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MAJOR CONSTITUTIONAL AND ADMINISTRATIVE DECISIONS OF 1996: PROGRESS OF THE SUPREME COURT OF PENNSYLVANIA

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I. INTRODUCTION

This Article examines selected administrative law and constitutional decisions of the Supreme Court of Pennsylvania in

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1996. Several caveats are in order at the outset.[1] First, this Article does not review all decisions of the Supreme Court of Pennsylvania in 1996. This Article, rather, attempts to describe several of the most important decisions of the supreme court in 1996. It is selective, and the interests of the author in certain areas—due process and separation of powers—have determined

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[1] The author stated his objectives more fully last year in the first article in this series as follows:

> This article examines several selected administrative law cases that the Supreme Court of Pennsylvania decided in 1995. In so doing, it differs from other writings which describe important cases for the legal profession during a given period of time. The focus here is selective, and there is no attempt or intent to list comprehensively all Pennsylvania Supreme Court cases which deal with administrative law issues.
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> This review diverges from traditional descriptive reviews of legal developments in two other significant respects. First, the author is attempting to write about only the most significant cases. Thus there has been no attempt to include all administrative law cases or to include cases representing activity in particular areas or affecting particular agencies. Second, every attempt has been made to evaluate and analyze the opinions at some length rather than merely describe them. The objective of the author is not only to deal with the major issues posed by the cases in terms of the area of law or particular subject—for example, labor law or sovereign immunity—but also to deal with the broader, more fundamental issues of constitutional and administrative law which the opinions pose. There has not been very much analysis of this type in regard to Pennsylvania administrative and constitutional decisions in the recent past. There is a growing interest in, and emphasis on, state constitutional law, and state courts—including Pennsylvania's—are deciding more cases in this area. Administrative law is a branch of constitutional law; therefore, cases in this area merit critical scholarly examination and discussion. The author is hopeful that this style of analysis will lead to critical examinations of the state of administrative law in Pennsylvania and, perhaps, lead to a dialogue that will help in continuing the development of this area of law. In any event, whether a dialogue develops or not, the author plans to write this review of important administrative decisions each year.

John L. Gedid, *Administrative Law Progress in 1995: Important Pennsylvania Supreme Court Decisions*, 5 WIDENER J. PUB. L. 625, 625-26 (1996) (footnote omitted).

many of the cases examined. An attempt has been made, however, to examine and analyze the most important cases in terms of fundamental administrative process, constitutional requirements as they affect the administrative process, and structural cases which will have great precedential impact. There is a special emphasis on constitutional law as applied to the administrative processes.

Although not all persons agree with the author that administrative law is a branch of constitutional law,[2] constitutional decisions define the administrative powers that the agencies exercise; they define the relationship between the three branches of government and the agencies; and they define the relationship between the citizen and the government in large areas of non-criminal activity. Administrative law is closely intertwined with constitutional law, constitutional concepts, and with constitutional principles. Thus, the most important cases of the Supreme Court of Pennsylvania are those that interpret and apply the Constitution to administrative agencies. This Article examines those cases.

II. DUE PROCESS CASES

A. Department of Transportation v. Clayton

1. Background

In *Department of Transportation v. Clayton*[3] the Supreme Court of Pennsylvania affirmed the lower court's decision which held that an epileptic driver's license could not be revoked without a hearing.[4] The decisions of the commonwealth court and the court of common pleas struck down a Pennsylvania Department of Transportation regulation that provided for the suspension of a driver's license for a period of one year, without hearing, upon the report of a physician[5] that the driver had suffered a single

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[2] Interview with William Nast, former Director of the Joint State Government Commission, in Harrisburg, PA, January 13, 1997. In a conversation with the author about last year's article in this series, Mr. Nast objected that administrative law is not constitutional law.

[3] 684 A.2d 1060 (Pa. 1996).

[4] *Id.* at 1065.

[5] A statute makes reporting by physicians mandatory. 75 PA. CONS. STAT.

epileptic seizure.[6] The case is of particular interest because the trial court, the commonwealth court, and the supreme court agreed that the driver's due process rights had been violated, but did so on three different grounds.

The trial court held that the regulation was "substantively unreasonable" and, therefore, violated the licensee's rights by creation of an irrebuttable presumption that a person who has suffered an epileptic seizure is not competent to drive.[7] The commonwealth court's opinion examined the distinction between substantive and procedural due process developed in recent federal cases[8] dealing with irrebuttable presumptions.[9] After reviewing the federal cases, the commonwealth court determined that the federal standard in irrebuttable presumption cases was based upon procedural due process.[10] Furthermore, the court determined that the regulation created an irrebuttable presumption that violated the procedural due process rights of the licensee.[11]

In the Supreme Court of Pennsylvania the Commonwealth argued that the commonwealth court erred in holding that the

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§ 1518(b) (1995).

[6] *Id.* at 1060 (citing 67 PA. CODE § 83.4 (1997)). This regulation provides that persons suffering from epilepsy can have their driver's license revoked. 67 PA. CODE § 83.4. Section 1519 of the Vehicle Code established the basis for this regulation. That statute provides as follows:

> (c) Recall of operating privilege.—The department shall recall the operating privilege of any person whose incompetency has been established under the provisions of this chapter. The recall shall be for an indefinite period until satisfactory evidence is presented to the department in accordance with regulations to establish that such person is competent to drive a motor vehicle. Any person aggrieved by recall of the operating privilege may appeal in the manner provided in section 1550 (relating to judicial review).

75 PA. CONS. STAT. ANN. § 1519(c) (1995).

[7] Department of Transp. v. Brown, 630 A.2d 927, 929 (Pa. Commw. Ct. 1993) (citing Department of Transp. v. Brown, No. 87-3644 (Court of Common Pleas, Wash. Co. 1987)).

[8] The court discussed Michael H. v. Gerald D., 491 U.S. 110 (1989) and Bell v. Burson, 402 U.S. 535 (1971).

[9] *Brown*, 630 A.2d at 930-31.

[10] *Id.* at 932.

[11] *Id.* at 931-32.

regulation violated procedural due process.[12] The Commonwealth renewed its argument that substantive due process provides the applicable standard.[13] Under the substantive due process test, so long as the regulation bears a rational relationship to a legitimate state interest, it does not violate due process.[14]

The majority held that characterizing a problem as involving substantive or procedural due process was irrelevant.[15] Instead, the Supreme Court of Pennsylvania held that the case of *Bell v. Burson*[16] and the cases which followed it[17] set forth the modern test. The Supreme Court of Pennsylvania noted that no decision in the *Bell* line of cases, with the exception of the recent *Michael H.* case,[18] examined or discussed distinctions between substantive and procedural due process as part of the irrebuttable presumption analysis.[19] An attempt to catalogue due process in this fashion may be counterproductive, for "analysis of such [irrebuttable] presumptions by its very nature eludes such precise cataloguing."[20] Instead, the court reasoned that the character or nature of the presumption created by the "substance" of the regulation controls in due process analysis.[21] Thus, if the regulation creates an irrebuttable presumption, it will trigger due process protections.[22] Furthermore, the court relied upon the *Bell* line of cases in a recent decision involving due process claims for

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[12] Department of Transp. v. Clayton, 684 A.2d 1060, 1062 (Pa. 1996).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1064.

[16] 402 U.S. 535 (1971).

[17] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (holding that a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties violates due process); Vlandis v. Kline, 412 U.S. 441 (1973) (holding that the Due Process Clause does not permit a state to deny an individual the opportunity for a hearing to prove he is a bona-fide resident entitled to in-state rates); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that due process entitled a person to a hearing on his fitness as a parent before his children were taken away).

[18] 491 U.S. 110 (1989).

[19] *Clayton*, 684 A.2d at 1063-64.

[20] *Id.* at 1064.

[21] *Id.*

[22] *Id.* at 1064-65.

suspension or revocation of a driver's license.[23] The key concept in the majority analysis was that suspension of an operator's license involved state action that affected important interests of the licensee.[24] Therefore, it follows that procedural due process requires a hearing.[25]

In cases of this type, analysis focuses primarily on the nature of the hearing that procedural due process requires.[26] In this case the Commonwealth argued that due process was satisfied because the licensee had a right to a *de novo* hearing before the court of common pleas prior to surrendering his license.[27] At the *de novo* hearing, however, the licensee would be limited to presenting evidence showing that he had not had a seizure.[28] The Supreme Court of Pennsylvania rejected this limited opportunity to present evidence as inconsistent with the constitutional guarantee of

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[23] The court recently cited *Bell* for the proposition that "it is beyond peradventure that procedural due process must be met before one's operating privilege can be revoked or recalled." *Id.* at 1064 (citing Pennsylvania Game Comm'n v. Marich, 666 A.2d 253 (Pa. 1995) (holding that due process does not apply to a hunting license)).

[24] *Clayton*, 684 A.2d at 1064 (citing Bell v. Burson, 402 U.S. 535, 539 (1971)).

[25] *Id.* (citing *Bell*, 402 U.S. at 539). Although the opinion cites Pennsylvania Game Comm'n v. Marich, 666 A.2d 253 (Pa. 1995) for this proposition, the Supreme Court of Pennsylvania did not take this analytical path in the *Marich* case. Instead, the *Marich* court placed heavy reliance on characterizing the interest of the citizen involved as a "right" or a "privilege." For example:

> Unlike a license to pursue a livelihood or engage in a profession, which has been held to be a property right protected by Article I, Section I of the Pennsylvania Constitution, no cases have held that provisions of the federal or state constitutions establish or protect a right to hunt or trap or the right to engage in a particular sport.

Id. at 256 (citation omitted), *see also*, Gedid, *supra* note 1, at 638-44.

[26] The court used the standard description of the hearing requirements for procedural due process, namely that it is a flexible notion which requires notice and a meaningful and appropriate opportunity to be heard. *Clayton*, 684 A.2d at 1064 (citing Bell v. Burson, 402 U.S. 535, 542 (1971); Fiore v. Board of Fin. and Revenue, 633 A.2d 1111, 1114 (Pa. 1993); Soja v. Pennsylvania State Police, 455 A.2d 613, 615 (Pa. 1982)).

[27] *Clayton*, 684 A.2d at 1062.

[28] *Id.*

procedural due process.[29] The court found this opportunity was not meaningful because the Commonwealth must permit the licensee "to present objections, not to the conclusion that he had suffered an epileptic seizure, but rather to the presumption of incompetency to drive."[30] The court recognized that this regulation created an irrebuttable presumption that prevented a driver with a single seizure from operating an automobile for a full year. Under this regulation, the licensee cannot argue, for example, that although the seizure occurred, medication controls the condition that caused it. In other words, the regulation precluded the licensee from introducing evidence except as is relevant to the occurrence or nonoccurrence of the seizure.[31] The Supreme Court of Pennsylvania concluded that, although preventing unsafe or potentially unsafe operators from driving is an important public interest, it does not outweigh an individual's interest in retaining his or her license without a hearing.[32] Additionally, because "competency to drive is the paramount factor behind the instant regulations, any hearing which eliminates consideration of that very factor is violative of procedural due process."[33]

Justice Zappala dissented finding the irrebuttable presumption doctrine a poor tool for constitutional analysis[34] because it leads to flawed reasoning and results.[35] He objected that merely characterizing the regulation as an irrebuttable presumption excluded all other analyses.[36] According to Justice Zappala, the exclusion of other analyses ignores the "foundational" rule of statutory construction that actions of a legislature enjoy a "strong"

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[29] *Id.* at 1065.

[30] *Id.* (citing *Bell*, 402 U.S. at 540-41).

[31] *Id.* The court stated that "[t]he real thrust of the Department's argument is that because the Medical Advisory Board has deemed persons who have suffered even one epileptic seizure unsafe to drive, that determination should remain inviolate." *Id.*

[32] *Id.*

[33] *Id.* (citing *Bell*, 402 U.S. at 540-41).

[34] *Id.* at 1066 (Zappala, J., dissenting).

[35] *Id.*

[36] *Id.*

presumption of constitutionality.[37] Furthermore, he argued that administrative regulations possess the attributes of statutes, which entitles them to the same presumption of constitutionality.[38] This double presumption of constitutionality means that one challenging regulations has a "heavy" burden of proof to meet in order to establish a constitutional violation.[39]

Justice Zappala also argued that the irrebuttable presumption analysis avoids equal protection analysis.[40] Under equal protection, regulations must be upheld if they are rationally related to the purpose of the regulation unless it involves a suspect class.[41] Here the regulation met that test.[42] The licensee argued that the Department of Transportation treated her differently from other drivers because of her epileptic seizure.[43] Justice Zappala, however, concluded that there was a rational basis for the regulation that treated the licensee differently.[44] The Medical Advisory Board concluded that licensing drivers who had suffered epileptic seizures would create a significant danger to the public and that the Department had to suspend her license to evaluate the effectiveness of the prescribed anti-seizure medication.[45]

Justice Zappala also argued that the majority had reached a flawed outcome as a result of its irrebuttable presumption analysis for another reason.[46] Justice Zappala believed, "given the significant danger to the public," that it is not enough to simply conclude that due process required an individualized hearing.[47] Instead, the timing of the hearing had been neglected. Justice Zappala believed that neglecting the timing of the hearing meant that the commonwealth should have authority to suspend the

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

license first, then have an individualized hearing.[48] Furthermore, he argued that the majority opinion had not paid any attention to the more simple solution that protects the public interest: if the fact that the presumption is irrebuttable creates the problem, then the courts should use the concept of burden of proof to make it rebuttable.[49]

2. Evaluation

The majority's analysis was both logical and fair, but the dissent was also thoughtful. Which is the better approach? The persuasiveness of both approaches points to one of the difficulties in this area: the irrebuttable or conclusive presumption is one of the most troubling problems in the area of constitutional law.[50] The Supreme Court of Pennsylvania noted that the case of *Michael H. v. Gerald D.*,[51] the United States Supreme Court's most recent decision on conclusive presumptions, further complicated the problem.[52] After the trial court rejected the substantive due process claim, the Commonwealth appealed. In dealing with the substantive due process claim, the commonwealth court attempted to explain the *Michael H.* case.[53] Unfortunately, *Michael H.* was a plurality decision with five separate opinions. A major part of the division of the Court involved the applicability of the

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[48] *Id.* at 1066-67 (Zappala, J., dissenting).

[49] *Id.* at 1067 (Zappala, J., dissenting).

[50] *See* Bruce L. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 762-63 (1977); Randall P. Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644, 652 (1974); Robert G. Dixon, Jr., *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 525 (1977); John M. Phillips, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 462 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1544 (1974).

[51] 491 U.S. 110 (1989).

[52] In the federal arena, a court would probably have turned to the test adopted by the Supreme Court of the United States in the case of Mathews v. Eldridge, 424 U.S. 319 (1976).

[53] *Clayton*, 684 A.2d at 1063.

conclusive presumption analysis. Because of these multiple opinions, the Supreme Court of Pennsylvania concluded that the opinion was simply too unclear to rely on for the conclusive presumption analysis.[54] On the other hand, the court noted that the available body of federal precedent, beginning with *Bell v. Burson*,[55] is directly on point for issues involving the right to a hearing before suspension of a driver's license.[56] Moreover, a body of Pennsylvania precedents has developed in reliance on, and consistent with, the *Bell* case and its successors.[57] The court concluded that *Bell* and its Pennsylvania progeny should be followed in conclusive presumption cases. This was a wise choice. Unless *Bell* and its progeny are directly overruled, their value as clear, fair precedents should lead to continued use.

The Supreme Court of Pennsylvania's analysis was straightforward, clear, and consistent with the *Bell* precedents for the following reasons. First, Pennsylvania precedents have held numerous times that a driver's license involves a property interest.[58] Second, what type of hearing is required? That is often the second question that must be addressed in procedural due process cases.[59] This second question is the real issue in the *Clayton* case and in most cases involving a conclusive presumption: if the due process guarantee of a hearing protects the claimant before the protected interest may be taken away or affected, then can the *nature* of the hearing to which the claimant is entitled be limited by a presumption which cannot be rebutted?[60] A statute or regulation that precludes evidence, testimony, or argument about some issue or fact establishes an irrebuttable or conclusive presumption. The essence of the *Bell*

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[54] *Id.*

[55] 402 U.S. 535 (1971).

[56] *Id.* at 542.

[57] For a discussion of the *Bell* line of cases, see *supra* note 17 and accompanying text.

[58] Department of Transp. v. Brown, 630 A.2d 927, 931 (Pa. Commw. Ct. 1993); Department of Transp. v. Quinlan, 408 A.2d 173, 174 (Pa. Commw. Ct. 1979).

[59] *Clayton*, 684 A.2d at 1064-65.

[60] *Id.*

approach and the approach of the Supreme Court of Pennsylvania was that the procedural unfairness of preventing party testimony or other evidence constituted a denial of a fair hearing.

The Supreme Court of Pennsylvania correctly perceived that the nature of the hearing procedure was the principal issue in *Clayton*.[61] The court also linked the nature of the issue, competency to drive, to the procedure that must be employed. The focus upon the issue led to the conclusion that the claimant must be free to assert not only the factual issue of whether the claimant had an epileptic seizure, but also to argue that even if the claimant had suffered such a seizure, he was still competent to drive.[62] On the other hand, the Commonwealth took the position that the claimant could challenge the factual occurrence of the seizure, but not the conclusion of the Medical Board—the conclusive presumption—that the claimant was unfit to drive for one year.[63] The court's analysis is highly persuasive. The entire purpose of the hearing in such cases is to litigate and air the issue of whether the particular disability renders this claimant unfit to drive. Such disability may arise from the mere occurrence of a single seizure, but not necessarily so. The court correctly concluded that preclusion of this issue or argument by means of an irrebuttable presumption would render the hearing nearly meaningless.

B. Delliponti v. DeAngelis

1. Background

In *Delliponti v. DeAngelis*[64] the Supreme Court of Pennsylvania held that an employee of a borough may have "a legitimate expectation of continued employment" under the Home Rule Charter and Administrative Code that would constitute a sufficient expectation of continued employment to comprise a property interest sufficient to entitle the claimant to the protection of procedural due process.[65] In 1976 the Borough of Norristown

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[61] *Id.* at 1064.
[62] *Id.* at 1065.
[63] *Id.*
[64] 681 A.2d 1261 (Pa. 1996).
[65] *Id.* at 1264-65.

hired the appellant as a secretary.[66] The Borough later promoted appellant to Administrative Assistant to the Chief of Police. In 1991 the Borough notified her by letter that her position was terminated.[67] The reason given for the termination was that a reduction in force was an economic necessity.[68] At the time of termination, she had the most seniority of the four non-union administrative assistants.[69] The trial court held that appellant was a civil servant entitled to due process protection because of the Borough's failure to exempt her position from the personnel administration system that was subject to merit principles and civil service rules.[70]

The commonwealth court reversed on the basis that failure to specifically exempt the appellant from the comprehensive personnel administration system did not make her a civil servant.[71] The court reasoned that she had no expectation of continued employment and, therefore, she had no property interest that entitled her to due process protection.[72]

The Supreme Court of Pennsylvania reversed and reinstated the appellant with back pay because the Borough denied her the right to a hearing.[73] First, the court examined the general law of Pennsylvania on the subject of a right to a hearing under the Local Agency Law.[74] A borough is a local agency and the Local Agency Law governs the actions of such agencies.[75] Under the applicable provision,[76] if an adjudication has occurred, the statute

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[66] *Id.* at 1262.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1262-63.

[72] *Id.*

[73] *Id.* at 1265.

[74] *Id.* at 1263.

[75] *Id.* (citing Guthrie v. Borough of Wilkinsburg, 478 A.2d 1279 (Pa. 1984)).

[76] *Id.* The court incorrectly cited to 2 PA. CONS. STAT. § 504 (1988), the notice and hearing provision of the Administrative Agency Law. The Administrative Agency Law applies to Commonwealth Agencies. 2 PA. CONS. STAT. § 501 (1988). The notice and hearing provision of the Local Agency Law

entitles a claimant to notice and a hearing.[77] Thus the question was whether an adjudication has occurred. The statute defines an adjudication as any final action by an agency that affects "personal or property rights, privileges, immunities, duties, liabilities or obligations" of parties.[78] A property right for a government employee exists if that person has an "expectation of continued employment," which may occur as a result of statute, contract, or quasi-contract.[79]

The court next analyzed how these principles applied to the facts of this particular case.[80] Specifically, the court analyzed whether the employee had an expectation of continued employment under the Borough's Administrative Code.[81] The Norristown Home Rule Charter required the council to adopt an administrative code "designed to promote efficient and fair personnel administration."[82] The Charter required the Borough's Administrative Code to be merit based and allowed the Borough to exempt certain employees from the civil service rules and regulations.[83] The Borough subsequently adopted an Administrative Code that covered the grounds for personnel removal or other adverse actions as well as the procedures to be followed. The Code, however, did not cover employees in the appellant's position, but only reductions in force of police and firemen.[84]

The Supreme Court of Pennsylvania held that the plain meaning of the Borough's Home Rule Charter was that the civil service rules that the Borough adopted covered all employees except those who had been affirmatively excluded by official council action taken in promulgating rules to create such

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is 2 PA. CONS. STAT. § 553 (1988). Nevertheless, it is unlikely that the outcome would be different under the correct section.

[77] *Delliponti*, 681 A.2d at 1263 (citing *Guthrie*, 478 A.2d at 1281).

[78] 2 PA. CONS. STAT. § 101 (1988).

[79] *Delliponti*, 681 A.2d at 1263.

[80] *Id.*

[81] *Id.*

[82] *Id.* (quoting NORRISTOWN, PA, HOME RULE CHARTER § 512D (1985)).

[83] *Id.* (citing NORRISTOWN, PA, HOME RULE CHARTER § 512D (1985)).

[84] *Id.* at 1263-64.

exemptions.[85] Because appellant's position had not been exempted, there was no exclusion and she had a property interest in her employment.[86] That is, she had an expectation of continued employment unless the Borough took steps to conform with the civil service ordinance that it enacted. Moreover, the court observed that the Borough's Home Rule Charter contained directions for the creation of mandatory provisions to be followed in case of reductions in police and fire department forces because of economic necessity.[87] The Borough, however, made no provisions for employees in the appellant's position. The Borough's failure by rule or regulation to exempt appellant from the operation of the civil service rules and to provide for reductions in force "afforded her a legitimate expectation of continued employment in the nature of a property interest."[88] The appellant, therefore, was entitled to notice and an opportunity to be heard.[89]

Justice Zappala, in an opinion joined by Justice Flaherty, dissented on the basis that "the failure of a legislative body to enact implementing legislation does not confer rights on the parties."[90] He reasoned that a more significant action was necessary to convert the appellant's status from an at-will employee to one covered by the civil service regulations.[91] Because she was not a civil service employee, she never possessed the "right" to continued employment. Therefore, she did not have a property interest in her position.[92]

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[85] *Id.* at 1264.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 1265.
[89] *Id.*
[90] *Id.* at 1266 (Zappala, J., dissenting).
[91] *Id.*
[92] *Id.*

2. Evaluation

Property interests differ from property rights. This is one of the central propositions of *Goldberg v. Kelly*[93] and the cases that follow it. Those cases allowed the creation of interests in property or liberty through state law, ordinance, custom, or contract.[94] The court has discussed this problem in connection with the case of *Pennsylvania Game Commission v. Marich*.[95] Furthermore, the case of *Perry v. Sindermann*[96] makes the point that "'a few rigid, technical forms'" do not define property interests protected by procedural due process.[97] On the contrary, property for procedural due process purposes consists of *interests* (not rights!) that are defined or established by state rules or *understandings*.[98] Additionally, it is "'a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement . . . that he may invoke at a hearing.'"[99] The point of the majority analysis in the *Delliponti* case was that a reasonable employee in the appellant's position would justifiably understand that she is covered by the civil service provisions of the Borough regulations, and that those regulations provide for something more than a furlough letter.[100] This understanding was reasonable and was created by the Borough's

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[93] 397 U.S. 254 (1970).

[94] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 603 (1972) (holding that proof of a property interest would entitle plaintiff to a hearing); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that respondent did not have a sufficient property interest created by state statute of university rule or policy that secured his re-employment); Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710, 716 (6th Cir. 1991) (holding that a state-issued liquor license creates a valid property interest for the holder).

[95] 666 A.2d 253 (Pa. 1995). For a discussion of *Marich*, *see* Gedid, *supra* note 1, at 638.

[96] 408 U.S. 593 (1972).

[97] Gedid, *supra* note 1, at 643-44 (quoting *Perry*, 408 U.S. at 601).

[98] *Id.*

[99] *Id.* (quoting *Perry*, 408 U.S. at 601 (internal quotation marks omitted) (citations omitted)).

[100] For a discussion of the majority opinion in *Delliponti*, see *supra* notes 64-89 and accompanying text.

failure to act. The majority in the *Delliponti* case squarely accepted and applied the modern concept of property interests for triggering the protection of procedural due process.

The dissent adopted an entirely different, traditional approach.[101] That approach required that a *right* be statutorily created in order to trigger procedural due process protection.[102] In fact, Justice Zappala's position is that Delliponti was not protected by procedural due process because no significant action was taken to make her a civil service employee and, therefore, she had no "right" to continued employment.[103] The hallmark of this approach is that it appears to be the approach that existed before the *Goldberg* line of cases. It appears to be an approach that limits the scope of procedural due process protection to only those situations in which a party has a statutorily created property right in a job. It is based upon an attempted distinction between rights and privileges. An expectation, even though created by the state, will not suffice. Justice Zappala was consistent in applying this approach. As pointed out last year, Justice Zappala employed this exact approach in the case of *Pennsylvania Game Commission v. Marich*.[104] As pointed out last year, this outmoded approach led to injustice and unfairness. It should be rejected.

C. Krupinski v. Northampton County

1. Background

In *Krupinski v. Northampton County*[105] the Supreme Court of Pennsylvania held that due process rights had not been violated when a school board first voted to suspend an employee as a result of curtailment of an educational program, then later heard her appeal regarding the suspension.[106] The court believed that this

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[101] For a discussion of Justice Zappala's dissenting opinion in *Delliponti*, see *supra* notes 90-92 and accompanying text.

[102] Delliponti v. DeAngelis, 681 A.2d 1261, 1266 (Pa. 1996).

[103] *Id.*

[104] 666 A.2d 253, 255-57 (Pa. 1995). For last year's discussion of Justice Zappala's opinion, see Gedid, *supra* note 1, at 638-41.

[105] 674 A.2d 683 (Pa. 1996).

[106] *Id.* at 684.

was not a commingling of prosecutorial and adjudicatory functions. The employee asserted that the holding in *Lyness v. State Board of Medicine* forbade such action.[107]

The employee argued that the vote to suspend her teaching position amounted to action by the school board as a prosecutor.[108] The plaintiff alleged that the subsequent review of her suspension appeal, by the same board that voted to suspend her, violated *Lyness* because the Board was biased as a result of its prior adjudication of the matter.[109] Relying on the precedent of *Belasco v. School District of Pittsburgh*,[110] the plaintiff further argued that the suspension violated *Lyness* because there was no provision for *de novo* review by, or appeal to, an independent court from the Board's decision.[111]

The Supreme Court of Pennsylvania rejected this argument and distinguished *Lyness* and its precedents.[112] In the first place, the court explained that the employee in this case had not shown how the Board had exercised prosecutorial functions because her suspension was *nondisciplinary*.[113] The opinion pointed out that "[u]nlike the disciplinary action taken by the Board of Medicine in *Lyness*, Krupinski's suspension was not based on any charges

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[107] 605 A.2d 1204 (Pa. 1992). The Supreme Court of Pennsylvania observed that *Lyness* involved a disciplinary prosecution against a physician in which the accused's case was heard by the same body that had made the probable cause to prosecute decision. *Krupinski*, 674 A.2d at 684. The court in *Lyness* explained that the Hearing Board was privy to information used in the prosecution that was inadmissible at trial, and that the commingling of roles led to a potential for bias as well as an appearance of non-objectivity that was enough to constitute a violation of due process. *Lyness*, 605 A.2d at 1210.

[108] *Krupinski*, 674 A.2d at 685.

[109] *Id.* The employee specifically relied upon *Belasco v. School Dist. of Pittsburgh*, 510 A.2d 337 (Pa. 1986), a case which applied the *Lyness* precedent in an educational setting. In *Belasco*, two teachers were dismissed on charges of willful violation of Pennsylvania School Laws. *Id.* at 338-39. In the *Belasco* opinion the court emphasized that in dismissal for cause cases the school board acts as prosecutor and judge, and the school code provides for de novo review by an independent forum. *Id.* at 342.

[110] *Belasco*, 510 A.2d at 337.

[111] *Krupinski*, 674 A.2d at 685.

[112] *See id.* at 686.

[113] *Id.* at 685.

stemming from some action or inaction by her. . . . There was no redress or punishment for any wrong involved here."[114] The court also pointed out that in this case the purpose of the second hearing was not to prosecute the employee, but to ascertain whether a reason for suspension existed and whether the board followed the procedure required by the applicable school regulations.[115] Thus the potential for bias that the *Lyness* court explained was a result of the commingling of prosecutorial and adjudicatory functions did not exist here because the Board did not act as a prosecutor.[116]

2. Evaluation

The *Krupinski* decision is clearly correct. In all of the cases upon which *Lyness* drew in fashioning the no-commingling-of-functions rule of due process,[117] there were charges of malfeasance, misfeasance, or charges based upon conduct of the employee.[118] In the proceeding in *Krupinski* the object of the proceeding was different. The *Krupinski* proceeding was held in order to ascertain whether there had been a sufficient decrease in students to justify a reduction in the work force and, if so, whether the appellant was one of the affected employees who should have been furloughed.[119] None of the considerations were based on the reputation of the employee, except, perhaps, the finding that she had less seniority than some other employees.

There is an analogy between the situation here and the distinction between adjudicative and legislative facts.[120] Professor Kenneth Davis first introduced the argument that a distinction must be drawn between two situations: (1) where the focus of the

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[114] *Id.* at 686.

[115] *Id.*

[116] *Id.*

[117] *See* Lyness v. State Bd. of Medicine, 605 A.2d 1204, 1207-11 (Pa. 1992).

[118] *Id.* at 1207 (citing PA. CONST. art. I, §§ 1, 9, 11).

[119] *Krupinski*, 674 A.2d at 685-86.

[120] Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 933-40 (1980).

proceeding is upon discrete, specific individuals and acts and turns upon specific facts and, (2) where the focus is upon a more general category or class, which does not involve or turn upon findings of specific facts for its resolution. Professor Davis referred to the former category as involving adjudicatory facts and the latter category as involving legislative facts.[121] This line of analysis also fits the *Krupinski* situation. For example, the determination that there has been such a change in circumstances that a reduction in the work force is justified is very similar to a determination that turns on legislative facts. The determination does not turn upon the condition of, or any facts involving, the Appellant, except whether she fits within the group who will be furloughed because of her length of service. In addition, the procedures in place guarantee that the determination in *Krupinski* is fairly supported by the facts. Thus the legislative nature of the hearing permits some blending of the roles of the board.

III. SEPARATION OF POWERS CASES

A. Pennsylvania State Association of County Commissioners v. Commonwealth

1. Background

In the past year, the Supreme Court of Pennsylvania has decided several cases that involve the issue of separation of powers. By far the most important is *Pennsylvania State Association of County Commissioners v. Commonwealth*,[122] a case involving a major confrontation between the legislature and the judiciary of Pennsylvania. In *County Commissioners*, ten Pennsylvania counties[123] and the Pennsylvania State Association of County Commissioners sought mandamus to enforce an earlier decision. The court issued a writ of mandamus ordering the legislature to comply with the court's earlier decision in *County of Allegheny v. Commonwealth* (*Allegheny County II*).[124] In that

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[121] *Id.* at 935-40.

[122] 681 A.2d 699 (Pa. 1996).

[123] The 10 Pennsylvania counties were Allegheny, Bucks, Cumberland, Dauphin, Erie, Forest, Fulton, Monroe, Snyder, and Tioga.

[124] 534 A.2d 760 (Pa. 1987).

case, the court held that the present system of funding the judicial system through the counties was unconstitutional because it failed to create a unified judicial system.[125] To reach that holding, the court applied Article 5, Section 1 of the Pennsylvania Constitution which provides for a unified judicial system in light of principles of separation of powers.[126] In order to understand the significance of the latest chapter of this saga, it is necessary to review *Allegheny County II*.

In that earlier decision, Allegheny County sought a declaratory judgment in the commonwealth court finding that the Pennsylvania statute, providing for the funding of lower courts through the counties, violated the Pennsylvania Constitution.[127] Under the Pennsylvania system, each county provides the support staff and physical facilities for the common pleas courts located in that county. Allegheny County argued that the local system of funding violated Article 5, Section 1 of the Pennsylvania Constitution in failing to create a "unified judicial system."[128] The Commonwealth's most important arguments were that there was no constitutional violation in the choice of a funding system for the judiciary and that the relief which the county sought violated separation of powers principles.[129]

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[125] *Id.* at 765.

[126] *Id.* at 763-65; PA. CONST. art. V, § 1.

[127] *Allegheny County II*, 534 A.2d at 761.

[128] *Id.* Pennsylvania Constitution Article 5, Section 1 provides:

> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

PA. CONST. art. V, § 1. The County also argued that the statute by which the legislature created the funding scheme, 42 PA. CONS. STAT. § 3721(a) (1995), did not require employment of all of the court personnel, approximately 800 employees, that the county was providing. *Allegheny County II*, 534 A.2d at 761.

[129] *Allegheny County II*, 534 A.2d at 761.

The commonwealth court decided that the issue was a political question not susceptible to judicial resolution. The court relied on *Baker v. Carr*[130] in determining that the issue was not justiciable because there had been "a textually demonstrable constitutional commitment of the issue to [another] branch."[131] Drawing upon earlier precedent, the court concluded that the legislature alone has the power to decide not only which programs it will adopt, but also how they will be implemented.[132] The court mentioned that there were separation of powers problems with the County's position, but the court did not develop that idea in any detail.[133] Basically, the commonwealth court's separation of powers analysis was that one branch, the judiciary, should not exercise a power exclusively assigned to another branch, the legislature.[134]

The Supreme Court of Pennsylvania reversed.[135] First, the court distinguished *Baker* from this case. The test adopted by the commonwealth court[136] for non-justiciability was an incorrect interpretation of *Baker*. The Supreme Court of Pennsylvania ruled that the correct test for a non-justiciable political question is whether a court can "identify" or "determine" the duty asserted

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[130] 369 U.S. 186 (1962). The court had adopted the *Baker* test in Zemprelli v. Thornburg, 407 A.2d 102 (Pa. Commw. Ct. 1979).

[131] County of Allegheny v. Commonwealth, 500 A.2d 1267, 1269 (Pa. Commw. Ct. 1985).

[132] *Id.* (citing Shapp v. Sloan, 391 A.2d 595, 604 (Pa. 1978)).

[133] The court reasoned:

> The County's premise is contrary to 200 years of history in the Commonwealth. It is also contrary to our constitutional concept of the separation of powers. While the boundary lines separating the governmental functions among the three branches, judicial, legislative and executive, are not always perceptible, it has always been the law that no branch should exercise the functions exclusively committed to another branch.

Id. at 1270 (footnote omitted) (citing Beckert v. Warren, 439 A.2d 638, 642-43 (Pa. 1981)).

[134] *Id.*

[135] *Allegheny County II*, 534 A.2d 760, 765 (Pa. 1987).

[136] One question the court used to determine if an issue was non-justiciable was whether there was "a textually demonstrable constitutional commitment of the issue to a coordinate governmental branch and impossibility of an appropriate judicial remedy." *County of Allegheny*, 500 A.2d at 1269.

and fashion a remedy for its violation.[137] Second, the court reviewed the Pennsylvania precedents[138] that the commonwealth court had relied on for its proposition that a textual commitment to one branch precludes judicial review for non-justiciability. Those precedents clearly showed that the legislature's control over fiscal matters was subject to the Constitution and that it could be reviewed by the judiciary in appropriate cases.[139]

After identifying the applicable test for justiciability from *Baker*, the court applied it. The opinion stated that the test was whether the legislature had imposed statutory duties on the county to fund the Pennsylvania court system and whether those duties were constitutional.[140] After extended review of the applicable statutes, the court concluded that indeed the legislature had imposed a statutory duty on all Pennsylvania counties to fund courts within their respective judicial districts.[141]

The court then turned to the second question: whether such legislative action was consistent with the Pennsylvania Constitution. Allegheny County argued that by spreading the duty

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[137] *Allegheny County II*, 534 A.2d at 762 (quoting Baker v. Carr, 369 U.S. 186, 198 (1962)). The *Baker* test provides:

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.

Baker, 369 U.S. at 198.

[138] Beckert v. Warren, 439 A.2d 638 (Pa. 1981); Shapp v. Sloan, 391 A.2d 595 (Pa. 1978).

[139] *Allegheny County II*, 534 A.2d at 762 (citing Beckert v. Warren, 439 A.2d 638 (Pa. 1981); Shapp v. Sloan, 391 A.2d 595 (Pa. 1978); Leahey v. Farrell, 66 A.2d 577 (Pa. 1949)).

[140] *Allegheny County II*, 534 A.2d at 762.

[141] *Id.* at 763. The court described this duty as follows:

> In sum, it is apparent that the General Assembly intended to create a legislative scheme in which funding of the various judicial districts was primarily a responsibility of the counties, and that these responsibilities include the funding of salaries, services and accommodations for the judicial system. We conclude, therefore, that the County's statutory claim is without merit.

Id. (footnote omitted).

to fund the judicial system to each separate county in the commonwealth the statute created dissention, conflict, and fragmentation in violation of the Pennsylvania Constitution.[142] More specifically, the county argued that the funding system violated the mandate of Article 5, Section 1 of the Pennsylvania Constitution to create a "unified" judicial system.[143]

The Supreme Court of Pennsylvania agreed with the Petitioner's argument. First, the court looked to the literal meaning of the word "unified" in Webster's dictionary.[144] The primary meaning of the word which the court appeared to draw upon was "[to] harmonize."[145] Second, the court listed the numerous lawsuits that had occurred between the judiciary and the counties under the present statutory scheme in Pennsylvania.[146] After reviewing these cases, the court concluded that the state funding

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[142] *Id.* Specifically, the County argued that the funding method created conflict at the county level in the following manners: county problems in determining numbers, functioning, and compensation of judicial employees for collective bargaining purposes; disputes over the scope of the county commissioners' bargaining power; disputes over whether the county commissioners have the legislative power to reject labor arbitration awards; and a history of strife and lawsuits between numerous counties and the common pleas courts over funding issues. *Id.* at 764.

[143] *Id.* (citing PA. CONST. art. V, § 1).

[144] The court concluded that "unify" means "'to cause to be one: make into a coherent group or whole: give unity to: HARMONIZE.'" *Id.* at 763 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2499 (3rd ed. 1986) (alteration in original)).

[145] *Id.* at 763.

[146] *Id.* at 764. *See, e.g.*, Beckert v. Warren, 439 A.2d 638 (Pa. 1981) (resolving a funding dispute regarding the Bucks County Court of Common Pleas); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971) (settling a funding dispute regarding the Philadelphia Court of Common Pleas); Leahey v. Farrell, 66 A.2d 577 (Pa. 1949) (entering a mandamus order requiring Cambria County to pay salary increases for court stenographers); County of Allegheny v. Allegheny Court Ass'n. of Professional Employees, 513 A.2d 1101 (Pa. Commw. Ct. 1986) (holding a labor arbitration award for court employees binding on the county); County of Allegheny v. Allegheny Court Ass'n of Professional Employees, 446 A.2d 1370 (Pa. Commw. Ct. 1982) (resolving a dispute regarding the scope of the county commissioner's bargaining power under the Public Employee Relations Act, PA. STAT. ANN. tit. 43, § 1101.805 (1974)).

scheme had created repeated litigation resulting in disharmony and fragmentation and turned the judiciary and the county governments into adversaries.[147] Although the Supreme Court of Pennsylvania conceded that county funding was a result of a delegation by the state to the counties, it stated that the administration of the funding by local authorities caused "continual friction and dissention."[148]

Second, drawing upon constitutional considerations, the court interpreted the word "unified" as used in Article 5, Section 1 of the Pennsylvania Constitution in terms of constitutional precedent and procedure. This interpretation or definition was the real focus of the opinion. The court began its exploration of whether a unified system had been created by examining the identity, quality, and nature of judicial staff personnel who were employed under the present system.[149] Staff members are a crucial element of an effective judiciary. Furthermore, the court reasoned that the purpose of a unified judicial system was to ensure "evenhanded, unbiased, and competent [judicial] administration" throughout the state without the intrusion of politics.[150] Thus, judges must have free rein to hire competent staff without interference from county political figures. This method of judicial hiring helps to eliminate the intrusions of political favors attendant with county hiring.[151] However, the majority also recognized that political activity in judicial hiring was not the only problem created by the present system. A more serious concern was the public's perception that the judiciary is involved in "political" hiring. As Chief Justice Flaherty stated:

> The citizens of this Commonwealth have a right not only to expect neutrality and fairness in the adjudication of legal cases, but also, they have a right to be absolutely certain this neutrality and fairness will actually be applied in every case. But if court funding is permitted to continue in the hands of local political authorities it is likely to produce nothing but suspicion or perception of bias and

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[147] *Allegheny County II*, 534 A.2d at 764.

[148] *Id.*

[149] *Id.* at 764-65.

[150] *Id.* at 764.

[151] *Id.* at 764-65.

> favoritism. As the framers of our constitution recognized, a unified system of jurisprudence cannot tolerate such uncertainties. All courts must be free and independent from the occasion of political influence and no court should even be perceived to be biased in favor of local political authorities who pay the bills.[152]

For these reasons, the court concluded that the county-based funding system enacted by the legislature violated the "clearly expressed" command in the constitution for a unified judicial system.[153] However, in 1987, in *Allegheny County II*, the court stayed judgment in order to give the legislature the opportunity to study and enact corrective legislation.[154]

In 1996, in *Pennsylvania State Ass'n of County Commissioners v. Commonwealth (County Commissioners)*,[155] the Commissioners sought a writ of mandamus under the original jurisdiction of the Supreme Court of Pennsylvania to order the legislature to comply with the decision in *Allegheny County II*.[156] The court noted that, in the nine years since the *Allegheny County II* decision, the legislature had not acted to study or to change the county-based method of funding held to be unconstitutional.[157] Accordingly, the court granted the writ of mandamus ordering the legislature to establish a statewide system of funding.[158] The court also appointed a commissioner to study and prepare recommendations for the implementation of a unified judicial system.[159]

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[152] *Id.* at 765.

[153] *Id.*

[154] *Id.*

[155] 681 A.2d 699 (Pa. 1996).

[156] The mandamus jurisdiction is based upon 42 PA. CONS. STAT. § 721 (1995), which provides:

> The Supreme Court shall have original but not exclusive jurisdiction of all cases of:
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> (1) Habeas corpus.
>
> (2) Mandamus or prohibition to courts of inferior jurisdiction.
>
> (3) Quo warranto as to any officer of Statewide jurisdiction.

[157] *County Comm'rs*, 681 A.2d at 703.

[158] *Id.* at 701.

[159] *Id.* at 703.

In *County Commissioners*, the legislature argued that the court did not have jurisdiction to grant mandamus[160] and that the court could not act against the legislature without violating the Speech and Debate Clause[161] of the Pennsylvania Constitution.[162] The legislature also founded this Speech and Debate Clause argument upon the principle of separation of powers.[163]

The Supreme Court of Pennsylvania held that it had the power to issue a writ of mandamus against the legislature because the matter involved was one of "immediate public importance."[164] The court reasoned that it had the power to assume plenary jurisdiction over any matter of immediate public importance pending before any court in the commonwealth under a specific statutory grant.[165]

A major part of the opinion focused upon dealing with the legislature's second argument that mandamus was barred because of the Speech and Debate Clause of the Pennsylvania Constitution.

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[160] *Id.* at 701. Specifically, the Commonwealth argued that the supreme court only had original jurisdiction to issue mandamus to courts of inferior jurisdiction, not against the legislature.

[161] *Id.* The Speech and Debate Clause provides as follows:

> The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

PA. CONST. art. II, § 15.

[162] The legislature asserted that the effect of the Speech and Debate Clause was to insulate the legislature from controversies over legislation as well as from the legislature's own "'contumacious conduct.'" *County Comm'rs*, 681 A.2d at 702 (citing Brief for Commonwealth at 14).

[163] *Id.*

[164] *Id.* at 701.

[165] *Id.* The court based its conclusion on the following statutory language:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 PA. CONS. STAT. § 726 (1995).

The court held that the Speech and Debate Clause does not bar judicial action against the legislature where such action was taken to correct a constitutional defect that threatened "the continued existence of an independent judiciary."[166]

First, the court analyzed the problem in general separation of powers terms.[167] Those issues revolved around the idea of separation into independent and co-equal branches to prevent concentration of power in one body. However, Chief Justice Flaherty pointed out that the general idea of separation would not work effectively unless it included within it a device for preventing one branch from "usurping the powers" of another; thus each branch has a "checking" power.[168] For example, the legislature has the taxing and spending power necessary to provide the funds for the judiciary, even though the judicial power is vested exclusively in the courts. This blending of powers requires that the two branches cooperate.[169] Second, the court analyzed the specific separation issue present in this case.[170] Chief Justice Marshall made it clear in *McCulloch v. Maryland*[171] that the power to tax includes the power to destroy.[172] Therefore, the court explained, the judiciary possesses "inherent" power to require necessities for its operation to be furnished and paid for from the public treasury if the legislature will not supply them.[173] The court reasoned that "[a]bsent such inherent power, the judiciary whose existence is mandated by Article 5 of the Pennsylvania Constitution, could be destroyed by the legislature."[174] The court concluded that "any legislative action which *impairs the independence* of the judiciary in its exercise of the judicial power and the administration of justice would be

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[166] *County Comm'rs*, 681 A.2d at 703.

[167] *Id.* at 702-03.

[168] *Id.* at 702.

[169] *Id.*

[170] *Id.* at 702-03.

[171] 17 U.S. (4 Wheat) 316 (1819).

[172] *Id.* at 431.

[173] *County Comm'rs*, 681 A.2d at 702-03 (quoting Leahey v. Farrell, 66 A.2d 577, 579 (Pa. 1949)).

[174] *Id.* at 703.

similarly abhorrent."[175] The court in *Allegheny County II* had explained how the independence of the judiciary had been impaired by the failure of the legislature to provide for a unified judicial system.[176] The perception of partiality on the part of the judiciary existed because the counties had control over the hiring of judicial personnel.[177] Because county politicians select and hire staff, judicial personnel appear to be hired as a result of considerations of political favoritism and payoff. Thus the court reasoned that the funding system adopted by the General Assembly of Pennsylvania had created suspicion and a perception of favoritism or partiality by the judiciary.[178] As a result, the principle of the Speech and Debate Clause must give way to the separation of power limitation in order to protect the independence of the judiciary.[179]

Justice Newman concurred. First, she reasoned that statutes enjoy a strong presumption of constitutionality.[180] She immediately noted that she doubted whether *Allegheny County II* established that county funding was the source of disunity and disharmony which prevented the existence of a unified court system.[181] Her reservations in this regard focused on the absence of a complete factual record on the history of discord between the common pleas courts and the counties where they are located.[182] She recognized that it is well established that the judiciary has the inherent power to require the legislature to make expenditures

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[175] *Id.* (emphasis added).

[176] For a discussion of the legislative inaction, see *supra* notes 149-54 and accompanying text.

[177] County of Allegheny v. Commonwealth, 534 A.2d 760, 764 (Pa. 1987).

[178] *Id.* at 765.

[179] *County Comm'rs*, 681 A.2d at 703.

[180] *Id.* at 704 (Newman, J., concurring).

[181] *Id.*

[182] *Id.* at 704 n.1 (Newman, J., concurring). Justice Newman stated:

> To a great extent, my reservations about *Allegheny II* stem from the fact that the Court does not provide complete data regarding the alleged history of strife regarding disputes between the judiciary and the counties. While references to three specific cases are helpful, I believe that a decision declaring a statutory scheme unconstitutional should be grounded on a complete factual record. *Id.*

reasonably necessary to operate the courts effectively and independently and that earlier cases before the Supreme Court of Pennsylvania had clearly established that right.[183] Nevertheless, Justice Newman argued that the existence of the right alone did not justify its exercise in the present circumstances to eliminate an entire, statewide system of funding for courts.[184] Thus, while recognizing the principle of inherent power, she questioned application of the doctrine on the facts of this case.

Justice Newman also expressed reservations about the majority holding on the basis that there was not a clear enough definition of the term "unified" to justify overcoming the strong presumption in favor of the constitutionality of a statute.[185] In spite of these reservations, she reasoned that the rule of stare decisis left her no choice but to apply the holding of *Allegheny County II* to the legislature, and that was the basis for her concurrence.[186] Nevertheless, she argued that *Allegheny County II* was decided without the benefit of a thorough study of the problems created by county funding, and gave no real guidance to the legislature.[187] She therefore argued that a master should conduct an extensive study of county funding, sources of conflict created by the present system, whether statewide funding would eliminate the problems, and how other states fund courts.[188]

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[183] *Id.* at 705 (Newman, J., concurring).

[184] *Id.*

[185] *Id.* at 705-06 (Newman, J., concurring).

[186] *Id.* at 706 (Newman, J., concurring). It should be noted that Justice Newman also observed that in abiding by the rule of stare decisis her position created a conflict with the Speech and Debate Clause, an issue that had been raised by the legislature. *Id.* at 707 (Newman, J., concurring).

[187] *Id.* at 707.

[188] *Id.* Justice Newman stated that the Master's specific duties should be:

> With respect to the current method of funding, the master will study (1) sources of county funding, (2) the methods by which the counties distribute these funds, (3) the ways in which sources and distribution of funds differ between the counties, and (4) the amount of funding each county court system has sought and actually received in the past five years. We should also charge the Master with analyzing all court challenges to county funding for the past five years.

Chief Justice Nix dissented. He argued that the majority had violated separation of powers principles by invading the province of a co-equal branch.[189] At the center of Chief Justice Nix's opinion was a direct disagreement with the majority's interpretation of the legislature's duty to provide a unified judicial system.[190] He argued that the underlying premise of the majority opinion was that the constitutional requirement for a unified system meant that the legislature was obligated to directly fund the judiciary (in other words, fund the judiciary by a direct appropriation from the state treasury to the judiciary rather than acting through the counties).[191] Chief Justice Nix, however, argued that the majority ignored the power or discretion of the legislature to determine the *method* of funding the judiciary.[192] As he explained in his dissenting opinion in *Allegheny County II*, it was within the province of the legislature to implement the constitutional command for a unified judiciary by choosing to fund it through the individual counties[193] or several counties or, for that matter, in any reasonable fashion. Because the legislature had acted in a manner that was not irrational, Chief Justice Nix asserted, the courts should not interfere.[194]

> With respect to state funding of the courts, the master should be charged with (1) examining existing statewide funding schemes in other jurisdictions, (2) studying possible sources of state funding, (3) clarifying how the distribution of state funds would differ from the current system, and (4) analyzing the ways in which statewide funding would relieve the alleged problems that exist under the current system.
>
> Within one year of appointment, the Master should complete a study of the issues outlined above, and make recommendations to the Court. A comprehensive Master's report will serve as a solid foundation as this Court guides the legislature toward the creation of unified funding for our unified judicial system.

Id.

[189] *Id.* at 707 (Nix, C.J., dissenting) (citing County of Allegheny v. Commonwealth, 534 A.2d 760, 765 (Pa. 1987) (Nix, C.J., dissenting)).

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Allegheny County II*, 534 A.2d at 766 (Nix, C.J., dissenting).

[194] *Id.*

In Pennsylvania only the legislature possesses the power to tax. Counties in Pennsylvania do not have any separate and independent taxing power.[195] The counties tax to support the courts solely at the command of the state and only have the power to tax as it is expressly delegated by the state. Chief Justice Nix argued that when the counties exercised the power to tax through a delegation from the legislature, they were acting merely as an organ of the *state*.[196] Consequently, Chief Justice Nix concluded that the present funding scheme is exactly what the Constitution requires: an exercise of the taxing power by the legislature acting through the counties to fund the judiciary.[197] Because the Constitution did not mandate the method of financing the judiciary, he concluded that such a decision about the method of funding is the prerogative of the legislature.[198]

Chief Justice Nix also vigorously disagreed with what he referred to as the "transparently fallacious" argument that the presence of the counties in funding the judiciary had been a cause of dissention.[199] He argued that any occasional dispute which arose out of the funding system had been resolved and that most of them arose from "uncertainties as to the relationship between the parties."[200] These "isolated" cases, he explained, did not point to any general collapse or serious problems with local funding for the judiciary.[201] Furthermore, if there were differences over funding between the county authorities and the judiciary, he reasoned that it was highly unlikely that centralizing the appropriations process would eliminate the generic differences

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[195] *Id.*

[196] *Id.*

[197] *Id.* at 766-67 (Nix, C.J., dissenting).

[198] *Id.* at 766 (Nix, C.J., dissenting). Chief Justice Nix reasoned further that, because the choice of the funding method is a matter within the discretion of the legislature, there is a textual constitutional commitment of the matter to the legislature; that commitment satisfies the *Baker v. Carr* test for a nonjusticiable political question. For that reason, Chief Justice Nix observed that the commonwealth court's decision was correct because it found a nonjusticiable political question. *Id.*

[199] *Id.* at 767 (Nix, C.J., dissenting).

[200] *Id.*

[201] *Id.*

which will always exist between an appropriating body and the recipient of funds.[202]

In *Allegheny County II* Chief Justice Nix also made what appears to be analogous to a standing argument, although it is not described as such. He criticized the majority for permitting a political subdivision (the plaintiff county) to complain about the difficult problems that its parent (the legislature) had placed upon it.[203] He reasoned that the county had no authority to tax without a specific and express delegation from the legislature; therefore, it had no right to complain about commands from the state about how the money was to be spent.[204] Thus this suit involved "nothing more than an instrumentality of the sovereign attempting to challenge the judgment of that sovereign."[205]

In addition to pointing out flaws in the majority's analysis, Chief Justice Nix also discussed the positive virtues of the present system of county funding of the judiciary.[206] First, he argued that, because Pennsylvania is a large state, there were substantial cost of living disparities between different areas. He reasoned that it followed that the salaries paid in one area do not need to be the same as in another where the cost of living was different.[207] The present system of local county funding took into account those local differences in cost of living. Second, he emphasized that interposing the counties between the courts and the court employees had insulated the judiciary from labor disputes with its employees.[208] Chief Justice Nix incorporated these arguments from his dissent in *Allegheny County II* into his dissenting opinion in *County Commissioners*.[209]

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[202] *Id.*

[203] *Id.* at 766 (Nix, C.J., dissenting).

[204] *Id.* at 767 (Nix, C.J., dissenting).

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* at 768 (Nix, C.J., dissenting).

[209] Pennsylvania State Ass'n of County Comm'rs v. Commonwealth, 681 A.2d 699, 707 (Pa. 1996) (Nix, C.J. dissenting).

2. Evaluation

This case involved several major constitutional issues including, political question, Speech and Debate Clause, and a particular subspecies of separation of power, inherent power. Because the principal issue was separation of powers and, more particularly, the concept of the inherent power of the judiciary to order funding for the courts, this commentary will focus upon that subject.[210]

The court's approach consisted of several steps. First, the court construed the command of the Constitution of Pennsylvania to adopt a unified judicial system and found that it meant a harmonious system.[211] Second, the frequent litigation between the judiciary or judicial staff and various counties revealed that the present system of county funding had been anything but harmonious.[212] Third, the local funding system had created a problem with the staffing of the judiciary in the State to the extent that the counties are involved, because hiring was an opportunity to "repay political debts."[213] This problem, in turn, created a "perception of bias and favoritism."[214] Consequently, the funding system did not meet the constitutional requirement of a unified system.[215] Thus far, the groundwork for this proposition was found in the *Allegheny County II* case.[216] Fourth, however, the *County Commissioners* case raised squarely the separation of powers issues.[217] In response to the arguments that the

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[210] The case was filled with other fascinating constitutional problems, such as the Speech and Debate Clause and the political question issues *Id.* at 761-62. Analysis of these issues, however, is beyond the scope of this survey article. To address these other issues would require another article in itself.

[211] *Allegheny County II*, 534 A.2d at 764.

[212] *Id.*

[213] *Id.* at 765.

[214] *Id.*

[215] *Id.*

[216] *See* Ellenbogen v. County of Allegheny, 388 A.2d 730 (Pa. 1978); County of Allegheny v. Allegheny Court Ass'n of Professional Employees, 513 A.2d 1101 (Pa. Commw. Ct. 1986); County of Allegheny v. Allegheny Court Ass'n of Professional Employees, 22 Pa. D. & C.3d 166 (1981).

[217] *See Allegheny County II*, 534 A.2d at 765.

appropriation and method of funding was a matter assigned by the Pennsylvania Constitution to the General Assembly (a traditional separation issue) and that the Speech and Debate Clause explicitly insulates the legislature from judicial inquiry, the court stated that it had the inherent power to act because the General Assembly's power was limited by the Constitution.[218] The court recognized that the power being exercised was unusual, but argued that the danger to the continued independent functioning of the judiciary was extraordinary.[219] Thus the invocation of inherent power depends on the magnitude of the threat to the judiciary.

Precedent furnishes some support for the majority position. In the first place, the inherent power doctrine appears to be well recognized in Pennsylvania and elsewhere. The doctrine has been regularly used against counties in a number of cases involving court staffing in Pennsylvania.[220] However, the *County*

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[218] *Id.* at 762.

[219] *Id.*

[220] *See, e.g.*, Leahey v. Farrell, 66 A.2d 577 (Pa. 1949) in which an earlier statute created a county salary board in the various counties to set the salary for court reporters, tipstaves, stenographers and other court employees. *Id.* at 578. The judges of the Court of Common Pleas of Cambria County entered an order giving raises to their court reporters. The county commissioners refused to comply with the order because the salary board legislation had not been followed by the court. The Supreme Court of Pennsylvania reasoned that, on the one hand, control of state finances rests with the legislature. *Id.* at 579. On the other hand, the court recognized that the legislature cannot encroach on the judiciary. *Id.* at 578. Furthermore, the role of the judiciary to dispense justice does not, in the normal course, include the power to impose taxes or to deal with funding, *id.* at 579, for "[i]t is the legislature which must supply such funds. Under the system of division of governmental powers it frequently happens that the functions of one branch may overlap another. But the successful and efficient administration of government *assumes* that each branch will co-operate with the others." *Id.* (emphasis in original). However, the supreme court also recognized that such cooperation may break down, and when that occurs:

> Should the legislature, or the county salary board, act arbitrarily or capriciously and fail or neglect to provide a sufficient number of court employes or for the payment of adequate salaries to them, whereby the efficient administration of justice is impaired or destroyed, the court possesses the inherent power to supply the deficiency. Should such officials neglect or refuse to comply with the reasonable requirements of the court they may be required to do so by

Commissioners case was not a court of common pleas invoking the doctrine against county commissioners. Instead, the Supreme Court of Pennsylvania was invoking the doctrine of inherent power against the state legislature to strike down a state-wide program.

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mandamus.

Id. at 580; *see also* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971). In the *Carroll* case, the Court of Common Pleas submitted its estimate of the necessary operating expense budget to the Finance Director of the City of Philadelphia, a Home Rule charter city. *Id.* at 194. The city reduced the amount and later refused another additional request for funds. *Id.* at 195. This budget was primarily for judicial staff. Upon the city's refusal to provide the requested funds, the court of common pleas brought a mandamus action to compel the payment of the additional funds for staffing. *Id.* The court reasoned that "the Judiciary is an independent and co-equal Branch of Government." *Id.* at 196. This means that:

> Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof.
>
> Expressed in other words, the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation.

Id. at 197 (emphasis in original) (citations omitted); *see also* Beckert v. Warren, 439 A.2d 638 (Pa. 1981). In *Beckert*, the Court of Common Pleas of Bucks County sought funding for additional staff positions from the County Commissioners. The Commissioners responded by eliminating existing Common Pleas staff positions. The court brought mandamus to compel financing for adequate financing. In its constitutional analysis of the doctrine of inherent power, the Supreme Court stated:

> [S]ince the destruction of one branch of government by another would be antithetical to the constitutional scheme of separation of powers, any legislative action which impairs the independence of the judiciary in its exercise of the judicial power and the administration of justice would be similarly abhorrent. Since it is the right and duty of the judiciary to invalidate a legislative act repugnant to the constitution, it is essential under such circumstances for the judiciary to come to its own defense. Thus the judiciary must use its check on the legislature.

Id. at 643 (citations omitted).

Thus the present case was a major escalation in the employment of the inherent power doctrine in Pennsylvania.[221] It represents a major, direct confrontation between the judiciary and the legislature. For perhaps the first time, a court used the doctrine of inherent power, not in a way that was arguably consistent with the overall scheme of the General Assembly, namely to work out details of funding in a particular county operating *under* that legislative scheme. Rather the court used the doctrine *directly against* the legislature to invalidate a statewide funding mandate.[222] Although the doctrine has been recognized in numerous other situations involving narrower issues of specific positions or interference with specific powers of the judiciary, inherent power had not previously been used in this state in such a sweeping fashion.[223] Because of this difference, the case is one of the most important constitutional cases that has been decided in this commonwealth. Therefore, citing precedents to establish that this was simply a more or less normal use of an existing power within the doctrine of separation of powers would be misleading. Although the general power which the Supreme Court of Pennsylvania drew upon was the same as in earlier cases in which courts used inherent power to check county officers, this use at a statewide level was so much more extensive that it amounted to a difference in kind.[224] Thus although the doctrine of inherent judicial power to compel funding is generally recognized, this particular use was such a substantial extension of the doctrine that one may wonder whether this extension was justified.

In the second place, the judiciary acted in direct contravention of a power expressly assigned to the legislature by the text of the constitution. This is not a conflict between two ambiguous implied powers of the different branches. Instead, the judiciary was intervening into a power which has clearly and historically been recognized as belonging to the legislature: the power to tax and appropriate.[225] Generally, the judiciary recognized the

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[221] *Allegheny County II*, 534 A.2d at 762-63.

[222] *Id.*

[223] *See id.* at 762-64.

[224] *See id.*

[225] Leahey v. Farrell, 66 A.2d 577, 579 (Pa. 1949).

constitutional power of the legislature in fiscal matters[226] and it recognized the power of the legislature to provide for funding of the judiciary.[227]

These introductory musings lead to several fair questions: first, is the perceived danger serious enough that the judiciary should extend and invoke the inherent power doctrine; and, second, is the inherent power doctrine one which is appropriate for use with a problem such as the present one? With regard to the first question, the explanation given by the majority opinion for its use of the inherent power doctrine appears to support the conclusion that the danger to the judiciary was so serious that this major constitutional step was justified.[228] The explanation of the majority was that the funding system and the actions of the counties under it had undermined public confidence in the judiciary so severely that the independence of the judiciary was endangered.[229] In addition, it was also clear that the present system had created an adversarial relationship between many of the counties and the courts of common pleas within them.[230] The majority argued that this was not a unified system, but rather one that was fragmented.[231] Do these factors justify the invocation of the doctrine of inherent power?

In his dissent, former Chief Justice Nix argued that there was no strife or fragmentation created by the present system.[232] He also argued that the state was funding in a unified fashion through its delegates, the counties.[233] He argued that the cases in which

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[226] *Id.* (stating that "[c]ontrol of state *finances* rests with the legislature") (emphasis in original).

[227] Beckert v. Warren, 439 A.2d 638, 642-43 (Pa. 1981) (stating that "the taxing and spending powers necessary to sustain the existence of the judiciary is [sic] vested in the legislature").

[228] *Allegheny County II*, 534 A.2d at 763-65.

[229] *Id.* In *Beckert*, the Supreme Court of Pennsylvania quoted Chief Justice Marshall as saying "'[a] Legislature has the power of life and death over all the Courts and over the entire Judicial system.'" *Beckert*, 439 A.2d at 643 (quoting Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971)).

[230] *Allegheny County II*, 534 A.2d at 764.

[231] *Id.*

[232] *Id.* at 767 (Nix, C.J., dissenting).

[233] *Id.* at 766-67 (Nix, C.J., dissenting).

courts of common pleas have litigated against their respective counties merely clarified the relationships between the counties and those courts.[234] However, if his description was accurate, why have the controversies involving the courts of common pleas and the counties continued? If this type of litigation clarifies relationships, why then does it continue to be necessary for cases to be filed and litigated? The majority opinion pointed out numerous cases in which staffing problems continued to occur, even after clarification by the supreme court.[235] In fact, last year the Supreme Court of Pennsylvania decided a major case involving the hiring and firing of probation officers by the court of common pleas.[236]

The continuance of the problem strongly suggests that the problems with the present funding system are *structural*, and inherent in the county funding system itself. There would seem to be considerable merit in the majority's position that the present funding system was not unified, at least in the sense that there was a settled, defined relationship between the counties and the courts of common pleas. That was a serious problem, because it created litigation on a continuing basis throughout the commonwealth.[237]

Paradoxically, it appears to be impossible to avoid litigation under the present system. This conclusion would seem to follow from the characteristic of a common law case methodology for solving problems which exist between the counties and the courts of common pleas. A common law stare decisis system in complex situations requires repeated litigation to work out every new problem.

Every lawyer can recall the first-year law school courses in torts, contracts, and property where the common law case system slowly worked out problems and doctrines over long periods of time through numerous cases. The relationships and situations between the various counties and courts of common pleas differ

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[234] *Id.* at 767 (Nix, C.J., dissenting).

[235] *Id.* at 764.

[236] Court of Common Pleas of Erie County, Juv. Probation Dep't v. Pennsylvania Human Relations Comm'n, 682 A.2d 1246 (Pa. 1996).

[237] *See Allegheny County II*, 534 A.2d at 764 (illustrating the continuous litigation in the Commonwealth).

widely; thus the situation which exists under the present funding for the judicial system is factually complex. It follows that a common law system of working out details in this situation through litigation will be lengthy, slow, and involve repeated litigation.[238]

The former Chief Justice was correct in one sense: each case litigated between the common pleas courts and their counties may clarify one aspect of one problem. There are, however, so many problems in the different Pennsylvania counties whose situations are unique and different, that frequently the solution posed by the holding of a particular case will serve as a viable precedent only for that particular county where the case was decided. That means, of course, that if a similar problem occurs in another county, it will have to be litigated because the factual matrix is different and the ways in which the prior decision will apply are not clear. Thus, under the present funding system litigation is unavoidable.[239] To the extent that continuing litigation is a sign of lack of unification, the present system is not unified.[240]

There is support in Pennsylvania precedent for the proposition that lack of cooperation and harmony between the branches of government may require the use of the inherent power of the judiciary:

> The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed.[241]

Therefore, to the extent that cooperation has broken down between the branches, earlier Pennsylvania cases have recognized that the exercise of inherent power by the judiciary may be required.[242]

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[238] *See id.* (discussing the repeated litigation in the County of Allegheny).

[239] *Id.*

[240] *See id.*

[241] Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (citations omitted).

[242] *Id.* at 193; County of Allegheny v. Allegheny Court Ass'n of

Thus far, analysis furnishes some support for the proposition that the fragmentation and fractiousness created by the present system of funding the courts may impede the creation of the unified system which the Pennsylvania constitution requires.[243]

There is a second basis for the majority's position: the public perception that the courts are prejudiced and biased because they are not free to hire their own personnel.[244] Instead, the counties do the hiring, and give or may give the appearance of selection for political payback or influence rather than for judicial efficiency.[245] This is a most serious matter. If courts are in fact partial or biased, or are merely perceived as such, the legitimacy of the judiciary and its effectiveness as an institution will be lost without regard to the accuracy or inaccuracy of the perception.

The independence of the judiciary is one of the keynotes of our system of separation of powers, and one of the principal sources of legitimacy for the courts:

> The argument for the independence of the judge is that in performing his function of rule-interpretation he should not be subject to pressure that would cause him to vary the meaning of the rules to suit the views of the persons affected by them, and that in ascertaining "facts" he will not be influenced by consideration of expediency. It is an essential element in the maintenance of that stability and predictability of the rules which is the core of constitutionalism. [246]

The judiciary must, in a separation of powers regime, check the other branches. To do so requires independence from the other branches. Furthermore, independence of the judiciary is required in order to decide cases impartially, and the corollary of that

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Professional Employees, 22 Pa. D. & C.3d 166 (1981).

[243] *Allegheny County II*, 534 A.2d at 764.

[244] *Id.* at 765.

[245] *Id.*

[246] In re Salary of Juvenile Director, 552 P.2d 163, 170 (Wash. 1976) (quoting M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 328-29 (1967)); *see also* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 226 (1993).

principle, is that the judiciary must be *perceived* as impartial.[247] Thus the Supreme Court of Pennsylvania's decision in *County Commissioners*[248] used the inherent power principle that was founded upon the need for, and the appearance of, impartiality.[249] The rationale of the court was that an extraordinary remedy was necessary because the continued existence of the judicial branch as an effective independent institution was at stake. The importance of public perception of the judiciary as independent and impartial, and the justification for the use of inherent power by the judiciary was addressed by the majority in *Carroll*[250] as follows: "The confidence, reliance and trust in our Courts and in our Judicial system on the part of the Bench and the Bar, as well as the general public, have been seriously eroded. We cannot permit this to continue."[251] It is clear that the "public perception" problem was serious enough to threaten the continued effective existence of the judiciary as a separate, co-equal branch of government.

The seriousness of the problem was not the only important question in cases involving a conflict between two of the branches of government. There was a related question of whether the inherent power doctrine was suitable to resolve the problem. On the one hand, it is true that the present system of funding has created serious dangers to the judiciary. On the other hand, the judicial use of inherent power to check means that a coordinate branch of government has been prevented from exercising power—taxing and appropriations—that has been assigned by the text of the Pennsylvania Constitution to the legislature. Still, there is simply no argument that the doctrine of inherent judicial power exists and is appropriately used in a variety of situations.[252]

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[247] F.F. STUMPF, INHERENT POWERS OF THE COURTS at xviii (1994).

[248] 681 A.2d 699 (Pa. 1996).

[249] *Id.* at 701-03.

[250] Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971).

[251] *Id.* at 199.

[252] *See, e.g.*, Howard B. Glaser, Wachtler v. Cuomo*: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994) (stating that courts have recognized inherent power as tool to assert judicial independence since the 1800s); Walter E. Swearingen, Note: Wachtler v. Cuomo*: Does New York's Judiciary Have an*

The real question, however, was whether the doctrine should be applied on a state-wide basis as the court did in this case. It is one thing to use the doctrine to force a county to provide the funds to operate the common pleas courts, but it is another matter entirely to order the legislature to adopt a centralized system of funding for the judiciary. The reasons for use of the doctrine, the way in which it relates to the judiciary and the legislature, and separation of powers concerns will help define the useful contours of the doctrine.

The Supreme Court of Pennsylvania has decided one of the leading cases[253] in the inherent power to appropriate area.[254] *Carroll* represents the majority rule in the United States.[255] The court reasoned that the three branches of government are co-equal and therefore:

> [T]he co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof. . . .
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> Expressed in other words, the Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation.[256]

Inherent Right of Self-Preservation?, 14 PACE L. REV. 153, 166 (1994) (stating courts in twenty-nine states have recognized doctrine of inherent power in appropriation cases); Note, *The Courts' Inherent Power To Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983) (stating that a virtually unanimous body of opinion in federal and state courts has upheld inherent power in appropriation cases). For an exhaustive collection of cases, see Gary D. Spivey, Annotation, *Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes*, 59 A.L.R. 3d 569 (1974 & Supp. 1996).

[253] Swearingen, *supra* note 252, at 166 n.65.

[254] *Carroll*, 274 A.2d 193.

[255] Glaser, *supra* note 252, at 116-17.

[256] *Carroll*, 274 A.2d at 197 (citations omitted).

In the past, scholars and analysts have noted that the exercise of the power to appropriate by the legislature could impair the judiciary in several ways and thus offend the constitution.[257] First, it may dispose of judicial business through the power of the purse.[258] Second, each branch must check the others. If financial support is lowered below a certain amount, the judiciary becomes unable to act independently to check the other branches.[259] One writer has noted that there may be a specific constitutional basis for the doctrine of inherent powers: courts cannot reduce services, for they are constitutionally required to deliver judicial decisions to the citizens.[260] The present case adds a new rationale and describes a new manner of interference with the judiciary by the legislature. Although many of the earlier cases and litigation in other states have involved the reduction of budgets and underfunding of the judiciary,[261] it does not appear that this is

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[257] JOHN C. CRATSLEY, INHERENT POWERS OF THE COURTS 18-26 (1980).

[258] Note, *supra* note 252, at 1690. For example, the author of this article points out that a California court observed that:

> [T]he state accounting office identified the following consequences of a new austerity budget on the courts:
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> (1) Consolidation of all municipal court districts;
> (2) Virtual elimination of civil calendars;
> (3) Elimination of small claims court cases;
> (4) Cutbacks on the criminal misdemeanor calendar;
> (5) The closure of 22 separate courthouses; and
> (6) The resulting violation of several provisions of the Code of Civil Procedure, Penal Code, and Constitutional guarantees of due process.

Id. at 1690 n.16 (quoting Alhambra Municipal Court District v. Bloodgood, 186 Cal. Rptr. 807, 810 (Ct. App. 1982)). The author also noted: "If an appropriations decision results in the 'elimination of civil calendars,' or identifiable violation of state law, fiscal pressure rather than legal judgment has decided the cases." *Id* (citation omitted).

[259] *See* Note, *supra* note 252, at 1690; *see also* PA. CONST., art. I, § 11 (1968).

[260] Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep,"* 45 CASE W. RES. L. REV. 705, 727 (1995).

[261] *See, e.g.*, Jackson, *supra* note 246, at 226-27 (discussing inherent judicial powers doctrine in the area of court funding); Glaser, *supra* note 252, at 153 (reviewing the limits of the inherent judicial power doctrine); I. Jackson Burson, Jr., *Not Endowed by Their Creator: State Mandated Expenses of Louisiana*

the reason for the Supreme Court of Pennsylvania's action in *County Commissioners*. The objection was not to the level of funding, but the method, which prevented operation of a unified system and which undermined the legitimacy of the judiciary by creating an appearance of lack of impartiality. This is a new wrinkle in the inherent power literature. It escalates the stakes, just as the case of *Wachtler v. Cuomo*[262] did in New York, by adopting a statewide approach to inherent power, rather than a county by county basis. It also introduces several novel arguments for the exercise of the inherent power.[263] Do those arguments justify the exercise of the inherent power of the courts on this scale?

There are many analogous arguments in earlier cases involving inherent power. One argument often advanced in favor of inherent power is that it is wholly justified to the extent that it preserves the independence of the judiciary in our system, and its ability to check the other branches.[264] Thus, the judiciary acts to decide

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Parish Governing Bodies, 50 LA. L. REV. 635 (1990) (examining state funding of Louisiana judiciary).

[262] For analysis and discussion of this case, for which there is no state supreme court opinion because it settled before trial, see Swearingen, *supra* note 252, at 194-97.

[263] For a discussion of arguments for the exercise of the Inherent Power Doctrine, see *supra* notes 220-27 and accompanying text.

[264] The *Carroll* court stated:

> [A] basic precept of our Constitutional form of Republican Government [is] that the Judiciary is an independent and co-equal Branch of Government, along with the Executive and Legislative Branches. The line of separation or demarcation between the Executive, the Legislative and the Judicial, and their respective jurisdiction and powers, has never been definitely and specifically defined, and perhaps no clear line of distinction can ever be drawn. However, we must, of necessity, from time to time examine and define some of the respective powers within these undefined boundaries. . . .
>
> Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof.

matters of collective bargaining of the county commissioners relative to judicial employees[265] and whether arbitration will cover labor matters of judicial employees.[266] There are numerous cases involving funding in which the Supreme Court of Pennsylvania has explained the rationale for inherent power: an independent judiciary must possess power co-equal with its duties and functions so that it can protect itself.[267] There is no question about the primary role of the legislature in appropriation.[268] However, when the legislature fails to provide sufficient appropriations, or interferes with the operation of the judiciary so that it cannot operate independently, impartially, and as a check on the other branches, the judicial branch may exercise the power necessary to preserve itself.[269]

It can be argued that the extent of the inherent power of the judiciary goes far enough to save itself, and no farther.[270] When a court compels funding, it is exercising the appropriations power. Because separation of powers is not a rigid boundary, there is no

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Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 196-97 (Pa. 1971) (citations omitted).

[265] County of Allegheny v. Allegheny Court Ass'n of Professional Employees, 446 A.2d 1370 (Pa. Commw. Ct. 1982).

[266] County of Allegheny v. Allegheny Court Ass'n of Professional Employees, 513 A.2d 1101 (Pa. Commw. Ct. 1986).

[267] Beckert v. Warren, 439 A.2d 638 (Pa. 1981); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971); Leahey v. Farrell, 66 A.2d 577 (Pa. 1949).

[268] In *Beckert*, the court stated that "[c]ontrol of state *finances* rests with the legislature, subject only to constitutional limitations[.] The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds." *Beckert*, 439 A.2d at 643 (emphasis in original) (citations omitted).

[269] *Leahey*, 66 A.2d at 579.

[270] In *Beckert* the court stated:

> [T]he actual exercise of inherent power must be viewed as exceptional, that is, reserved for defensive use. There must be a *genuine threat* to the administration of justice, that is, a nexus between the legislative act and the injury to the judiciary, not merely a theoretical encroachment by the legislature.

Beckert, 439 A.2d at 643.

serious objection when "the exercise by one branch of another branch's powers helps to protect the constitutional status of each."[271] On the other hand, although the boundary between the branches is not clear, the dividing line in this area occurs when the exercise of inherent power does not solely or primarily protect the judicial branch, but curtails or reduces the essential powers of another branch, the legislature.[272] Has that line been crossed in Pennsylvania? This is not an easy question to answer. The danger to the judiciary is serious and continuing. The essence of the majority opinion is that the continuing litigation with different counties is an impediment which has been caused by structural defects in the county funding system. A characteristic of this type of problem is that it worsens over time; with each crisis or new litigation, the flaws and deficiencies of the funding system become more obvious.

Another flaw which has become obvious is that many of these recurrent problems involve personnel who have been hired by the respective counties. The Supreme Court of Pennsylvania has explained that this practice has created the perception or appearance of bias or lack of impartiality in the judiciary, which jeopardizes an attribute absolutely essential for the courts.[273] Thus, the judiciary has restrained itself while the problems with the present funding system have become manifest.

On the other hand, the constitution expressly assigns the power to appropriate to the legislature. Of course, the inherent power exercised here is not an attempt to obtain additional funds. The problems are with the *method* of funding. Although much of the literature on inherent power has focused upon the judiciary's use of inherent power to take funds from the treasury,[274] such is not

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[271] Glaser, *supra* note 252, at 137.

[272] *Id.*

[273] One commentator has noted: "The courts' most critical resource is their perceived legitimacy." Note, *supra* note 252, at 1694.

[274] The articles address the problem of lack of sufficient funds by the legislature damaging the judicial branch. *See e.g.*, Burson, *supra* note 261; Jackson, *supra* note 246; Glaser, *supra* note 252; Note, *supra* note 252; Andre Doguet, Note, McCain v. Grant Parish Police Jury*: Judicial Use Of The Inherent Power Doctrine To Compel Adequate Judicial Funding*, 46 LA. L. REV.

the case here. Therefore, the argument that a core power of the legislature is being usurped loses considerable force.

Justice Newman in her concurring opinion made several important arguments.[275] She observed that there was no doubt that the judiciary possessed the power to compel a new system of funding, for the judiciary clearly has the power to preserve itself, and, where necessary, that power extends even to appropriation.[276] On the other hand, she appeared to be arguing that, although the inherent power to appropriate and to order an entirely new system existed, such inherent judicial power should not be exercised unless a record has been established which shows that (1) the threat to the independence of the judiciary is real; (2) the present system is not unified; (3) the solution proposed will correct the existing problem.[277]

Her argument is intriguing for a number of reasons. First, the blending of powers which exists within the general constitutional scheme in Pennsylvania requires some cooperation.[278] That is, the constitution assigns the funding of the judicial system to the legislature. Presumably, the legislature is to work cooperatively with the judiciary to implement the judicial power. Justice Newman's position encourages and facilitates such interbranch cooperation.[279] It is true that separation of powers requires checks and balances so that the branches are pitted against one another to prevent the accumulation of power in one branch.[280] However, the blending of powers also requires some cooperation between the branches when they share power.[281] Justice Newman's position would encourage the restoration of the

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157 (1985).

[275] Pennsylvania State Ass'n of County Comm'rs v. Commonwealth, 681 A.2d 699, 704 (Pa. 1996) (Newman, J., concurring). For a discussion of Justice Newman's concurring opinion, see *supra* notes 180-88 and accompanying text.

[276] *County Comm'rs*, 681 A.2d at 705 (Newman, J., concurring).

[277] *Id.* at 704-07 (Newman, J., concurring).

[278] *Id.* at 704-06 (Newman, J., concurring).

[279] *Id.*

[280] Jackson, *supra* note 246, at 224.

[281] *See id.* at 224-25.

cooperation between the branches.[282] Second, two important constitutional principles and powers—and two branches—are in direct conflict and confrontation.[283] On the one hand, the power of the legislature to appropriate and to set the method of implementing the funding of the judicial system is clear.[284] On the other hand, the inherent power of the judiciary to protect itself, as a co-equal, independent branch, against action by the legislature that destroys or undermines the judiciary is equally clear.

The major problem with the doctrine of inherent power is what is its boundaries? An expansive reading of the doctrine could weaken the other branches if it interfered with a core function. In the past, the Pennsylvania courts themselves have recognized that the inherent power doctrine is to be used sparingly, and only where "reasonably necessary."[285] Justice Newman's point was that she was uncertain whether it was reasonably necessary to take the strong action which the majority had taken.[286] She supported such action if it was necessary, and she also emphatically affirmed that the court possessed that power.[287] However, it was not clear to her that the record displayed such damage to the judiciary that the majority should have taken the action that it took.[288] Thus she recognized the existence and legitimacy of inherent judicial power, but attempted to confine its use to cases of manifest danger to the judiciary.

She was not convinced that manifest danger had been established. The question was not so much whether a record could

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[282] *See County Comm'rs*, 681 A.2d at 704-06 (Newman, J., concurring).

[283] Jackson, *supra* note 246, at 224-25.

[284] *Id.* at 223-25.

[285] The *Beckert* court stated:

> "It is only when a board acts arbitrarily or capriciously and refuses or neglects to comply with the reasonably necessary requirements of the court, whereby the administration of justice may be impaired or destroyed, that under the inherent power of the court, orders like that now complained of may be enforced by mandamus."

Beckert v. Warren, 439 A.2d 638, 644 (Pa. 1981) (quoting Leahey v. Farrell, 66 A.2d 577, 580 (Pa. 1949)).

[286] *County Comm'rs*, 681 A.2d at 704 (Newman, J., concurring).

[287] *Id.* at 705 (Newman, J., concurring).

[288] *Id.* at 704 (Newman, J., concurring).

be made which more clearly illustrated damage to the judiciary. Instead, the question was whether such damage had been shown. Unfortunately, the numerous lawsuits which have occurred between the common pleas courts and the various counties created a clear record of antagonism and continuing crisis in the courts. The fact that so many of the decisions have involved personnel matters helped to establish the perception that the judicial branch lacks independence. Although it was a close call, the majority had the better argument.

B. Court of Common Pleas of Erie County v. Pennsylvania Human Relations Commission (Ison)[289]

In *Ison* a discharged common pleas probation officer, Ison, filed a complaint with the Pennsylvania Human Relations Commission (PHRC).[290] The court of common pleas filed a motion to dismiss Ison's complaint on the basis of separation of powers principles.[291] The PHRC denied the motion to dismiss, and the commonwealth court reversed.[292] PHRC appealed to the supreme court which affirmed this decision.[293] The majority held that the action of the PHRC violated separation of powers principles.[294] The Pennsylvania Constitution gave the Supreme Court of Pennsylvania supervisory and administrative authority over the entire court system in the state.[295] This constitutional

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[289] 682 A.2d 1246 (Pa. 1996).

[290] *Id.* at 1247.

[291] *Id.*

[292] *Id.*

[293] *Id.* at 1249.

[294] *Id.* at 1248.

[295] In *Ison*, the majority reiterated that

> "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure, and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, . . ., and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the

provision and the doctrine of separation of powers gave judges the power to "select, discharge and supervise court employees."[296] Thus applying this statute to the judiciary infringed upon the power of the judiciary to supervise the courts.[297] The power to discharge involves the authority to select the personnel who will serve as staff in the judiciary and assist judges. Review of this power by the PHRC was an encroachment on this supervisory power.[298]

The scope of judicial power is a recurring problem which has been examined and decided in many states under the doctrine of inherent power of the judiciary.[299] The doctrine has been litigated regularly in Pennsylvania for many years. For example, in 1995 another case was decided involving the power of the judiciary to hire and discharge in Erie County.[300] Here, the Supreme Court of Pennsylvania relied upon the explicit grant of judicial supervisory power in the Pennsylvania Constitution.[301] The court has followed a course of complete and absolute

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jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose."

Id. at 1247 (quoting PA. CONST. art. V, § 10 (c)) (second alteration in original).

[296] *Id.*

[297] *Id.*

[298] *Id.* at 1248.

[299] Holohan v. Mahoney, 480 P.2d 351 (Ariz. 1971); Smith v. Miller, 384 P.2d 738 (Colo. 1963); People *ex rel.* Bier v. Scholz, 394 N.E.2d 1157 (Ill. 1979); District Court v. Williams, 268 A.2d 812 (Me. 1970); Young v. Board of County Comm'rs, 530 P.2d 1203 (Nev. 1975); Mowrer v. Rusk, 618 P.2d 886 (N.M. 1980); *In re* Janitor, 35 Wis. 410 (1874); *see also* Jackson, *supra* note 246, at 218 (discussing the "inherent powers of judges").

[300] Commonwealth *ex rel.* Jiuliante v. County of Erie, 657 A.2d 1245 (Pa. 1995). The *Jiuliante* case was examined last year in this publication. *See* Gedid, *supra* note 1, at 649-58; *see also* Sweet v. Pennsylvania Labor Relations Bd., 322 A.2d 362, 365-66 (Pa. 1974) (stating that the county is not the single employer of all court-related employees); Eshelman v. Commissioners of the County of Berks, 436 A.2d 710, 712 (Pa. Commw. Ct. 1981) (setting aside a labor arbitration award because it encroached on the judiciary's power over its employees).

[301] For a discussion of the grant of judicial supervisory power, see *supra* note 295 and accompanying text.

separation, without any blending of powers.[302] It is a course that naturally follows from the language of absolute separation in the Pennsylvania Constitution.[303]

This course, however, does not involve or encourage cooperation between the branches of government in Pennsylvania.[304] In his dissent in *Ison*, Justice Zappala wrote that the courts must, whenever possible, construe a statute in such a way as to avoid holding it unconstitutional, because of the presumption in the Pennsylvania Statutory Construction Act[305] that the legislature did not intend to violate the state or federal constitution.[306] He noted that several such interpretations are available, and that the majority opinion "swe[pt] far too broadly."[307] Justice Zappala's ideas and judicial instincts are admirable, for his approach has the advantage of avoiding, attempting to avoid, or reducing confrontation between the branches.[308] It is unfortunate that Justice Zappala did not further develop his dissenting analysis, for it might well be a viable

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[302] Gedid, *supra* note 1, at 656-57.

[303] For an explanation of the effect of the complete separation language in the Pennsylvania Constitution relative to the judiciary, see Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1054-63 (1995).

[304] *See* Court of Common Pleas of Erie County v. Pennsylvania Human Relations Comm'n (Ison), 682 A.2d 1246, 1249 (Pa. 1996) (Zappala, J., dissenting).

[305] 1 PA. CONS. STAT. § 1922 (1975).

[306] *Ison*, 682 A.2d at 1249 (Zappala, J., dissenting).

[307] *Id.* The first interpretation he suggested was that the PHRA could be held to apply to all personnel except judges. *Id.* Unfortunately, although it is true that this interpretation is possible, Justice Zappala did not explain why it was preferable. *Id.* This omission is especially glaring because the majority takes great pains to explain exactly why the judiciary must be able to hire and fire staff. Instead of responding to any of these arguments of the majority, Justice Zappala in an equally sweeping fashion invokes a presumption in response.

The second interpretation which he suggested was that the PHRA is unconstitutional only to the extent that the remedy—reinstatement—impinged upon the judiciary. *Id.*

[308] See Gedid, *supra* note 1, at 657. The point was made that such a course of interpretation minimizes or eliminates the conflict with the legislature.

alternative which has the advantage of avoiding the inter-branch conflict that the majority opinion engenders.

It would also have been helpful for the majority to consider the approach taken by Judge Pellegrini, who dissented in the commonwealth court decision of the case.[309] Judge Pellegrini reasoned that the commonwealth court was vested with the inherent power of the judiciary to do whatever was "'reasonably necessary for the administration of justice.'"[310] A branch alleging encroachment by another branch, however, must show how its authority has been violated.[311] An administrative agency—a part of the executive branch—cannot have jurisdiction to make decisions regarding judges because such power is vested in the Court of Judicial Discipline.[312] Judge Pellegrini, however, observed that there are numerous personnel who are associated with the operation of a court system who have no contact with a judge.[313] He reasoned that as to these employees, if action was not taken directly by a judge, there should be no objection to allowing PHRC to have jurisdiction, because there would be no threat to the core function of the judiciary.[314] This approach is more carefully calculated to preserve that amount of power necessary for the operation of the judiciary, with the least friction between the judiciary and legislature. It draws the line at exactly the amount of power and separation necessary for the judiciary to remain independent and to exercise a checking function. Instead of describing inherent power generally, Judge Pellegrini used a principled approach that took into account the core function of the branch asserting the breach of separation.[315] This is a familiar device in federal cases involving separation of powers.[316] This

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[309] Court of Common Pleas of Erie County v. Pennsylvania Human Relations Comm'n, 653 A.2d 1312, 1315-18 (Pa. Commw. Ct. 1994) (Pellegrini, J., dissenting).

[310] *Id.* at 1316 (Pellegrini, J., dissenting) (quoting Sweet v. Pennsylvania Labor Relations Bd., 322 A.2d 362, 365 (Pa. 1974)).

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *Id.* at 1316-17 (Pellegrini, J., dissenting).

[315] *Id.* at 1316-18 (Pellegrini, J., dissenting).

[316] *See* Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson,

approach recognizes that there is no watertight and absolute bounding off of power, but rather that there is some overlap between the branches. In addition, it does not forbid exercise of power by another branch unless that exercise implicates a basic, core function of the complaining branch. In doing so, it limits confrontation between the branches to those situations where it is absolutely necessary to prevent power from being taken away from the complaining branch or to prevent the function of the complaining branch from being impaired. Thus the doctrine encouraged cooperation between the branches, where possible.

IV. CONCLUSION

This past year has been eventful. In the procedural due process area, the Supreme Court of Pennsylvania has dealt effectively with the conclusive presumption problem in the *Clayton* case.[317] The court correctly defined the issue in that case as involving the type of hearing to which a claimant was entitled.[318] The court also identified the situation as one where procedural due process is clearly applicable because of the presence of a property interest in a license.[319] An irrebuttable presumption, however, prevented a fair hearing on all of the relevant issues. Therefore, the hearing must be extended to include more issues than simply whether a seizure had occurred or not.

Regarding the other half of the procedural due process problem, the existence of an interest that would permit the claimant to invoke the protections of procedural due process, the Supreme Court of Pennsylvania employed a modern, effective analysis. The *Delliponti*[320] case technically only construed a statute to conclude that borough action under that statute led to a legitimate expectation and understanding by a terminated borough employee that she was covered by the borough's civil service

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487 U.S. 654 (1988).

[317] *See* 684 A.2d 1060 (Pa. 1996).

[318] *Id.* at 1064-65.

[319] *Id.* at 1064.

[320] Delliponti v. DeAngelis, 681 A.2d 1261 (Pa. 1996).

rules.[321] The Supreme Court of Pennsylvania, however, held that this understanding and expectation was sufficient to create a property interest that entitled the claimant to the protection of procedural due process so that she could not be terminated without proper procedure.[322] More important than the specific outcome in the case is the principle or test that the majority employed to reach its conclusion. That test was whether there was a legitimate expectation or understanding of continued employment created by the borough action.[323] That is, the test employed by the majority was the modern test for procedural due process: whether there is a property *interest*, not whether there is a property *right*. It is a superior test to the old right/privilege dichotomy because it does not permit technical or common law labels such as "right" or "privilege" to dictate the outcome. The dissent argued that the rights/privilege analysis ought to be applied in the case.[324] For thirty years, this test has generally been discarded and rejected because of its potential for injustice.[325] The rights/privilege test, however, was used last year in *Pennsylvania Game Commission v. Marich*.[326] The result in the *Marich* case was correct, but the analysis used to reach it was the same right/privilege analysis that the dissent in *Delliponti* argued.[327] This author pointed out last year that the right/privilege test had been rejected in most arenas in the last thirty years.[328] It appears that the majority in the *Delliponti* case has now adopted the modern view in Pennsylvania and made it clear that a property interest is sufficient to trigger procedural due process.[329]

The *Krupinski* case clarified one of the boundaries of the *Lyness* rule that an agency may not commingle prosecutorial and

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[321] *Id.* at 1264-65.
[322] *Id.* at 1265.
[323] *Id.* at 1263.
[324] *See id.* at 1266 (Zappala, J., dissenting).
[325] Gedid, *supra* note 1, at 640-44.
[326] 666 A.2d 253 (Pa. 1995).
[327] *Id.* at 256-57.
[328] Gedid, *supra* note 1, at 640-44.
[329] 681 A.2d at 1264-65.

adjudicatory functions.[330] The court ruled that the committee was not acting in its prosecutorial capacity because the action did not focus upon an individual's actions, but only on whether general facts justified layoffs or an exigency declaration.[331] Therefore, *Lyness* was not applicable.[332] Clearly, this situation was not prosecutorial because it involved something akin to "legislative" facts. Therefore, *Lyness* should not be applicable to this situation.

One separation of powers case stood out in 1996. That case was *Pennsylvania State Ass'n of County Commissioners v. Commonwealth*.[333] In *County Commissioners*, a genuine constitutional crisis involving the legislature and the judiciary occurred.[334] The Supreme Court of Pennsylvania's invocation of the doctrine of inherent power to protect itself is in principle correct, because of the serious threat to the independence, effective functioning, and legitimacy of the judiciary.[335] The court, however, arguably extended the inherent power doctrine to its outer limits in a state-wide, direct confrontation with another branch over a power—appropriations—expressly committed to the legislature by the Pennsylvania Constitution. The problem with the inherent power doctrine is that it is difficult to describe or draw its outer limits or how far it should extend. That is a danger which may be as great as the danger to the judiciary created by the present system of funding. Accordingly, so much of Justice Newman's concurrence which encouraged cooperation between the two branches should be recognized by the legislature and judiciary.[336] Nevertheless, as has been pointed out, the fear of the judiciary about loss of independence, public perception of partiality, bias, and political influence is well-founded and strikes to the very heart of the role of the judiciary. The argument is strong that the legislative scheme of funding through counties in Pennsylvania is destroying a core function of the judiciary. That

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[330] 674 A.2d 683, 686 (Pa. 1996).
[331] *See id.*
[332] *Id.*
[333] 681 A.2d 699 (Pa. 1996).
[334] *Id.* at 701-02.
[335] *Id.* at 701-03.
[336] *Id.* at 704-07 (Newman, J., concurring).

danger has forced the judiciary to interfere with a power expressly assigned to the legislature. Both branches need to recognize that separation of powers imposes a duty of cooperation on the branches of government in attempting to resolve problems.

Finally, in the *Ison* case the Supreme Court of Pennsylvania invoked the inherent power doctrine to strike down state agency action that had an effect on the judiciary.[337] In this case the Supreme Court of Pennsylvania followed an approach that is similar to the action taken in the *County Commissioners* case. Claiming interference with the independence of the judiciary, the court struck down action of the Pennsylvania Human Relations Commission, an agency with state-wide jurisdiction.[338] Although Justice Zappala's dissenting opinion[339] and Judge Pellegrini's dissenting opinion in the commonwealth court[340] were persuasive because they counseled moderation in the use of the inherent power doctrine and argued for judicial strategies that foster cooperation between the branches, the majority's application of inherent power is probably correct. In this case, unlike the *Allegheny County II* and *County Commissioners* cases, the record discloses direct, unequivocal and undeniable interference with the power of the judiciary to terminate an employee. Moreover, the action of the Supreme Court of Pennsylvania did not strike down the statute generally, but only as applied to the judicial branch, This lessened the extent of the confrontation or friction between the branches. Arguably, the inherent power doctrine was used in this case in a manner consistent with separation of powers jurisprudence, for the doctrine was invoked only so far as was manifestly necessary to preserve the independence of the judicial branch.

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[337] Court of Common Pleas of Erie County v. Pennsylvania Human Relations Comm'n (Ison), 682 A.2d 1246, 1248-49 (Pa. 1996).

[338] *Id.*

[339] *Id.* at 1249 (Zappala, J., dissenting).

[340] Court of Common Pleas of Erie County v. Pennsylvania Human Relations Comm'n, 653 A.2d 1312, 1315 (Pa. Commw. Ct. 1994) (Pellegrini, J., dissenting).