and disinterest will hopefully result in the creation of a renewed public confidence in our judiciary. It is conceivable that measures which ignite the public's awareness will prompt the news media to become more involved and interested in elections for the judicial branch of government.

The Court may wish to consider calling upon the state and local bar associations to become involved in the public's education about what judges do and who they are. Possible initiatives include: a judicial voter pamphlet like those implemented by the Washington and Ohio Supreme Courts, which would contain a statement of qualifications by each prospective candidate; establishing special judicial home pages containing information about the candidates and the function of the court system in general; developing programs focusing on the judiciary, such as town meetings and panel discussions, for the Pennsylvania Cable Network; and facilitating the education of our future voters by creating in-school programs designed to teach judicial principles and processes.

The Commission also urges that the many civic, legal and "good government" groups, which submitted testimony on judicial election reform, become partners in the effort to educate the public about the nature of the judicial system and the character of the judicial office. The fact that many Pennsylvanians do not enter the voting booth to exercise their constitutional right to elect judges or cannot exercise their vote wisely due to a lack of knowledge deserves our utmost attention. By joining resources we can move closer to an informed and responsive electorate and restore the public’s confidence in one of our most cherished democratic institutions -- the judiciary.

SECTION II-F

ENFORCEMENT AND SANCTIONS

The Commission recommends that the Judicial Conduct Board and the Court of Judicial Discipline should adopt procedures, similar to those in place in Ohio, to assure timely enforcement of judicial election reform measures.

The Commission also recommends that Rule 8.4 of the Rules of Professional Conduct should be amended to add to its subsets as follows:

It is professional misconduct for a lawyer to:

- **violate the Code of Judicial Conduct as a candidate for judicial office;**
- **knowingly contribute to or on behalf of a candidate for judicial office an amount of money which in of itself or in the aggregate exceeds the maximum contribution limits established in the Code of Judicial Conduct.**

Without resolute enforcement, these recommendations will become virtually meaningless -- empty promises prompting further disillusionment. If we wish to build public trust and confidence in our judiciary, then we must sanction those who violate the integrity of our system. This Commission was charged with recommending the necessary reforms to the Code of Judicial Conduct to bring about constructive change in judicial elections. However, mechanisms for the expedient resolution of alleged violations must be put in place for the system to effectively change.

The Commission recommends that the Judicial Conduct Board and the Court of Judicial

Discipline, by virtue of their constitutional authority, develop competent investigatory and adjudicative processes which will operate within the short time-frame of a judicial election. The Judicial Conduct Board and the Court of Judicial Discipline should consider reviewing the enforcement procedures implemented by the Ohio Supreme Court. Ohio's system is structured to provide timely, straightforward review. Pursuant to court rule, the secretary of Ohio's disciplinary agency must conduct a preliminary review of a complaint within five days of the initial filing to determine whether: a) the complaint is facially valid; b) the agency has jurisdiction; and c) probable cause exists that a violation occurred. Once all three determinations are made, the complaint is forwarded to a three-member panel, comprised of the agency's board members, which must conduct a full hearing within five days of its appointment. If the panel determines that a violation has occurred, it reports same to the Ohio Supreme Court within five days. The Court then must appoint a five-member commission to review the panel's report and enter an order, which may include sanctions as appropriate.

It seems the experience of Ohio has been that its enforcement provisions did not turn out to be as burdensome as expected. In 1995, the year the provisions were implemented, approximately four grievances made it past the probable cause hearing. In 1996, there were nine grievances that made it past that point, and in 1997 there was only one.

The Commission also considers it necessary to promulgate changes in the Rules of Professional Conduct to correlate with the proposed changes to Canon 7. Presently, lawyers who campaign for judicial office are held to the standards enunciated in the Code of Judicial Conduct. However, if the candidacy is unsuccessful, it is unclear whether the lawyer is subject to any disciplinary mechanism when he or she returns to the practice of law. In addition,

lawyers who attempt to circumvent campaign contribution limitations by knowingly participating in a scheme to get around the limitations should also be subjected to discipline.

The Commission, therefore, recommends amending Rule of Professional Conduct 8.4 to add the following subsets:

It is professional misconduct for a lawyer to:

- violate the Code of Judicial Conduct as a candidate for judicial office;
- knowingly contribute to or on behalf of a candidate for judicial office an amount of money which in of itself or in the aggregate exceeds the maximum contribution limits established in the Code of Judicial Conduct.

The swift evaluation of questionable conduct is absolutely necessary to changing the face of our judicial campaigns in Pennsylvania. More importantly, making judicial candidates accountable for their campaign conduct will dismantle popular belief that corruption prevails in our judicial system.

SECTION II-G

PARTISAN POLITICAL ACTIVITY

The Commission recommends that Canon 7(B)(6) of the Code of Judicial Conduct should be amended to explicitly prohibit a judicial candidate from encouraging or allowing any court-appointed employee to engage in partisan political activity.

In 1987 the Court ordered that partisan political activity by court-appointed employees be prohibited. It has come to the Commission's attention that this order has been violated in the past with respect to judicial campaigns. In its order the Court puts forth examples of partisan political activity: running for public office, serving as a party committee-person, working at a polling place on Election Day, performing volunteer work in a political campaign, soliciting contributions for political campaigns, and soliciting contributions for a political action committee or organization. In Re: Prohibited Political Activity by Court-Appointed Employees, 82 Judicial Administration Docket No. 1 (June 29, 1987).

If, for example, a judicial candidate looks the other way while a court-appointed employee solicits contributions on his or her behalf, the candidate is clearly conducting himself or herself in a manner which encourages the violation of a Supreme Court order. To avoid these wink and nod situations, the Commission proposes that Canon 7(B)(b) be amended to prohibit a candidate from encouraging or allowing court-appointed employees to participate in partisan political activity. This amendment would be in line with the spirit of the existing language in

Canon 7(B)(b) -- a candidate should not permit any other person to do what will detract from the dignity of judicial office. The Commission would also like to encourage the Court to impress upon the President Judges of the Commonwealth their responsibility in implementing the guidelines of the partisan political activity order. A collaborative effort by all parties would certainly aid in preserving the honor and reputation of the judiciary.

SECTION II-H

JUDICIAL CAMPAIGN ADVERTISING GUIDELINES

The Commission recommends that Canon 7 should be amended to incorporate the judicial campaign advertising guidelines, as promulgated by the Pennsylvania Bar Association.

Several of those who testified before the Commission remarked that judicial campaign advertising is predictably ineffectual and tirelessly negative. More than two thirds of voters find that campaign commercials have the effect of making people more confused about their choice of candidates.[19] Less than one in five voters believe that television and radio advertisements actually provide useful information that helps people decide how to vote.[20] Clearly, the amount of money being spent on these commercials has not been successful, in any large sense, in engaging the voting population.

Campaign commercials are indeed part and parcel of a judicial campaign, however, a candidate's commercials should comply with the high standards of conduct articulated in the Canons, in spirit as well as in fact. Unfortunately, negative political ads are alive and well in judicial campaigns. In fact, they are deemed to be essential:

> "I learned the hard way that judicial campaigns of the '90's were no different than any other spin-driven political campaign complete with media consultants, pollsters and sound bites. Even I met with a media consultant in the event I would have money for tv.

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[19] LSSP/Deardourff Exec. Summ., Appendix A, 6.

[20] Id.

> You see, hope always springs eternal. He told me I had to have a negative in the can. When I told him I didn't have any negatives on my colleagues, he assured me he could come up with something." Honorable Kate Ford Elliott, Appendix C, 44.

The Commission heard Vito Geroulo, the Immediate Past President of the Lackawanna Bar Association, describe the use of such ads in the most recent judicial election held in that county:

> "There were a number of ads that appeared, very dramatic, a candidate claiming that this candidate was involved in jailing crooked lawyers. We had images of lawyers appearing in handcuffs . . . being led away by police, and clanging doors." Appendix D, 118.

There can be no question that the use of such ads can be highly effective, as Edward Madeira, Chair of the ABA's Committee on Separation of Powers and Judicial Independence, stated: "[T]he most dreaded accusation in the political world since 'I know of 48 known Communists in the State Department' is the dreaded 'she . . . or he is soft on crime.'" Appendix F, 196.

The Commission recommends that the Court incorporate the Pennsylvania Bar Association Judicial Campaign Advertising Guidelines[21] into Canon 7. These guidelines are intended to produce advertisements which are consistent with the integrity, impartiality and independence of the judiciary, while recognizing a candidate's free speech rights and the need for fair comment in an election campaign. The essence of the guidelines aims at disallowing false and misleading statements by candidates or their staffs and elevating the subject matter of the advertisements to the relevant concerns of candidates' ability to perform the judicial function.

[21] The Judicial Campaign Advertising Guidelines are set forth in Appendix H.

SECTION III

CONCLUSION

The Commission recognizes that many of its recommendations may be viewed as controversial. To a large extent, the decision of the Commission to go forward is based upon two conclusions. First, the public blames our sitting judges for what they perceive as the corruptive influence of money in our elective system. The result has been that an alarmingly large segment of the population has lost faith in the integrity of the judiciary. Fortunately, however, an equally large segment of the public believes that these problems are solvable, which should translate into widespread support should this Court decide to implement change.

The second factor which has motivated the Commission may be of even greater consequence. The fear of what the future may bring, if we do nothing. We refer not only to the empirical evidence of geometrical increases in judicial campaign spending at all levels[22], but a prediction of Armageddon which the Commission finds to be entirely plausible. Fred Voigt, Executive Director of the Committee of Seventy, in his testimony outlined a scenario which he believed would cause the Commonwealth to adopt appointive selection after the next Supreme Court race:

> "In most jurisdictions that have done away with electing judges, they needed a disaster to propel that. We're going to have one. . . . Given this lineup now, we have four Democrats and three Republicans, so control over that process is at stake. So you are going to have nuclear war that's going to rage." Appendix F, 170-1. (emphasis supplied)

[22] See supra Section II-B.

Mr. Voigt was referring to his belief that because legislative reapportionment may be affected by the outcome of the next Supreme Court race, the political parties are likely to engage in the type of "no holds barred"campaign that would greatly exacerbate the public's existing antipathy toward judicial elections.

Recognizing the unfortunate truth that no system is perfect, we urge the Supreme Court of Pennsylvania to weigh carefully the potential for improving the elective process through amendments to the Code of Judicial Conduct against the risks that may be attendant to change. We are confident that if this Court chooses to implement reform, it will do so not only with the active support of the lawyers of this Commonwealth, but based upon the polling results, with overwhelming support from the public as well. As stated in the LSSP/Deardourff Executive Summary: "There is remarkably little demographic, geographic, or partisan variation in voters' attitudes on these issues. Pennsylvanians of all parties and in all parts of the state believe strongly that reform of judicial elections is needed and that reform would have beneficial consequences." LSSP/Deardourff Exec. Summ., Appendix A, 18.