From the Chair

Last year at this time I announced that the Government Lawyers Committee was making a concerted effort at driving up our membership. To this end, we formed the new Membership Subcommittee and put Deputy General Counsel Doreen McCall in charge. Thanks to Doreen’s efforts and those of her subcommittee members, including Deputy General Counsel K. Scott Roy and Assistant General Counsel Susan Hensel, the number of Government Lawyer Committee members has hit an all time high. I appreciate their efforts and know that they plan on working until the committee membership reaches our target of 400 members.

I would like to offer my thanks to the many members who supported the committee by attending the May meeting in Hershey. The various subcommittees have been working all year on worthwhile projects, and I hope that more of you will get involved in the activities. As the Social Subcommittee reported, the Relay for Life needs walkers and sponsors. Additionally, I believe that the Services to Members subcommittee is looking for volunteers to help finish the Web site project. The Career Enhancement Subcommittee reported that it plans to continue its popular “Leaders on Leadership” series, through which preeminent members of the bar share their views on how to lead, motivate and inspire attorneys in the public sector. Chris Carusone, assistant counsel, Pennsylvania State Police, has agreed to take over for Lisa-Jo Fanelli-Greer and co-chair the Career Enhancement Subcommittee with Department of State Chief Counsel John Henderson.

When the committee was formed in 1998, it was because we, as government lawyers, wanted to do more. We wanted to raise the image of government lawyers in the profession. We wanted to be heard on public policy issues. We wanted to see government lawyers as bar leaders. I believe that we have come a long way toward fulfilling that mission. But, we can do more. With your help, we will continue to grow and add to our list of accomplishments. We look forward to engaging more of you directly in our activities and to identifying and meeting your professional needs.

—-

James M. Sheehan

Government Lawyers Win PBA Pro Bono and Special Achievement Awards

Jim Sheehan, chair of the Government Lawyers Committee and general counsel to Gov. Mark Schweiker; and Steve Turner, deputy general counsel, were among those honored by the PBA for their outstanding contributions to the provision of pro bono services to the less fortunate.

Also honored were Assistant Counsel Chris Carusone, Pennsylvania State Police; Chief Counsel Jerry Mackarevich, Pennsylvania Commission on Crime and Delinquency; and Assistant Chief Counsel Bob Shea, Department of Transportation, who received special achievement awards for developing the Government Lawyers Career Information Center Web site.

The PBA presented these outstanding government lawyers with their awards and thanked them for their hard work and achievements at a special awards breakfast held during the PBA annual meeting on May 2.

Sheehan was recognized for the pivotal role he has played in encouraging the Commonwealth’s attorneys to participate in the Office of General Counsel’s Pro Bono Initiative. Turner was honored for his unwavering dedication to the YWCA and

(continued on Page 2)
The month of May marks the beginning of a new year for the Government Lawyers Committee. The new year means new opportunities for committee members to realize the benefits of being a part of this growing, professional organization.

To that end, we invite you to become more active in the committee, to serve on a subcommittee, or simply to offer feedback on how the committee and its subcommittees can better serve you. Whether you have someone in mind for the Career Enhancement Subcommittee to invite to speak at the next “Lunch and Learn,” a lead on a guest author to write a feature article for News & Views or a suggestion for an event the Social Subcommittee could sponsor or participate in, we would like to hear from you.

You can e-mail your ideas, leads or suggestions to Doreen at dmcall@state.pa.us or Susan at shenseljar@state.pa.us.

We look forward to hearing from you and to having another productive year for the Government Lawyers Committee.

Govt. Lawyers Win PBA Pro Bono and Special Achievement Awards

(Continued from Page 1)

to its domestic violence prevention program.

Carusone, Mackarevich and Shea were singled out for their extraordinary effort in building a Web site that will help educate the legal community about the work that government lawyers at all levels perform.

Congratulations to Jim, Steve, Chris, Jerry and Bob for setting such a great example.
Subcommittee Reports

What’s Going On

Membership Subcommittee

Even if you have not renewed your membership in the Government Lawyers Committee yet, it is not too late. (Remember, memberships automatically expired on April 30.) To sign up, visit the PBA Web site at www.pabar.org.

Since the formation of the Membership Subcommittee last year, membership has increased significantly, with more than 100 new members joining our ranks. We continue to encourage members to recruit other government lawyers so that they, too, can benefit from this worthwhile organization.

Career Enhancement

The Career Enhancement Subcommittee continues to assemble panels of government lawyers to discuss the benefits of careers in government service with law school students. The panels have featured lawyers from the Office of General Counsel, Office of Attorney General, Pennsylvania Human Relations Commission, district attorney’s offices, HUD and various U.S. attorneys’ offices. The programs have been well received, especially at Dickinson, where 40 law students recently attended a presentation, and at Temple University School of Law, where as many as 50 law students attended.

The panels also spoke at Widener University School of Law, the University of Pennsylvania School of Law and Duquesne University School of Law.

In addition, the subcommittee is excited about the “Lunch and Learn” events scheduled for the remainder of the year. On May 22, Col. Thomas McShane, National Security Studies, United States Army War College, will speak on balancing constitutional rights with the need for increased national security. On Sept. 11, Sheila Dow-Ford, vice president and chief counsel for the Pennsylvania Higher Education Assistance Agency, will speak on leadership. On Nov. 6, H. Reginald Belden, past PBA president, will speak on how the PBA can enhance the career of attorneys in public service.

Lunch and Learn Series

Long Term Care: Planning is the Key

By Judy Gilroy, Assistant Counsel, Governor’s Office of General Counsel assigned to the Department of Labor and Industry

It is something that none of us want to think about, but that most of us will have to deal with someday, either for ourselves or for a loved one. It is the need for extended health care services, otherwise known as long-term care.

On Feb. 14, the Career Enhancement Subcommittee of the Government Lawyers Committee presented a “Lunch and Learn” with guest speaker Sheila Thurston of PIS Inc. PIS counsels clients on long-term care issues.

Thurston, who graduated from the University of Scranton and the Widener University School of Law, shared some sobering statistics with those who attended: one-fourth of all Americans will eventually need some type of long-term care and nearly 40 percent of those receiving long-term care are under the age of 65.

These numbers will likely go much higher as the baby boom generation continues to reach retirement age. Therefore, all of us should, in thinking about our futures, plan for long-term care.

According to Thurston, long-term care insurance is an increasingly popular option for those who wish to protect their assets. There are many different types of long-term care insurance plans available. Most are expense reimbursement plans while others are more flexible indemnity plans. Plans can be individual or pooled with one’s spouse.

When choosing long-term care insurance it is important to remember that costs are expected to rise seven to eight percent annually. You should take this into account when making your long-term health care decisions.

Thurston stressed that advanced planning is the key to being prepared for your future and the future of those you love.

For more information about long-term care and other elder care needs, you can contact your County Office of Aging.

Relay for Life

The Government Lawyers Committee is organizing a team to participate in the American Cancer Society’s Relay for Life event. The event will be held June 22-23 on City Island in Harrisburg. If you are interested in participating on the team, please contact Paul Stahlnecker at 717-237-0373 or pstahlneck@state.pa.us.
On Feb. 5, the Pennsylvania Bar Institute (PBI) gathered an impressive panel of election law attorneys from both the public and private sectors to present the continuing legal education course “Election Law in Pennsylvania: The Legal Nuts and Bolts of the Race for Public Office.” The panel presented useful information on election law topics such as campaign finance, the procedures for getting a candidate on a ballot, and voter registration.

A highlight of the program came when Sherry Swirsky, partner, Schnader Harrison Segal & Lewis LLP, discussed campaign finance and the expenditure of funds for so-called express advocacy — communications that include explicit words of advocacy of election or defeat of a candidate — and issue advocacy — First Amendment protected communications that do not expressly call for the election or defeat of a candidate. See *Buckley v. Valeo*, 424 U.S. 1, 45-46 (1976); see also Bipartisan Campaign Reform Act of 2002, which among other things, places new restrictions on express advocacy. Swirsky explained, however, that Pennsylvania election law is not clear on this issue.

Whether the Pennsylvania Election Code applies to issue and express advocacy is unclear considering *Buckley*. For example, during the 2001 Supreme Court election campaign between J. Michael Eakin and Kate Ford Elliot, the Law Enforcement Alliance of America (LEAA) ran commercials on local television stations touting Justice Eakin and questioning Judge Elliot’s credentials. The advertisements, however, did not expressly advocate the election of Justice Eakin or the defeat of Judge Elliot. Nonetheless, supporters of Judge Elliot made a legal challenge in Common Pleas Court claiming that the LEAA’s commercials, when considered as a whole, amounted to express advocacy on behalf of Justice Eakin or the defeat of Judge Elliot. Nonetheless, supporters of Judge Elliot made a legal challenge in Common Pleas Court claiming that the LEAA’s commercials, when considered as a whole, amounted to express advocacy on behalf of Justice Eakin and questioning Judge Elliot’s credentials. 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Nonetheless, supporters of Judge Elliot made a legal challenge in Common Pleas Court claiming that the LEAA’s commercials, when considered as a whole, amounted to express advocacy on behalf of Justice Eakin or the defeat of Judge Elliot. Nonetheless, supporters of Judge Elliot made a legal challenge in Common Pl...
A Profile of Pennsylvania Supreme Court Justice J. Michael Eakin

By Alison Taylor, Assistant General Counsel, Governor’s Office of General Counsel

There’s a principle that has guided Justice J. Michael Eakin throughout his entire life and particularly throughout his life as a lawyer. It is a maxim that figures into almost every speech he has ever given to gatherings of lawyers and judges, to legislative and community groups, at retirement dinners and Rotary luncheons: “Do the right thing for the right reason.”

With his wit, good humor and warm, self-effacing manner, Justice Eakin has always been a popular speaker at a wide variety of events. As his legal career progressed from district attorney to Superior Court judge to Supreme Court justice, he found himself in ever-increasing demand to talk about justice, the law and the courts. Today, it is a role he relishes and believes is instrumental in making the court more accessible to the public and the bar it serves.

As district attorney, Justice Eakin enjoyed, but was sobered by, being on the front lines of battling crime, making charging decisions, and crafting and executing public policy to better serve the people of the Commonwealth, including those accused of crimes. “I was a ‘minister of justice’ and not just an advocate for the state,” he explained. “A DA has an obligation to be even-handed and impartial. I had to do the right thing for the victim and the public while protecting the rights of the accused because I represented all three.” In doing “the right thing for the right reason,” Justice Eakin developed the ability to balance often-competing interests — an ability that served him well on the Superior Court and will serve him well on the state Supreme Court.

In 1995, he was elected to the Pennsylvania Superior Court. During his years on that court, Justice Eakin earned a reputation for asking thoughtful, common sense questions. He became known for putting advocates at ease — with good-natured humor when appropriate — while tenaciously pressing the advocates to address what he viewed as the real crux of the matter.

Justice Eakin was the first Superior Court judge to bring a laptop onto the bench with him. Rather than relying on bench memos prepared by his law clerks, he prepared for oral argument by reading every brief himself and using his laptop to make notes and record questions he wanted answered about the case. During oral argument, he could then ensure that the advocates answered the questions his advance review of the briefs and case record had raised. He also could make additional notes during the argument to capture precisely the advocate’s position on key issues.

Since his election to the high court in 2001, Justice Eakin has continued this pre-oral argument practice and use of his laptop. He thus becomes the court’s second jurist (The first was Justice Newman.) to make the most of computer technology to prepare for and hear oral argument. Justice Eakin has been

(Continued on Page 6)
**Close Up**

**Day–by–Day and Client–by–Client Add Up to 30 Years of Outstanding Service**

*A Profile of Greg Santoro, Chief Counsel to the Department of General Services*

*By Donald L. Carmelite, Assistant Counsel, Environmental Hearing Board*

In April, the Office of General Counsel congratulated Greg Santoro, chief counsel to the Department of General Services, for his 30 years of service to the Commonwealth as an attorney. At a surprise luncheon held in Santoro’s honor, General Counsel James M. Sheehan and Secretary of General Services Kelly Powell Logan recognized Santoro for his three decades of service. In addition to his colleagues, Santoro’s wife, Colette; son, Bryce; daughter-in-law, Katie; and granddaughter, Julia joined in the celebration held at the Firehouse restaurant in Harrisburg.

Santoro began his career with the Commonwealth in 1972 at the Department of Transportation as an assistant attorney general. He remembers those years fondly. Santoro, who was in his first year of practice, was one of six attorneys who traveled the state litigating eminent domain cases that arose from the department’s highway and road construction activities. For approximately three years “it was like living out of a suitcase for three or four days a week,” said Santoro. However, he recognized the valuable experience he was getting. Within those three years, Santoro had litigated at least 10 jury trials.

From 1980 to 1995, Santoro served the department as an assistant counsel and later as assistant chief counsel. In these roles, his days as a traveling litigator ended, but his career as a transactional attorney began. What Santoro enjoys most as an attorney is sitting across the table from the opposition and negotiating a favorable result for his client. He has had plenty of opportunities to do this at the department. At one time the department operated the Harrisburg International Airport (HIA). Santoro, on several occasions, was part of a team that negotiated all aspects of the relationship between the department and the commercial airlines operating at HIA. He remembers this as a frustrating but also an enjoyable and rewarding experience because of the “across the table” competition.

In 1995, then General Counsel Paul A. Tufano appointed Santoro chief counsel to the Department of General Services. As chief counsel, Santoro’s practice focuses on, among other things, procurement, public works and landlord/tenant matters. Santoro is particularly proud of his current position because he was promoted from within. He especially enjoys being the person ultimately responsible for the department’s legal team. Santoro also appreciates his current position for the many opportunities it provides for him to counsel clients and work with colleagues whose assistance he respects.

For 30 years, Santoro has practiced law the same way — day-by-day and client-by-client. He approaches each day with the same outlook as the next and brings with him to the job a strong Pennsylvania work ethic. According to Santoro, each day is “about picking up my lunch bucket, going to work, and trying to get the best result for my client.” Indeed, Santoro wants to be remembered not for his 30-plus years of service, but for the service he gives his last client. He says if his last client is happy with the results he worked for then he too will be happy. However, as long as that little flame burns inside, Santoro does not plan to retire anytime soon. So that lucky last client will just have to wait.

**Close Up: J. Michael Eakin**

**The Right Man in the Right Place**

*(Continued from Page 5)*

impressed with the dedication, integrity and professionalism of the current justices on the court. He strives for the same collegial atmosphere, mutual respect and cordial working relationship among the justices that he experienced on the intermediate court. Today, questioning by the justices at oral argument is insightful and to the point, and Justice Eakin believes this comes from the justices’ principled commitment to the law, whatever their ultimate position on the issue.

By joining Justice Tom Saylor, another mid-stater on the bench, Justice Eakin strengthens what he views as necessary regional balance on the high court. A more diverse geographic
representation among the justices brings with it a broader perspective in terms of experience and outlook. “Local knowledge is always important,” Justice Eakin explained. “Justice Saylor and I know the personalities of the judges and many lawyers in Central Pennsylvania, and we know how things work here. We balance the perspectives of our more urban colleagues from Philadelphia and Pittsburgh.”

Whether the philosophical balance on the court has changed is more difficult to judge, although Justice Eakin believes he has shifted the majority on some cases. The political makeup of the court may impact administrative matters, such as appointments of administrative judges and other personnel, but “the people who vote together on cases do not always vote along party lines,” Justice Eakin noted. He sees the justices’ political affiliations rightly giving way to impartiality and fairness as the court strives to achieve justice under the law.

Justice Eakin’s humble, modest manner is reflected in his observation that “my being on the high court doesn’t mean I’m any smarter now than in years past.” It does mean he welcomes invitations to speak at as many functions as he can. He has long believed the Supreme Court should be more visible. “Judges cannot be seen as isolated or aloof,” Justice Eakin observed. “Being accessible to the public at civic, professional or social gatherings shows the citizens of Pennsylvania we are real. At the same time, it reminds us of our commonality with them, as well as with the litigants and advocates that bring their disputes to us for resolution.”

According to Justice Eakin, greater interaction with the public means the court’s decisions are not reached in “ignorance born of isolation” but reflect real world practicalities. This does not mean the court decides cases or makes new law based on the trend of the moment or the whims of public opinion. “But justice,” he notes, “should always be tempered by reality and reflect the law as well as society’s needs and concerns.” In sum, justice means doing the right thing for the right reason — a task Justice Eakin has been striving to do his entire legal career.

Calder Mixes Business and Pleasure in the “Earth Tones”

During business hours, he is an attorney with the Pennsylvania Department of Environmental Protection (DEP). But Thursdays at noon, you will find Bill Calder, assistant counsel, Governor’s Office of General Counsel assigned to DEP, rehearsing in the conference room with at least 20 of his colleagues. The rehearsals are for a workplace singing group appropriately named the “Earth Tones.”

The singers work in the Rachel Carson State Office Building in Harrisburg, either in DEP or in the Department of Conservation and Natural Resources. Calder, who sings bass, is one of the group’s founders. “Although our skill levels differ, we all like music,” he said. The a cappella group sings for fun and for special events. Since forming in late 1999, they have performed at 37 events, including office parties, award luncheons and government dinners.

The group sang recently for Gov. Mark Schweiker at the opening of the state’s Center for Customer Service. They had their largest audience last summer when they sang the national anthem at a Harrisburg Senators’ baseball game.

Back at the office, Calder counsels the department in public contracting and tort liability. He has been with the department since 1986.

He credits much of his love of music to his Grove City College days singing at the Chapel Choir. Calder says he was introduced to some of the major works in choral repertoire while singing at Grove City.

In addition to the Earth Tones, Calder performs with several other groups, including the Central Pennsylvania Oratorio Singers, the Harrisburg Singers and the Mechanicsburg Presbyterian Church Chancel Choir. He also participates in the Berkshire Choral Festival in the summer, which has taken him to Sheffield, Mass.; Canterbury, England; and will take him this summer, to Santa Fe, N.M. “For me, singing is a glorious activity,” he explained. “It ties me to the great choral traditions we inherit, allows me to meet people from all walks of life who share a love of music, and — most of all — keeps me sane in a busy world.”

Excerpts reprinted from the Grove City Alumni Magazine.
Reapportionment: When you Have to Draw the Line Somewhere

By William Martin Sloane, Democratic legal counsel to the Pennsylvania House of Representatives

We are not sure what they do during the other nine years, but once each decade, the “demographics specialists” for the major parties sprout forth fully formed — like Athena from the brow of Zeus — to redraw the map of Pennsylvania into some of the oddest configurations since jigsaws were first invented.

Among the surprising facts emerging from the 2000 census were that (Democratic) Philadelphia lost fewer people over the decade than had been anticipated — only 68,000 — and that the (Republican) counties surrounding Philadelphia had a slower than expected rate of growth. As a result Philadelphia lost only one state House seat (Republican Chris Wogan’s), and the “bedroom” counties picked up only one (in Bucks County).

This was the fourth state legislative reapportionment since the 1968 constitutional revision that established a legislative reapportionment commission. Members for this round were House Majority Leader John Perzel (R-Philadelphia County), House Minority Leader William DeWeese (D-Greene County), Senate Majority Leader David Brightbill (R-Lebanon County), Senate Minority Leader Robert Mellow (D-Lackawanna County), and former Supreme Court Justice Frank Montemuro (R-Philadelphia County), now a senior judge of the Superior Court. Montemuro, who chaired the commission, was designated by the state Supreme Court when the other four members deadlocked in their effort to agree upon a chair.

General Assembly

In the state House of Representatives, only four districts were “moved” to other parts of the state (the lowest number among the last four reapportionments). The state Supreme Court has rejected all challenges filed to the plan. Those four seats that were “moved” are:

1. Allegheny County’s 29th district, with a Republican performance edge but represented by Democrat David Mayernik, was moved to (Republican) Bucks County. Mayernik, whose residence is now in the 16th District, represented by Susan Laughlin (D-Beaver County), chose not to run again.

2. Allegheny County’s 41st District, also with a Republican performance majority but also represented by a Democrat, Ralph Kaiser, was moved to (Republican) Lancaster County. Kaiser’s residence is now located in the 36th District, represented by Democrat Harry Readshaw. Kaiser filed a nomination petition for lieutenant governor and is not challenging Readshaw for the House seat.

3. Washington County’s 47th District, a Democratic area with a Democratic incumbent, Leo Trich, was moved to (Republican) York County. Trich made the Reapportionment Commission’s job easier by announcing his retirement before the plan was adopted.

4. Philadelphia’s 176th District, a Republican neighborhood represented by Republican Chris Wogan, was moved to Monroe County. The new district has a slight Republican registration edge, but the seat is considered highly competitive because of the Democratic candidacy of former Rep. Joseph Battisto. Wogan is now a common pleas court judge.

The state Senate story is much easier to tell: No districts were moved to other parts of the state. Existing boundaries were simply shifted to accommodate population changes. House and Senate reapportionment details are available online at www.dos.state.pa.us/bcel/elections/2001_reap/Final_Reap.html.

Pennsylvania gained population over the past decade, as it has every decade, but its rate of growth was below the national average. As a result, our congressional delegation was reduced from 21 to 19 seats.

U.S. Congress

Pennsylvania actually gained population over the past decade, as it has every decade, but its rate of growth was below the national average. As a result, our congressional delegation was reduced from 21 to 19 seats. There is no commission to handle the federal map; rather the process is handled by legislation, with a bill going through the state House and Senate and on to the governor. That bill is now Act 1 of 2002. Following are among the changes it makes:

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**Reapportionment: When you Have to Draw the Line Somewhere**

(Continued from Page 8)

1. The 3rd District, represented by Robert Borski (D-Philadelphia County) was moved to the northwest corner of the state, where the incumbent is Phil English (D-Erie). This left Borski a resident of the 13th District, represented by Joseph Hoeffel (D-Montgomery County). English and Hoeffel are running for re-election, and Borski is retiring.

2. The 6th District was moved so that incumbent Tim Holden (D-Schuylkill County) no longer resides in it. He is now in the 17th District, in which he is challenging another incumbent, George Gekas (R-Dauphin County). The new 6th District has no incumbent, but Republican state Sen. James Gerlach (R-Chester County) is the lone G.O.P. candidate in this Republican-majority district.

3. The 14th District was moved, and incumbent William Coyne (D-Allegheny County) is retiring. Mike Doyle (D-Allegheny), who now represents the old 18th District, is the only candidate in the new 14th.

4. That’s the easy part; now it gets tricky. Frank Mascara (D-Washington County) is the only incumbent residing in the new 18th District, and John Murtha (D-Cambria County) is the only incumbent residing in the new 12th District. That should solve everybody’s problem, but Mascara finds that most of the district he currently represents has been put in the 12th District and has decided that that’s the area he would prefer to represent. So the two are both seeking election in the 12th District, even though Mascara actually resides in the adjacent 18th. (Members of the General Assembly must reside in the district that they represent, but members of Congress need reside only in the state from which they are elected.) This leaves State Sen. Timothy Murphy (R-Allegheny County) and three Democrats to vie for election in the 18th.

The Congressional redistricting plan can be seen online at www.dos.state.pa.us/bcel/elections/2001_reap/Congreap.html. For those interested in legal issues relating to this process, see the article on “Reapportionment” in the 6th Annual Administrative Law Symposium book (Pennsylvania Bar Institute, 2001).

Dr. Sloane has served as Democratic legal counsel to the Pennsylvania House of Representatives since 1976. He teaches at Widener University School of Law, Capital University of Integrative Medicine, Elizabethtown College, and Wilson College and is chair emeritus of the American Board of Forensic Counselors. His e-mail is sloane@lawyer.com. According to Sloane, House demographic guru W. Scott Casper helped him to sort all this out.

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**Update:**

As we go to press …

By William M. Sloane

Act 1 of 2002, the U.S. Congressional reapportionment legislation described in the main article, has been declared unconstitutional by a 2-to-1 vote of a U.S. District Court panel. Vieth v. Commonwealth of Pennsylvania, ___ F.Supp.2d ___, 2002 WL 530870 (M.D.Pa., April 8, 2002). Judges Nygaard and Rambo (with Judge Yohn dissenting) held that the population difference — although only 19 people — violated the Equal Protection Clause of the Fourteenth Amendment. Any population variance, unless it is “unavoidable or resulted despite a good faith effort to draw districts of equal population,” must be supported by a “legitimate justification …”

The court found that the deviation in Act 1 was not unavoidable and was not the result of a good-faith effort to reach numerical equality. The commonwealth’s purported justification for the variance (“a desire to avoid splitting voting precincts”) was dismissed by the court as “a mere pretext … [I]t is possible to draw a congressional district map with zero deviation and no precinct splits.” The court also found that, of all the maps proposed, Act 1 was the plan “which least comports with the neutral legislative policies that … would justify … some deviations. Act 1 is the plan which contains the least compact districts. … Act 1 splits the most counties (25) and municipalities. … Act 1 even splits the most precincts.” The court noted that, although the goal of avoiding contests between incumbents would justify some population deviation, it was on this point “that Act 1 fails most miserably” by unnecessarily pitting three pairs of incumbents against each other (a total of five Democrats and one Republican).

Judge Rambo granted a stay of the injunction, however, on April 23. This will allow Pennsylvania “to conduct only the 2002 congressional elections using Act 1.” This means that the primary election will be held on May 21 as originally scheduled. Meanwhile the General Assembly had already adopted new U.S. Congressional reapportionment legislation in case the stay was not granted. House Bill 2545, Printer’s Number 3726, passed the state House on April 15 (132-61) and passed the state Senate with amendments on April 17 (29-21). The House concurred in the Senate amendments on April 17 (121-72), and Gov. Schweiker signed it into law on April 18 (Act 34 of 2002). Judge Rambo scheduled a hearing for June on the constitutionality of this new plan. If it is upheld, it will take effect at the 2004 election.
Some Thoughts on Equal Protection & Lawmaking Post-9/11

By Christine H. Kellett, Professor of Law, The Dickinson School of Law of The Pennsylvania State University

Since Sept. 11, many words have been spoken and written about how our governments — state, local and national — should respond to the threat of terrorism within our boundaries. The most immediate response, of course, was in the U.S. Congress as it expeditiously amended federal anti-terrorism statutes to deal swiftly and severely with those suspected of having engaged in terrorism and to cut off the flow of funds that might support the activities of those who would plan and execute further acts of violence. Law enforcement officials, scholars, and politicians discussed and sometimes hotly debated these measures. Compromises were made, and much legislation quickly became law. But now that some time has passed since those tragic events of last fall, state and local governments are pondering the steps that we can take to strengthen — knowing, of course, that we can never assure — our “homeland security.”

As legislation is being written, government lawyers will be called upon for advice. The discussion should take into account some basic principles of sound lawmaker:

- Effectiveness - Knowing that a few terrorists could wreak havoc on many, we should seek laws that are effective;
- Efficiency - because we have neither time nor money to waste in preventing further acts of violence;
- Constitutionality - axiomatic for all laws; and
- Justness - for if we sacrifice the basic principles of a free society by passing onerous laws, then the terrorists have, in fact, succeeded.

One of the prerequisites of such constitutional lawmaker (and one which this author, as a law teacher of civil rights and liberties, feels competent to comment upon) is equal protection. Equal protection of the laws, of course, is the constitutional concept that strives to balance fair lawmaker on the one hand with efficient government action on the other. In a nutshell, equal protection means that — contrary to a layman’s understanding — the Constitution does not demand that laws treat all persons in the same manner, but only that laws treat “those who are similarly situated alike.” Thus government is provided with the tool of classification and laws may operate upon groups or “classes,” as long as those in the class share a common trait that bears some relationship to the harm that the law seeks to eliminate. Additionally, government need not address all harms at the same time but has the option of addressing evils “one step at a time.”

If the classification of like persons is done using a trait that is not immutable, then the classification need only be reasonably related to a legitimate governmental interest, thus passing the rational basis test. Such classifications pass constitutional muster with a rather loose fit between the trait and harm. In contrast, if the group is identified by a trait which is immutable (like race or ethnicity) then the classification must be “perfectly tailored to achieve a compelling state interest,” thus passing the “strict scrutiny” test. Some may remember the laws that excluded persons of Japanese ancestry (citizens and non-citizens alike) from certain designated areas on the West Coast, thus keeping those persons from their homes and jobs, survived the strict scrutiny test in the landmark Supreme Court decision of Korematsu v. United States in 1944.

There is no doubt in my mind that these troubled times, like those of World War II, would supply the requisite “compelling state interest” to satisfy constitutional scrutiny. Nor do I have any doubt that singling out certain groups for adverse or special treatment would be more efficient than imposing blanket impositions or restrictions on everyone or almost everyone. Such laws, especially those using non-immutable traits to classify, will easily pass constitutional muster.

Let us consider several scenarios: In the days immediately following the Sept. 11 hijackings, governments at all levels could have questioned millions of Americans concerning their activities leading up to the events of that day. Such questioning would clearly have been very inefficient. Alternatively, knowing as we did the identity of some of the hijackers, the government could have instead targeted all Muslim-Americans. The compelling nature of the crisis would, as in World War II, have supplied the justification for using ethnicity as the determinative classifier. Such action would have been more efficient than questioning everyone (a virtual impossibility) but clearly less efficient than questioning a smaller group. No doubt such action would have been met with a political outcry, as our infamous treatment of Japanese-Americans eventually was. And finally, the government could have questioned only male Muslim pilots. This would have been much more efficient and politically more palatable than questioning everyone or questioning all Muslims. In any of these scenarios, the Constitution would probably not have been a bar.

Often efficiency and effectiveness are at cross-purposes. One can easily see that as the group becomes smaller, the government’s action becomes more efficient and less subject to political disapproval. Laws that affect everyone are unwieldy and usually unworkable. Laws that begin with a large class, all Muslims, for example, are so over-inclusive as to be inefficient: all Muslims are not terrorists and questioning all of them would be costly and time consuming. But as the class is narrowed to Muslim pilots, it can become so under-inclusive as to become ineffective: the “shoe bomber” terrorist was not a pilot. Ironically almost all classes — even large ones — are both over-inclusive and under-inclusive: Timothy McVeigh was not Muslim, nor, it now appears, is the anthrax terrorist.

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In the Spotlight

Compiled by Carol Mowery, Assistant Counsel, Governor’s Office of General Counsel assigned to the Dept. of Labor and Industry

Speaking Engagements

Thomas A. Cinti, an attorney with EPA’s Philadelphia office, gave the keynote address at the Defense Research Institute’s seminar on Toxic Tort and Environmental Law, held in Miami in March. Cinti discussed EPA’s response to bioterrorism threats, and its recent cleanup of the anthrax-contaminated Hart Senate Office Building. He also participated in a panel on perspective purchaser agreements in EPA’s Superfund program.

Dept. of Health Assistant Counsel Rob Evarts and Senior Counsel Yvette Kostelac gave presentations on long-term care and managed care at the 8th annual PBI Health Law Institute in Philadelphia in March.

Brad Harker, assistant counsel to the Insurance Dept., spoke at the third annual Insurance Industry Privacy Summit and Money Laundering Forum in Philadelphia in March.

Joyce Howell, senior attorney, Office of Enforcement, Compliance and Environmental Justice, EPA, spoke at the Association of General Contractors annual convention in Las Vegas. She discussed the EPA’s position on environmental crimes.

Jonathan W. Kunkel, assistant counsel to the Dept. of Corrections, spoke at the Dauphin County Bar Association’s Young Lawyers Section Practicum in April. He discussed “Practice Before the State Civil Service Commission and Unemployment Compensation Referees.”

Dept. of Health Chief Counsel Lori McLaughlin and Deputy Chief Counsel James Steele presented at the 8th annual PBI Health Law Institute in Philadelphia in March. McLaughlin discussed “Pennsylvania’s Response to Bioterrorism: A Legal and Practical Perspective.” In addition, McLaughlin and Steele gave a Dept. of Health regulatory update.

Jeffrey J. Wood, Chief Counsel, Dept. of Aging, presented “Litigation Trends in Elder Abuse” at the annual Long-Term Care and the Law Symposium sponsored by the American Health Care Lawyers Association in New Orleans in February.

Susan Hensel, assistant general counsel/knowledge manager, Office of General Counsel spoke at the Dept. of Transportation’s annual legal office retreat in March. She spoke on the benefits of using the Office of General Counsel’s legal intranet.

Martha H. Brown, assistant counsel, Dept. of State, spoke at the third annual Regional School Health Update sponsored by the Dept. of Health and the Tri-County School Nurse’s Association.

Andrew B. Kramer, senior prosecutor in charge, Dept. of State, lectured the 110th Pa. State Police Cadet Class on the Crimes Code, Chapter 57, Wiretap and Electronic Surveillance, in April. Kramer has also presented this lecture to prior cadet classes.

Benjamin A. Cero, prosecuting attorney, Dept. of State, lectured York Memorial Hospital physicians on common problems leading to disciplinary action against physicians. Cero has presented this lecture at other Commonwealth venues.

Elections/Appointments

Gregory E. Dunlap, deputy general counsel, Governor’s Office of General Counsel, was re-appointed as a member of the Pennsylvania Board of Law Examiners in April. Dunlap was selected to serve as vice-chair of the board.

Chet Karas, assistant counsel, Dept. of Transportation, was recently appointed to the council of the ABA Administrative Law Section.

Karen Oill Moury, former deputy chief counsel, was appointed deputy executive director of the Pennsylvania Utilities Commission in March.

Former state representative and Commissioner of the Bureau of Professional and Occupational Affairs Albert H. Masland was named state inspector general by Gov. Mark Schweiker.

Christopher D. Carusone, assistant counsel, Governor’s Office of General Counsel assigned to the Pa. State Police, was appointed by Government Lawyers Committee Chair James M. Sheehan to serve as co-chair of the Career Enhancement Subcommittee.

Births

Lisa Jo Fanelli-Greer, assistant counsel, Pennsylvania Human Relations Commission, and her husband, Keith, celebrated the birth of their daughter, Hannah Grace, on April 1.

Brad Harker, assistant counsel, Dept. of Insurance, and his wife, Stephanie, celebrated the birth of their first child, Tyler James Harker, on January 3.

Suzanne N. Hueston, assistant general counsel, Governor’s Office of General Counsel, and her husband, Colin, announced the birth of their son, Colin Richard Hueston Jr., on April 8.

Miscellaneous

In March, Office of General Counsel attorneys assigned to the Dept. of Environmental Protection participated in Bowl for Kids Sake 2002 Lawyers Challenge sponsored by Big Brothers and Big Sisters of the Capitol Region. The team raised nearly $1,000.

(Left to right) Judy Rivera, assistant counsel; Brenda Houck, legal assistant; Patrick Bair, assistant counsel (who is not applauding his score); Brooke Weaver, clerical support assistant; Jackie Borda, administrative support; and Gary Niland, bureau director.
Some Thoughts on Equal Protection & Lawmaking Post-9/11
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So where does this take us when considering new legislation? Clearly lawmakers should strive to define the optimum class: one that is effective because it includes all who would do us harm, but is small enough to be efficient. And such a perfect class would be most just. The trick is knowing where to draw the line!

If I were drawing the line, I would err on the side of over-inclusiveness and inefficiency so as to maximize the principles of sound lawmaking. First, ordinarily an under-inclusive class will pass constitutional muster. Second, less efficient laws tend to be more effective because larger classes are less likely to exclude would be wrongdoers. And third, over-inclusive laws tend to produce more just laws. Although this seems counter-intuitive — because broader classes are likely to affect the innocent — it is their impact on the innocent that eventually leads to just laws. We look back on Korematsu and shudder. Yet the mere fact that today the law in Korematsu is seen as so vastly over-inclusive has led to the understanding that in like times we must be more careful with our laws and, more importantly, we must be sensitive about stereotyping and singling out groups for adverse treatment. Why else did our lawmakers seek to strengthen hate crime laws at the same time we were strengthening anti-terrorist measures?

Furthermore, laws that affect all of us (like those that result in long lines at airports), while less efficient than racial profiling, are more likely to be repealed when the threat of danger has passed. As Justice Jackson opined in Railway Express Agency v. New York:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Broader laws then, while less efficient but equally constitutional, will be more effective and, in the long run, more just because they will be subject to political adjustment and reinforce democratic principles.

Professor Kellett is a graduate of The Dickinson School of Law. She joined the faculty there in 1976. She has taught on Constitutional Law, Equal Protection and Civil Rights, The Supreme Court, State and Local Government Law, and Agricultural Law, and she has written on Constitutional Law for many years. In addition to teaching, she served as associate dean for Institutional Planning in 1996-1998 and was instrumental in the Dickinson-Penn State merger. She is the director of the Agricultural Law Research and Education Center.