

**Testimony of Clifford E. Haines, President, Pennsylvania Bar Association  
Interbranch Commission on Juvenile Justice  
Pennsylvania Judicial Center  
Feb. 2, 2010**

Good morning, Chairman Cleland and members of the Interbranch Commission.

I want to thank the Commission for allowing the PBA to share some thoughts with you as you continue your work of investigating the events that have been reported about the justice system in Luzerne County. I want to particularly thank Ken Horoho, former president of the Pennsylvania Bar Association who arranged for this appearance.

The Pennsylvania Bar Association is comprised of 29,000 lawyers from across the state. In 1997, we were designated as the organization most representative of the legal profession in Pennsylvania, by order of the Pennsylvania Supreme Court in accordance with 42 Pa. C.S.A. Section 1728.

We regularly speak out on issues of importance to the judiciary and the justice system and offer testimony before and guidance to the Legislature.

Despite that position, we have struggled with what to do or say about the drama that has unfolded in Luzerne County. In truth, we have no power to do anything, and we have been hard pressed to know what to say. While we have a long history of staunchly defending judicial independence, in this case, independence seems to have been transformed into arrogance and abuse. And there has been a paucity of what I call the “true facts.”

What we do know started with the conditional guilty pleas of Judges Ciavarella and Conahan – pleas that were subsequently rejected by the Federal Court. From when the pleas were conditional and until now, both judges are cloaked with the presumption of innocence despite what appears to be overwhelming evidence against them. As much as we want to condemn their conduct, it is hard to do that in the context of the presumption they enjoy. As lawyers we are the bulwark of that Rule of Law, which we are compelled to follow, but does not always constrain others.

While the media has reported “admissions” and other information about this situation, we have been hard pressed to find concrete answers to precisely what happened in Luzerne County. What we know is what we read in the papers. And while I don’t doubt most of what has been printed, we cannot, as the organized bar, let what is printed take on the mantra of the true facts.

The U.S. Department of Justice has been notorious for its reticence to comment on criminal investigations that are ongoing. In this instance, that policy has, in my personal view, caused more harm than good to the people of Pennsylvania and to the justice system. At a time when society demands more openness from its government and open records laws have proliferated, we have heard no word from the Department of Justice about what is going on in Luzerne County. Rumors of “more to come,” rumors of target letters sent to lawyers last summer, and rumors of FBI agents buying homes in Luzerne County only prolong the belief that corruption is ongoing, and they make it very difficult to remove the dark cloud of suspicion and distrust hanging over those good lawyers and judges who have adhered to the law in Luzerne County.

The situation reminds us of Franz Kafka’s *The Trial* in which the protagonist Josef K. is arrested by unidentified agents for unspecified crimes and over the course of a year mentally deteriorates awaiting the outcome of the unknown charges.

I believe the Department of Justice owes the people of Pennsylvania more than its utter silence. Although formal charges against Judges Conahan and Ciavarella became public over a year ago, there is not, to date, a trial scheduled. I would call on this Commission to seek out greater transparency and explanations from the Department of Justice.

As I said earlier, the Pennsylvania Bar Association has been a long-time supporter of the concept of judicial independence. Since 1998, we have had an active Judicial Independence Committee, which seeks to promote increased public understanding of the justice system and judicial decisions.

As recently as 2007, the Pennsylvania Bar Association led the defense of retention judges from baseless attacks because these attacks threatened the independence of the judiciary. We adhere to the principle that judges must be free to perform their duties without unfair criticism and attack. We have taken that principle to the point where we believe it is our duty, as officers of the Court, to actively defend the judiciary – and we will continue to do so when warranted.

The situation in Luzerne County, however, did not, of course, allow us to do that, principally because we are not talking about the concepts relevant to independence – for independence never incorporates criminality.

To say that lawyers were disheartened would be a polite understatement – revulsion is probably closer to the reaction. Revulsion because any failing of the justice system – particularly one involving abuse of power and independence – inflicts a scar on the integrity of the justice system and is another stake in the heart of proud lawyers who believe they follow the concept of equal justice and are in a constant battle for their own reputations, which are so often the subject of groundless attack and criticism.

Unfortunately, as an organization, the Pennsylvania Bar Association is not in a position to either determine the root cause of what went wrong in Luzerne County or to do something directly about it. Despite my earlier comments about the presumption of innocence, the apparent admissions by one of the judges and the conditional plea and resignations are evidence that something did go seriously wrong. But it is in the hands of those charged under Statute and our State Constitution to take action. This, of course, does not mean that we can't and won't make suggestions of safeguards to help ensure that the situation and events in Luzerne County are not repeated.

Judicial accountability is a term that has received increasing attention in the legal community. Accountability of our courts to the Rule of Law and the Constitution is essential to an effective system of judicial administration. A major research study of public opinion conducted in 2005 found that although 94 percent of Americans strongly agree their courts should be strong and "free from political influence," 62 percent of those surveyed believe the courts should be "held accountable" to the Rule of Law and the Constitution.

The Pennsylvania Bar Association's support of judicial independence always has been tempered by the dependence of that concept on judicial responsibility. No one is entitled to independence who cannot fulfill the responsibility of that principle. The election of judges in the political realm is not a test of responsibility, a subject that is, at the moment more properly discussed by Pennsylvanians for Modern Courts.

But we are rapidly moving in the direction of just such a test.

In 17 states, we find differing forms of judicial performance evaluations. New Hampshire's Supreme Court has adopted a judicial evaluation rule that involves a broad-based commission to evaluate judicial performance every three years. It insures secrecy of those evaluations to a point and has been widely heralded as a fair and helpful process to foster judicial integrity and respect. Judicial performance evaluations allow a judge to get feedback on the quality of his or her work and provide some important oversight of what judges do between the time of election – or even appointment – until a retention election.

In 2007, the Pennsylvania Bar Association's House of Delegates accepted a special report from the PBA Task Force on the Judicial System that included a recommendation that a judicial evaluation process be considered. We have formed another task force to study this issue, and this group is in the process of crafting a recommendation to our governing body that will call for the Supreme Court's consideration of an evaluative process. The idea of such a recommendation recently was supported by a resolution of our Board of Governors, and I expect that our House of Delegates will take an official position on this issue at our Annual Meeting in May.

In the interim, we are setting up a less formal process of a confidential ombudsperson to act as a resource for lawyers who perceive unfair treatment by a judge. Often this perception is fueled by disappointment about an outcome, but sometimes it is based on legitimate concerns. And often lawyers are reticent to report those concerns out of fear of retaliation. One can't help but speculate that if such a mechanism had been available in Luzerne County, some of the problems could have been dealt with more expeditiously.

The Pennsylvania Bar Association appreciates that your Commission is casting a broad net that includes other public officials who may have fallen down on their responsibility and whose conduct is outside the realm of our "expertise."

We also appreciate the focus you have placed on the plight of the victims from what is apparent misconduct and abuse of public office. We hope our focus will add to the recommendations made by the Commission, and I would be happy to entertain your questions.