IN THE SUPREME COURT OF PENNSYLVANIA

Supreme Court Docket No. 9 MAP 2006

THE HONORABLE CHARLES C. BROWN, JR., THE HONORABLE FRANK T. HAZEL, THE HONORABLE ROBERT E. KUNSELMAN, THE HONORABLE BENJAMIN LERNER, THE HONORABLE WILLIAM A. MEEHAN, THE HONORABLE TIMOTHY PATRICK O'REILLY, AND THE HONORABLE JOSEPH A. SMYTH,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, EDWARD G. RENDELL, Governor of the Commonwealth of Pennsylvania, AND ROBERT P. CASEY, JR., State Treasurer of the Commonwealth of Pennsylvania,
Respondents.

BRIEF OF AMICUS CURIAE THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF PETITIONERS

Marc J. Sonnenfeld (Pa. I.D. No. 17210)
Timothy D. Mygatt (Pa. I.D. No. 90403)
Thomas V. Ayala (Pa. I.D. No. 93130)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5000

Attorneys for the Philadelphia Bar Association

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I. INTRODUCTION

Pursuant to Rule 531(a) of the Pennsylvania Rules of Appellate Procedure, Amicus Curiae The Philadelphia Bar Association ("the amicus") submits this brief in support of the position of Petitioners The Honorable Charles C. Brown, Jr., The Honorable Frank T. Hazel, The Honorable Robert E. Kunselman, The Honorable Benjamin Lerner, The Honorable William A. Meehan, The Honorable Timothy Patrick O'Reilly, and The Honorable Joseph A. Smyth. This Court has assumed plenary jurisdiction over this matter, granting the Application for Extraordinary Relief of Petitioners in its January 11, 2006 Order. The amicus agrees with the factual and legal analysis presented in the brief of Petitioners, but presents this brief to emphasize the importance of judicial independence to the amicus's members and the public.

II. STATEMENT OF INTEREST

Founded in 1802, the Philadelphia Bar Association is a non-profit organization composed of 13,000 attorneys from multiple Pennsylvania counties. Philadelphia is Pennsylvania's largest metropolitan area, with a population of nearly 1.5 million in the city alone and more than six million people in the greater metropolitan area. In 2004, the Philadelphia Courts of Common Pleas disposed of more than 50,000 civil and criminal cases.[1] Members of the Philadelphia Bar Association are involved in a large proportion of these cases, and are therefore acutely aware of the necessity for a strong and independent judiciary. They understand and appreciate both the cost to taxpayers of government services and the public benefits offered by an efficient judicial

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[1] *See* Z. A. Pines, *2004 Caseload Statistics of the Unified Judicial System of Pennsylvania*, *at* http://www.courts.state.pa.us/Index/Aopc/Research/caseloads/2004report.pdf.

system. Accordingly, the Philadelphia Bar Association and its members have actively supported the provision of public services not only in the most economical manner possible but at the highest level of quality as well.

In their various capacities within the legal profession, the amicus's members have a deep and abiding respect for each of the co-equal branches of the government of the Commonwealth and for the spirit of the Constitution which guides them. Indeed, no mission has been of greater importance to the Philadelphia Bar Association than preserving and protecting the independence of the judiciary. That mission is of particular urgency now, when direct and indirect threats to judicial independence are emanating even from those who should understand that our democratic freedoms are dependent upon judges who can decide cases without worrying about political reprisals. As a result of its members' sensitivity to any abrogation of constitutional principles, the amicus, perhaps more than the average taxpayer, has a strong interest in seeking to maintain the independence of the judiciary.

As attorneys, the amicus's members recognize that a truly autonomous judicial system cannot be subject to the whims of the political process or public outcry. The diminishment of the judiciary's compensation through the Act of November 16, 2005, P.L. 385, No. 72 ("Act 72"), however, subjected the judiciary to the variable winds of legislative and public opinion, compromising judicial independence and endangering public confidence in the judicial system. The amicus therefore urges this Court to declare the diminishment of judicial compensation effected by Act 72 to be unconstitutional.

III. INCORPORATION OF STATEMENTS

The amicus incorporates by reference the Statement of Jurisdiction, Statement of the Questions Involved, and Statement of the Case set forth in the brief of Petitioners The Honorable Charles C. Brown, Jr., The Honorable Frank T. Hazel, The Honorable Robert E. Kunselman, The Honorable Benjamin Lerner, The Honorable William A. Meehan, The Honorable Timothy Patrick O'Reilly, and The Honorable Joseph A. Smyth.

IV. SUMMARY OF ARGUMENT

It has been a long-established constitutional principle that judicial compensation cannot be diminished. This prohibition is inherent in the fundamental constitutional framework of the Commonwealth, which relies on a separation of power among the co-ordinate branches and the independence of the judiciary. Act 72 clearly diminishes judicial compensation, and does so in a manner that raises the very concerns that the constitutional principle against diminution of judicial compensation was designed to address. Moreover, a finding of improper legislative purpose in reducing judicial compensation is not requisite for this Court to hold Act 72 unconstitutional. Because Act 72 results in a clear diminishment of judicial compensation in a manner that has the potential to compromise judicial independence, it should be declared unconstitutional.

V. ARGUMENT

A. The Prohibition Against Diminishment of Judicial Compensation Is Intrinsic to the Structure of Our Government and Has Been Consistently Upheld.

Article V, Section 16(a) of the Pennsylvania Constitution of 1968 expressly prohibits the legislature from diminishing the compensation of judges while in office except by a law applying generally to all salaried officers of the Commonwealth:

> Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

Pa. Const. art. V, § 16(a). This prohibition against diminishment of judicial compensation dates back to the origins of the Commonwealth itself and has been continually reaffirmed. The Constitution of 1776, Section 23, provided that fixed salaries should be given to the judges of the Supreme Court. Article V, Section 2 of the Constitution of 1790 provided, in part, that "[t]he judges of the supreme court and the presidents of the several courts of common pleas, shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office." Article V, Section 2 of the Constitution of 1838 provided similarly. Even when such an explicit prohibition was not included in the Constitution of 1874, this Court nevertheless found that the proscription against diminishment of judicial compensation was one of the "fundamental constitutional principles underlying the structure of our constitutional government." *Commonwealth ex rel. Carson v. Mathues*, 210 Pa. 372, 59 A. 961 (1904); *see also Bailey v. Waters*, 308 Pa. 309, 162 A. 819 (1932). "[I]n our frame of government the judiciary must be independent . . . ." *Id.* at 315, 162 A. at 821.

A nearly identical provision against the diminishment of judicial compensation as that found in the Pennsylvania Constitution was included in the Constitution of the United States

(Article III, Section I), an unsurprising fact given how close in time and place each was created. The framers of both the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania, cognizant of the abuses they had suffered at the hands of colonial judges dependent on the favor of the British crown, divided the power of government into three independent, co-equal branches: the executive, legislative, and judicial. *Goodheart v. Casey*, 521 Pa. 316, 319-20, 555 A.2d 1210, 1211, *aff'd after reargument*, 523 Pa. 188, 565 A.2d 757 (1989); *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403, 406-07 (1843); *see also United States v. Will*, 449 U.S. 200, 219 (1980).

> The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence – if it was not made both real and enduring – the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

Evans v. Gore, 253 U.S. 245, 249 (1920). Because of the particular susceptibility of the judiciary to be dominated by the other two branches, the Compensation Clauses of both the federal and Pennsylvania Constitutions were formulated to maintain the independence of the judiciary from encroachment or improper influence. *See Firing v. Kephart*, 466 Pa. 560, 568, 353 A.2d 833, 837 (1976); *see also Will*, 449 U.S. at 217-18 ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

An oft-cited phrase by Alexander Hamilton emphasizes the necessity of protecting judicial compensation from diminishment in order to maintain the integrity and independence of the judiciary: "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." *The Federalist No. 79*, p. 491 (1818), cited in *Will*, 449 U.S. at 218. Similarly, former Chief Justice John Marshall highlighted the necessity of a fully independent judiciary to the administration of justice:

> The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.

Debates Va. Conv. 1829-1831, at 616, 619, cited in *Evans*, 253 U.S. at 250-51.

The concern that a judiciary could not be truly independent absent fixed financial resources not subject to the manipulation of the executive or legislature has led this Court to consistently strike down efforts by the legislature to diminish judicial compensation in a way that might impair the freedom of the judiciary. *See, e.g.*, *Bailey*, 308 Pa. at 315, 162 A. at 819 (prohibiting diminishment of a judge's compensation during his term of office despite judicial redistricting by the legislature that reduced the pay to which he was entitled); *Mann*, 5 Watts & Serg. 403 (holding unconstitutional the repeal of an earlier statute which raised judicial compensation); *see also Catania v. Commonwealth, State Employees' Ret. Bd.*, 71 Pa. Commw. 393, 455 A.2d 1250 (1983) (prohibiting reduction of judges' pension benefits as an unconstitutional diminishment of judicial compensation). Similarly, the need to maintain a judiciary free from legislative influences requires that Act 72 be declared unconstitutional.

B. Judicial Compensation Is Clearly Diminished by Act 72.

There can be no question that Act 72 diminishes judicial compensation. Judicial compensation is "diminished" if there is a repeal of a salary increase already in force. *Will*, 449 U.S. at 225. In this case, the General Assembly of Pennsylvania enacted a statute, the act of July 7, 2005, P.L. 201, No. 44 ("Act 44"), providing salary increases that the judiciary began to receive immediately, and that the legislature and certain officers of the executive would receive following the next election. There was an immediate backlash from the public. Due to this public outcry, the legislature passed Act 72, which purported to entirely repeal Act 44, including the judicial pay increases.

Respondents cannot argue that Act 72 somehow "relates back" and eliminates the passage of Act 44 *nunc pro tunc*, such that there was no actual diminishment of judicial compensation. Once a statute is passed and a right under that statute is vested, the legislature cannot retroactively rescind that right by the passage of a later statute. In *Will*, for example, statutes providing for pay increases for the judiciary were enacted in four separate years. 449 U.S. at 205-08. In two of the years, Congress passed statutes repealing the pay increases, and the President signed the repealing statutes into law before the judicial pay increases took effect. *Id.* at 206-08. The United States Supreme Court held that the repeal of the pay increases in these years resulted in no diminishment of judicial compensation and were therefore constitutional. *Id.* at 226-29. However, in the other two years, although Congress passed statutes repealing the pay increases, the President did not sign the repealing statutes until after the judicial pay raises took effect. *Id.* at 205-09. For these years, because the pay increases were already in force, the

Supreme Court held that the statutes repealing the pay increases diminished judicial compensation and were therefore unconstitutional. *Id.* at 224-30.

In this case, the increase in judicial compensation became effective upon the enactment of Act 44. The judges of the Commonwealth received this higher rate of pay from July 7, 2005 until the repeal of Act 44 on November 16, 2005. Act 72 therefore repealed a salary increase already in force and "diminished" judicial compensation as that term is used in Article V, Section 16(a) of the Pennsylvania Constitution.

The present issue is strikingly similar to that found in *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403 (1843). In that case, a judge was appointed to the Court of Common Pleas on March 5, 1839. *Id.* at 404. At the time of his appointment, the salary for the judge's position was $1600 per year. *Id.* On July 19, 1839, the Pennsylvania legislature enacted a statute increasing his pay $400, for a total of $2000 per year. *Id.* The legislature subsequently repealed this pay increase in a statute passed on January 14, 1843. *Id.* at 404-05. This Court held that the statute of January 14, 1843 violated the prohibition against diminishment of judicial compensation found in the Pennsylvania Constitution of 1838 and was therefore void. *Id.* at 422.

The facts involved in *Mann* are virtually indistinguishable from those at issue here. In both cases, the legislature gave a pay increase to the judiciary, the pay increase was in effect for a period of time, and the legislature attempted to repeal the pay increase by later statute. Nor is there any significant difference between the prohibition against diminution of judicial compensation found in the Pennsylvania Constitution of 1838 and the one in force today. The only exception to the prohibition against diminishment of judicial compensation, provided for in the present Constitution but not found in the Constitution of 1838, is for diminishment "by law applying generally to all salaried officers of the Commonwealth." But as Petitioners have ably

pointed out, this exception does not apply in the present case. The diminishment attempted by Act 72 does not apply generally to all salaried officers of the Commonwealth, does not in fact diminish the salary of any officer of the Commonwealth except the judiciary, and does not provide for a uniform pay reduction for all salaried officers of the Commonwealth. Without any meaningful distinction between the issue in this case and that in *Mann*, that holding compels the conclusion that Act 72 is unconstitutional.

C. A Finding of Improper Purpose Is Not Required to Hold Act 72 Unconstitutional.

The General Assembly need not have had an improper purpose for diminishing judicial compensation for that diminishment to be unconstitutional. When passing Act 72, the legislature included a policy statement declaring that it did not intend to interfere with the independence of the judicial branch. *See* Act 72, § 1(b). Act 72 also contains another declaration of policy that purports to define the phrase "all salaried officers of the Commonwealth" found in Article V, Section 16(a) of the Constitution as the officers referenced in Act 72. *See* Act 72, § 1(c). In so doing, the legislature did not render an otherwise unconstitutional diminishment of judicial compensation permissible. Rather, the legislature usurped the function of the judiciary as the ultimate interpreter of the Constitution, highlighting the danger of an overreaching legislature against which the Compensation Clause was designed to protect.

First, this Court has long held that it is the judiciary's responsibility, not the legislature's, to declare the meaning of the Constitution. *See Mann*, 5 Watts & Serg. at 418-19 ("A doubt has been expressed . . . that the court has no right to declare an Act of the Legislature unconstitutional. Whatever scruples may have existed in the minds of some as to this power, it

has now ceased to be an open question. This power has been repeatedly asserted by the courts of the United States, and of this State, and has been most cheerfully acquiesced in by the people. . . . This is the necessary result of the distribution of power made by the Constitution between the legislative and judicial departments."); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). In defining terms within the Pennsylvania Constitution, the General Assembly assumed a role reserved to the judiciary. Moreover, it did so in an attempt to exert its influence over the judiciary, in order to shield its actions from judicial review. This merely compounds the problem where the very issue involved is the independence of the judiciary from legislative control. It is the responsibility of this Court to decide the meaning of the Constitution, and the General Assembly's gloss on its meaning is entitled to no deference, especially where deference would only further subjugate the judiciary to the legislature.

Second, the General Assembly's intent in repealing Act 44 and diminishing judicial compensation is irrelevant for constitutional purposes. As this Court held in *Mann*, the question for constitutional purposes is not whether the legislature ***intended*** to exert some control over the judiciary, but whether through the diminution of judicial compensation such control is ***possible***:

> It is not intentional disrespect to a co-ordinate branch, nor to the judiciary, to suppose it possible that cases may arise, where, to effect a favourite object of legislative ambition, or to gratify the vindictive feelings occasioned by the phrenzy and madness of party, a successful resort may be had, by such means, to the judicial tribunals of the country. That cases of the kind will not be frequent I am ready to admit; but that they are *possible*, and have taken place in other lands, if not in this pure and enlightened Commonwealth, will hardly be denied by those who have taken the trouble to look into the history of the times, and particularly that period of history where the judicial departments were subject to the

> temptations which must necessarily arise from a dependent condition.

5 Watts & Serg. at 409.

This Court implicitly adhered to the view set forth in *Mann* in *Bailey v. Waters*, 308 Pa. 309, 162 A. 819 (1932). The issue was whether a judge's pay could be diminished during his term of office due to a legislative reduction of his judicial district. 308 Pa. at 310-11, 162 A. at 819-20. Due to the redistricting, the judge was entitled to lesser pay, because judicial pay rates were based on the size of the district. *Id.* This Court held the reduction in pay unconstitutional. *Id.* at 319, 162 A. at 823. Significantly for present purposes, this holding was not dependent on a finding that the legislature intended to exert its influence over the judge through the redistricting; there is no mention of any improper legislative purpose in the opinion.

Similarly, the Commonwealth Court's opinion in *Catania v. Commonwealth, State Employees' Ret. Bd.*, 71 Pa. Commw. 393, 455 A.2d 1250 (1983) was not dependent on a finding of improper purpose. In *Catania*, a legislative change would have led to the reduction of judges' pension benefits. 71 Pa. Commw. at 409-10, 455 A.2d at 1258-59. In holding that the reduction of judges' pension benefits was unconstitutional, the court made no finding of improper legislative purpose; it was enough that the legislation would have resulted in the diminishment of judicial compensation. *Id.*

The manner in which the General Assembly increased and then diminished judicial compensation in this case is particularly subject to abuse, even if not intended, and should not be permitted. The General Assembly provided themselves and certain officers of the executive with a ***prospective*** pay raise, not yet effective when the pay raises were repealed. But the General Assembly made the judiciary's pay increase effective ***immediately***, and judges of the

Commonwealth received this pay increase for several months before the repeal. Structuring the pay raises as merely prospective for the legislature and the executive, but immediate for the judiciary, and then repealing all the pay raises before the increases for the executive and legislative branches took effect, may create the appearance of a general diminishment, but that in fact did not occur. Thus, even if the General Assembly in this case had made the pay increase and repeal applicable to "all salaried officers of the Commonwealth," if the pay raises for officers other than the judiciary had not yet taken effect upon repeal, it would create a mechanism whereby the legislature could exert control over the judiciary while purporting to fulfill the language of the Constitution. Even if the legislature does not purposefully seek to control the judiciary, it is the ***possibility*** that such control could result that makes the statute diminishing judicial compensation unconstitutional. *See Mann*, 5 Watts & Serg. at 409.

D. This Case Illustrates the Dangers Against Which the Compensation Clause Was Designed to Protect.

The diminishment of judicial compensation attempted by the legislature through the passage of Act 72 implicates the precise concerns that led to the formulation of the Compensation Clauses in the Constitutions of Pennsylvania and the United States. The public outcry against Act 44 precipitated the repeal of that statute by the legislature through Act 72. Through Act 72, the legislators were attempting to appease their constituencies.

Yet the very purpose of the Compensation Clause was to shield judicial action from popular sentiment. While the legislature is intended to be responsive to public opinion and popular views, the judiciary exists to protect the rights of individuals from oppression by the majority. *See Mann*, 5 Watts & Serg. at 411 ("This independence of the Judges is equally

requisite to guard the Constitution and rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves; and which, although they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."); John Marshall, *Debates Va. Conv. 1829-1831*, at 616, 619, cited in *Evans*, 253 U.S. at 250-51 ("Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness?"). While the oppression of individual rights is not at issue in the present case, the diminution of judicial compensation due to the legislature's efforts to assuage the ire of the electorate must not be permitted. The judiciary's ability to properly administer justice for all who stand before it – rich or poor, popular or unpopular – is contingent upon it being shielded from rapid changes in public opinion and legislative will.

VI. CONCLUSION

The express language of Article V, Section 16(a) of the Pennsylvania Constitution, the history of the Compensation Clauses found in both the earlier Constitutions of the Commonwealth of Pennsylvania and the Constitution of the United States, and cases interpreting those clauses establish that diminishment of judicial compensation as attempted by Act 72 is unconstitutional. The amicus is particularly concerned that any holding other than unconstitutionality would seriously undermine the independence of the judiciary and endanger public confidence therein. For all of the reasons set forth herein, and for the reasons set forth in the brief of Petitioners, the diminishment of judicial compensation purportedly effected by Act 72 should be held unconstitutional.

Respectfully submitted,

Marc J. Sonnenfeld (Pa. I.D. No. 17210)
Timothy D. Mygatt (Pa. I.D. No. 90403)
Thomas V. Ayala (Pa. I.D. No. 93130)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5000

Attorneys for the Philadelphia Bar Association

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CERTIFICATE OF SERVICE

I, Thomas V. Ayala, hereby certify that I am this day serving the foregoing Brief of Amicus Curiae The Philadelphia Bar Association upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service By First-Class Mail Addressed As Follows:

Gregory E. Dunlap
Deputy General Counsel
OFFICE OF GENERAL COUNSEL
333 Market Street
17th Floor
Harrisburg, PA 17102
717.783.6563

Gregory R. Neuhauser
Senior Deputy Attorney General
Amanda L. Smith
Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
Strawberry Square, 15th Floor
Harrisburg, PA 17120
717.787.8106
717.787.1194

Attorneys for Respondents Commonwealth of Pennsylvania and Thomas W. Corbett, Jr., Attorney General of Pennsylvania

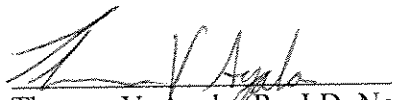
Sally Ann Ulrich
Chief Counsel
TREASURY DEPARTMENT
127 Finance Building
Harrisburg, PA 17120
717.787.4104
Attorneys for Respondent Robert P. Casey, Jr., State Treasurer of Pennsylvania

Zygmont A. Pines
COURT ADMINISTRATOR OF PENNSYLVANIA
1515 Market Street
Suite 1414
Philadelphia, PA 19102
215.560.6300

Jane Leslie Dalton
John J. Soroko
Matthew M. Ryan
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103-4196
215.979.1000
Attorneys for Petitioners The Honorable Charles C. Brown, Jr., et al.

Thomas G. Wilkinson, Jr.
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
215.665.2000
Attorneys for Amicus Curiae The Pennsylvania Bar Association

Dated: February 21, 2006



Thomas V. Ayala (Pa. I.D. No. 93130)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5000

Attorneys for the Philadelphia Bar Association