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History of the Court Reporter in the Appellate Courts of Pennsylvania

Joel Fishman

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HISTORY OF THE COURT REPORTER IN THE APPELLATE COURTS OF PENNSYLVANIA

by Joel Fishman, Ph.D.*

I. INTRODUCTION

States have traditionally published the decisions of their intermediate and highest courts.¹ Legal historians, in recent years, have written extensively on the history of court reporting and court reports.² These historical accounts have revealed that many famous

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* Ph.D., University of Wisconsin—Madison; Law Librarian, Allegheny County Law Library, Pittsburgh, Pa.

¹ For a listing of state court publications, see Morris L. Cohen et al., How to Find the Law app. B at 614-62 (9th ed. 1989). Appendix B of Cohen's text covers state primary legal sources for court reports, session laws, statutory compilations, administrative code and register, and court rules. See id. Moreover, this article complements two other articles previously written by this author. See Joel Fishman, The Reports of the Supreme Court of Pennsylvania, 87 Law Libr. J. 643 (1995) [hereinafter Fishman, Reports of the Supreme Court]; Joel Fishman, Court Reporters of the Supreme Court of Pennsylvania, 121 Pitts. L.J. 1 (1995) [hereinafter Fishman, Court Reporters].

judges and lawyers throughout the country gained prominent reputations stemming from the publishing of their decisions. In the "nineteenth century, the development of court reports received attention from the legal community through reviews in many of the leading periodicals of the day." By 1900, however, the periodical literature contained only a small number of reviews of individual state reports. Unfortunately, the review of these reports decreased over time as court reports became more commonplace. Reports were no longer cited according to the reporter's last name, although the reporter's name was listed on the spine of the book. Ultimately, the reports were reduced to being part of a numbered series.

II. EVOLUTION OF EARLY COURT REPORTERS IN PENNSYLVANIA
   A. Legislative Developments Regarding Court Reporters and Reports

In Pennsylvania, the history of court reporting began with the publication of the decisions of the Supreme Court of Pennsylvania, the Council of Censors, and the Philadelphia county courts by Alexander James Dallas in 1790. Reporting supreme court cases in sixty-four volumes from 1790 to 1845, leading Philadelphia lawyers and judges performed the service as a private commercial venture. In time, the quality of the reports began to diminish. The decline of the quality of the reports, especially those of

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3 See Fishman, Reports of the Supreme Court, supra note 1, at 649-60.
4 Id. at 643.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at 646.
10 Id. at 645.
11 See id. at 649-60. For a listing of the early reporters of the Pennsylvania courts, see infra Appendix.
12 Fishman, Reports of the Supreme Court, supra note 1, at 656.
Frederick Watts and Henry Sergeant,\textsuperscript{13} resulted in the enactment of legislation calling for an official court reporter.\textsuperscript{14} Such a position had already been established for the Supreme Court of the United States and other state jurisdictions.

By the law of April 11, 1845 (Act of 1845),\textsuperscript{15} the Pennsylvania General Assembly created the first official court reporter for Pennsylvania.\textsuperscript{16} The Act authorized the governor to appoint “a person of known integrity, experience and learning in the law” for a period of five years.\textsuperscript{17} The reporter had to “give bond to the commonwealth, with at least two sufficient sureties, to be approved by the governor, in the sum of ten thousand dollars, upon condition for the correct and faithful performance of his official duties,” as well as his oath or affirmation that he will perform his duties “with correctness, impartiality and fidelity.”\textsuperscript{18} Section two of the Act required the judges of the supreme court to write opinions for every case.\textsuperscript{19} The judges were required to endorse each of their opinions for publication, provide the written opinions and “paper book[s]”\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{13} Id. at 659-60.
\item \textsuperscript{14} Id. at 660-61.
\item \textsuperscript{15} Act of Apr. 11, 1845, ch. 250, 1845 Pa. Laws 374 (providing for a reporter of the decisions of the Supreme Court of Pennsylvania).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. § 1.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. § 2.
\item \textsuperscript{20} Id. In Pennsylvania, “paper book” is the term commonly used to refer to the briefs that are filed for each case. Fishman, \textit{Reports of the Supreme Court}, \textit{supra} note 1, at 661 n.93. According to James T. Mitchell, a judge of the Philadelphia Court of Common Pleas and later Chief Justice of the Supreme Court of Pennsylvania:
\end{itemize}

The origin of the term \textit{paper book} not being perhaps generally understood, and being not infrequently thought to be (like Pamphlet Laws) a peculiar Pennsylvania idiom, it may be interesting to note it here, especially as it supplies an illustration of the indebtedness of the junior bar to Lord Mansfield. By the ancient practice of the English courts on motion days the court began by calling upon the senior barrister present to move, and after he had been heard then the next in seniority, and so on through the bar as far as the day’s sitting would permit. This custom it may be observed continued down to our own day in the
to the reporters for them to prepare their report, and return the materials to the files.\textsuperscript{21} A short proviso added \textquote{[t]hat no minority opinions of the said court shall be published by said reporter.}\textsuperscript{22}

Under the Act, the reporter had to arrange the opinions \textquote{with suitable indices and captions . . . with a statement of the material facts and points made in each case.}\textsuperscript{23} Only two volumes could be produced per year, with a minimum of 500 printed copies, and sold for no more than four dollars per volume.\textsuperscript{24} A person convicted in a court of quarter sessions of violating the sales provision of this section would be ordered to pay a fine of $200: $100 would go to the state and $100 would go to the person who prosecuted the individual.\textsuperscript{25}

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JAMES T. MITCHELL, MOTIONS AND RULES AT COMMON LAW, ACCORDING TO THE PRACTICE OF THE COURTS OF COMMON PLEAS OF PENNSYLVANIA, at 26-7 n.15 (2d ed. 1906) (citations omitted).
\end{flushleft}

\textsuperscript{21} Id.

\textsuperscript{22} Act of Apr. 11, 1845, No. 250, 1845 Pa. Laws 374, \S\ 2.

\textsuperscript{23} Id. \S\ 3.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
Section four detailed the publishing requirements. The quality of the type and paper had to be as good as the previous reports; it had to be bound in law calf binding and it had to contain a minimum of 550 pages. Section five permitted the reporter to hold the copyright to the publication “in the same manner as if the same were his own entire original production.” Section six authorized the governor to remove the reporter for “incompetency, or a failure to discharge his official duties” upon the written letter by the judges to the governor, or to fill the position on account of death for the duration of the unexpired term of office. Finally, section seven mandated that the court reports be called the “Pennsylvania State Reports.”

Subsequently, the Act of March 3, 1868, (Act of 1868) amended section two of the Act of April 11, 1845, (Act of 1845) and authorized the reporter to include minority opinions on constitutional matters. During the years from 1845 to 1871, various judges filed dissents in 395 cases. In some cases the dissent was only noted; sometimes “the reasons [for the dissents] were orally stated and published”; and sometimes a written dissent was prepared. The Act of May 11, 1871, provided:

[It shall be the duty of the judges of the supreme court to give their opinion in writing, and file the same of record, upon every point on which a judgment of reversal shall be entered in said court, and in such other case as the majority of the said judges shall deem of sufficient importance to require their opinion to be reduced to writing and filed of record.]

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26 Id. § 4.
27 Id.
28 Id. § 5.
29 Id. § 6.
30 Id. § 7.
31 Act of Mar. 3, 1868, No. 12, 1868 Pa. Laws 46 (authorizing the reporter to publish minority opinions).
32 Alex. Simpson, Jr., Dissenting Opinions, 71 U. PA. L. REV. 205, 208 (1923).
33 Id.
34 Act of May 11, 1871, No. 246, 1871 Pa. Laws 266 (requiring a judge
The legislature's subsequent passage of the Act of June 12, 1878 (Act of 1878), reiterates many of the provisions of the Act of 1845. Section one repeated the governor's ability to select a court reporter for a five-year period, with the appropriate sureties in the sum of $5000, and the taking of an oath to "perform the duties of his office with correctness, impartiality and fidelity." Section two authorized the governor to remove the reporter for incompetency or to fill the position in the case of a death of the person in office. Section three granted the reporter the authority to draw up syllabi for all cases, but the original judge providing the opinion had to approve the syllabus. Section four provided:

The court shall cause to be reported such of its decisions, whether made in disposing of motions or otherwise, as determine any theretofore unsettled, or new and important, or modify any theretofore settled, question of law in this commonwealth, or that give construction to a statute of ambiguous or doubtful import, together with such other of its decisions as may be deemed by the court of public interest and importance.

According to section five, the reports were to be printed "on first class book paper, and bound in good full law sheep, in style not inferior to volume one of Harris' reports." The volume size was raised from a minimum of 550 pages to 700 pages, including "an index and table of cases" prepared by the reporter. This section required the following to appear on the back of the book: the title

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35 Act of June 12, 1878, No. 232, 1878 Pa. Laws 201 (providing for publication of decisions and appointment of a reporter).
36 See id.
37 Id. § 1.
38 Id. § 2.
39 Id. § 3.
40 Id. § 4.
41 Id. § 5. Volume 1 of Harris' Reports is volume 13 of the Pennsylvania State Reports. See infra Appendix.
of the work, the number of the volume in the series, the name of the reporter, the volume number for the reporter’s own series, and the year that the volume was published.\footnote{1878 Pa. Laws 201, § 5.}

The court reporter received a $3000 salary payable in quarterly installments, with the last payment being withheld “until the decisions for that year . . . [had] been reported and prepared for publication.”\footnote{Id. § 6.} Furthermore, the legislature limited the court reporter’s pecuniary interest in the publications by contracting out the publication of the reports and requiring the reporter, the Secretary of the Commonwealth, and the Auditor General to agree to a contract with a publisher.\footnote{Id. § 7.} The reports had to be sold on terms that were “the most advantageous to the public and at the lowest price.”\footnote{Id.} The contract with the publisher was for a period of ten years.\footnote{Id.} The reports had to be stereotyped for printing and the printing plates had to be turned over to the government within three years after the contract expired.\footnote{Id.} The contractor had to make the volumes easily accessible for sale for up to fifteen years (contract term plus five years).\footnote{Id.}

Section eight provided for advertisement of the contract in both Philadelphia and Pittsburgh newspapers and the issuance of the contract to the publisher that submitted the lowest bid.\footnote{Id. § 8.} Section nine required the contractor to give bond, including no less than three sureties in the amount of $20,000 for the performance of the contract.\footnote{Id. § 9.} The reporter could neither receive compensation other than what the Act set forth\footnote{Id. § 10.} nor obtain a copyright to the reports.\footnote{Id. § 11.} Thereafter, the Secretary of the Commonwealth continued to hold
the copyright. 54 The concluding section of the Act, section twelve, established that the effective date of the Act would be at the expiration of the term (or contract) of the present reporter. 55

Nine years later, by the Act of May 19, 1887, 56 the legislature amended sections two and three of the previous Act. 57 Section two of the new Act expanded the grounds upon which the Governor was authorized to remove the reporter at any time "for incompetency or a failure to promptly discharge his official duties." 58 The Governor was also authorized to fill vacancies. 59 Accordingly, the Governor could discharge a reporter if the reporter failed to compile the volume(s) within "twenty days after a sufficient number of such decisions ha[d] been delivered . . . upon the complaint of any one showing such delay in the performance of his duties." 60 Consequently, certification by the prothonotaries, "stating the number of unreported cases in the hands of said reporter, shall be deemed sufficient evidence . . . to require the Governor to act on such removal." 61 Moreover, "the said prothonotaries . . . [were] . . . required to furnish a list stating the number of cases placed in his hands, and the number of pages of manuscript covered by said cases, upon the application of any attorney of said court, upon paying the legal fees therefor." 62 Section three of the new Act required the reporter to attend court sessions. 63 It also required the reporter to promptly report cases and deliver the syllabus of every case to the appropriate judge for correction and approval. 64
A subsequent Act of March 28, 1889,\(^{65}\) provided that the reporter must publish all cases marked by the justices "to be reported"; for those cases not marked, the reporter could condense "by the omission therefrom of all parts of the history, arguments, and opinion of the court below, not necessary to a proper understanding of the points ruled."\(^{66}\) A second section gave the reporter $3000 per year to purchase stationery and to hire a clerk to assist the reporter.\(^{67}\)

In 1895, the General Assembly enacted legislation to establish an intermediate court of appeals known as the Superior Court of Pennsylvania.\(^{68}\) The legislation also authorized the present reporter and all future reporters "to employ an assistant at a salary of not more than two thousand dollars per year."\(^{69}\) Wilson C. Kress was the first State Reporter appointed under the new law, and Edward P. Allinson served as his Assistant State Reporter.\(^{70}\) The dual positions continued until 1953, when a single reporter was listed as State Reporter for volume 171 and all volumes that subsequently followed it.\(^{71}\)

No major changes occurred in the court reporter's position during the early twentieth century. The Act of May 6, 1909,\(^{72}\) however, raised the reporter's salary to $5000\(^{73}\) and the assistant reporter's salary to $3000.\(^{74}\) In addition, the Act of 1921 raised the sum of money to $5000 for stationery and clerical assistance to perform the job.\(^{75}\)

\(^{65}\) Act of Mar. 28, 1889, No. 19, 1889 Pa. Laws 22 (providing for the continued use of previous publication methods for "marked" decisions and for the condensed publication of all unmarked decisions).

\(^{66}\) Id. § 1.

\(^{67}\) Id. § 2.

\(^{68}\) Act of June 24, 1895, ch. 128, 1895 Pa. Laws 212 (providing for the establishment of the superior court).

\(^{69}\) Id. § 6.

\(^{70}\) See 1 Pa. Super. title page (1910).

\(^{71}\) See 171 Pa. Super. title page (1953).

\(^{72}\) Act of May 6, 1909, ch. 240, 1909 Pa. Laws 433 (fixing the salary of the reporter and the reporter's assistant).

\(^{73}\) Id. § 1.

\(^{74}\) Id. § 2.

\(^{75}\) Act of May 25, 1921, ch. 413, 1921 Pa. Laws 1118 (providing for an
By an Act of August 16, 1951 (Act of 1951), the General Assembly granted both the supreme court and superior court the authority to appoint their own reporter. The reporters were appointed for a five-year term and were required to put up bond for surety, the amount and terms of which were to be determined by the individual courts. According to section three, both courts could appoint the same person. Pursuant to section four, both courts were authorized to appoint assistant reporters and other employees whose salaries were set by the respective court. The sixth section repealed the previous acts of 1878, 1887, 1889, 1909, and 1921. The Act of 1951 was subsequently repealed under the Judiciary Act Repealer Act of 1978, which was then codified in the Judiciary Code in Pennsylvania under Title 42 of the Pennsylvania Consolidated Statutes.

The act creating the Commonwealth Court of Pennsylvania in 1970 provided for the court to hire a court reporter as one of its personnel. The act provided that the reporter’s salary must be approved by the supreme court, but no further information was

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76 Act of Aug. 16, 1951, ch. 283, 1951 Pa. Laws 1236 (authorizing the supreme court and superior court to appoint and fix the compensation of their respective reporters).

77 Id. § 1.

78 Id. § 2.

79 Id. §§ 1-2.

80 Id. § 3.

81 Id. § 4.

82 Id. § 6.


84 17 P.S. §§ 1690.1-4 repealed and replaced by 42 Pa. CONS. STAT. § 2301; 17 P.S. § 1690.5 repealed and replaced by 42 Pa. CONS. STAT. § 3702.


provided, including no mention of establishing a separate set of official court reports.\textsuperscript{87}

In the mid-1970s West Publishing Company was awarded the state contract to publish the appellate court reports.\textsuperscript{88} Under this arrangement, the more detailed headnotes and index of the previous court reports were reduced under the new arrangement to fit the headnote and digest system of the West National Reporter System.\textsuperscript{89} The name of the Supreme Court Reporter ceased being published on the spine of the volumes with volume 478 of the \textit{Pennsylvania State Reports}, but the reporter's name continued on the superior and commonwealth court reports.\textsuperscript{90} With West Publishing Company publishing both the official and unofficial reports (∗Atlantic Reporter∗) for Pennsylvania, there is no difference between the two sets.\textsuperscript{91} West's coverage of the three courts began in 1974 for the supreme court (volume 459 of the \textit{Pennsylvania State Reports}), 1976 for the superior court (volume 241 of the \textit{Pennsylvania Superior Court Reports}), and 1993 for the commonwealth court (volume 126 to 168 of the \textit{Pennsylvania Commonwealth Court Reports}).\textsuperscript{92} The superior court reporter, called a recorder since the early 1980s, assists in the transferring of opinions electronically between the court and West Publishing Company and plays no part in determining the headnotes of the cases.\textsuperscript{93} For commonwealth court, the reporter prepared headnotes and index for the first 125 volumes that were published by Murrelle Printing Company, but the changeover to West limited

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\textsuperscript{87} \textit{Id.}

\textsuperscript{88} See 5 Pa. Bull. 1811, 1837 (July 19, 1975) (announcing that the West Publishing Company would be the "Official Reporter" of Supreme Court of Pennsylvania opinions as of July 1, 1975).


\textsuperscript{90} Interview with Kathryn Bann, Recorder of the Superior Court, in Pittsburgh, Pa. (July 18, 1997).

\textsuperscript{91} Orton, \textit{supra} note 89, at 309 (asserting that "[i]t is the status . . . and not the substance of the reporter that determines whether a reporter that determines whether a reporter is official or unofficial").


\textsuperscript{93} Interview with Kathryn Bann, \textit{supra} note 90.
the tasks of the reporter to the preparation of the history of the case.\textsuperscript{94}

**B. Judicial Developments Involving Court Reporters and Reports**

Little has been written about cases dealing with court reporters, except for the famous case between the reporters of the Supreme Court of the United States, Richard Peters and Henry Wheaton.\textsuperscript{95} Two Pennsylvania court cases, which addressed the work of court reporters, were reported in 1892\textsuperscript{96} and 1954, respectively.\textsuperscript{97} Each case addresses important elements of the responsibility of the reporters: the timeliness with which cases are officially published, and the question of the reporter's obligation to publish all opinions in any given case. A review of these two cases provides insight not only on how the reporters interact with each other but how the justices interact with the reporters as well.

1. **In re State Reporter\textsuperscript{98}**

The legislative acts passed between 1845 and 1887 came under judicial scrutiny in *In re State Reporter*. This case was a dispute between the outgoing reporter, Boyd Crumrine,\textsuperscript{99} and the incoming

\begin{footnotesize}
\textsuperscript{94} Telephone Interview with John L. Gedid, Court Reporter for the Commonwealth Court of Pennsylvania (July 7, 1997).


\textsuperscript{96} In re State Reporter, 24 A. 908 (Pa. 1892).


\textsuperscript{98} *Reporter*, 24 A. at 908.

\textsuperscript{99} Boyd Crumrine was born on February 9, 1838. He was the son of Daniel Crumrine and Margaret (Bower) Crumrine. He graduated from Waynesburg College on August 1, 1860. He studied law under Judge John L. Gow and was admitted to the Washington County Bar on August 26, 1861. He served as a lieutenant in the Civil War. As a Republican politician after the war, Crumrine served as District Attorney of Washington County from 1865 to 1868. He compiled social statistics of the Western District of Pennsylvania for the 1870 census. Governor James Beaver appointed him State Reporter from 1887 to 1892, covering
\end{footnotesize}
reporter, James Monaghan.\textsuperscript{100} Crumrine's term as reporter expired on May 21, 1892,\textsuperscript{101} and Monaghan's term began on May 24, 1892.\textsuperscript{102} Crumrine left office with a number of reports still unpublished, and Monaghan did not believe that he had a duty to complete the volumes.\textsuperscript{103} Both men agreed to present the case to the supreme court involving three points for decision.\textsuperscript{104} The court first had to decide which man had the legal obligation to complete the unreported cases decided before May 23, 1892.\textsuperscript{105} Second, if the justices determined that it was not the legal obligation of Crumrine to report \textit{all} of the unreported cases, then the court had to decide what part or portion he might be responsible for completing.\textsuperscript{106}

\textsuperscript{100} James Monaghan was born September 21, 1854. He was admitted to the Pennsylvania bar in 1878. Governor Pattison appointed him to act as Supreme Court Reporter from 1892 to 1895, during which time volumes 147 to 165 were published. He also served as the editor of two volumes that were part of the Miscellaneous State Reports (\textit{Monaghan's Supreme Court Reports} (1891-92)). Monaghan was a charter member of the Pennsylvania Bar Association in 1885. He served as assistant librarian for the Pennsylvania Supreme Court in 1921, was vice president of the Philadelphia Ethical Society, member of the Federal Union, a member of the American Academy of Political and Social Science, and honorary member of the Institute of American Genealogy. He also edited the \textit{Chester County Reports} and was the first editor of the \textit{Pennsylvania County Court Reports} and \textit{Pennsylvania District Reports}. Furthermore, he published Monaghan's \textit{Cumulative American Digest of Pennsylvania Decisions}, which cumulated all reported decisions from 1899 to 1937. Cases from 1906 to 1929 were cumulated by George Henry in \textit{Pennsylvania Digest of Decisions} (1931). He died on April 3, 1949. 2 \textit{WHO WAS WHO IN AMERICA} 1943-1950 at 378 (1950).
Third, if the justices determined Crumrine was responsible for completing all of the reports, then it had to be determined if he was eligible for any of the funds approved under the Act of 1889 for payment, of which $925.83 was left for any work performed prior to June 1, 1892. 107 The parties agreed to have the justices take into consideration that the number of cases argued and reported from January 4, 1892, to May 1892 totaled 537 cases and would require more than three full volumes to publish. 108 In addition, the justices were to consider that volumes 138 to 145 were published by June 14, 1892, and volumes 140, 141 to 146, and 150 pages of volume 147 were published after May 23, 1891. 109 Finally, the parties agreed to submit to the decision of the court. 110

Crumrine, the outgoing reporter, argued that the position of state reporter was a public office, and he, as the reporter, could not delegate his duties except for those that were ministerial. 111 He further argued that his rights, duties, and authority “cease[d] at the end of his term.” 112 He conceded that if it were an official duty of the reporter to report the arrears prior to the end of his term, then a mandamus could be issued against him; however, because his term had expired, he could not be compelled by mandamus. 113 By analogy, just like a retiring justice could not file opinions after his term ended, a reporter could not complete his work. 114 Although a section of the Act of 1878 held back salary in order to ensure the reports were completed, the restriction was only available during the term of the reporter, not after the term expired. 115

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107 Id.
108 Id.
109 Id.
110 Id.
112 Id. at 553.
113 Id.
114 Id.
115 Id. at 553-54.
Counsel for Monaghan argued that the rule of *functus officio*\textsuperscript{116} had no application against the statutes.\textsuperscript{117} They questioned what decisions were to be covered and for how long.\textsuperscript{118} Under section six of the Act of 1878, the salary for the last quarter ought to have been withheld until the cases were completed by the incumbent reporter.\textsuperscript{119} Furthermore, the Act of 1887 declared that the reporter had twenty days to report the decisions or be dismissed.\textsuperscript{120} It did not make sense that his successor had to complete the work possibly without pay and still be required to do his own work.\textsuperscript{121} If the incumbent could default without repercussions, then "it offers a premium to a retiring official to be as far in default as possible."\textsuperscript{122}

Chief Justice Paxson delivered the opinion of the court.\textsuperscript{123} The court recognized that this was the first time such a problem had arisen.\textsuperscript{124} Previously, the reporter was not a salaried position and the conditions of the job had changed under the Act of June 12, 1878.\textsuperscript{125} Under the Act of 1878, the failure of the reporter to report cases within twenty days was considered a failure to discharge his official duties and warranted dismissal upon petition to the governor.\textsuperscript{126} The Act of 1889 "made a radical change" in the publication of reports.\textsuperscript{127} Previously, the reporter was responsible for one or two volumes per year.\textsuperscript{128} The court noted that pursuant to the new act the reporter was responsible for those opinions

\textsuperscript{116} See *Black's Law Dictionary* 673 (6th ed. 1990). Under this definition, the term *functus officio* is "[a]lplied to an officer whose term has expired and who has consequently no further official authority." \textit{Id.}

\textsuperscript{117} *Reporter's Case*, 150 Pa. 550 at 554.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} In re State Reporter, 24 A. 908, 908 (Pa. 1892).

\textsuperscript{124} \textit{Id.} at 908.

\textsuperscript{125} \textit{Id.} (noting that previously the reporter's "compensation was the profit arising upon the sales of his Reports, for which he was given the copyright, as well as a fee of 50 cents to be taxed as a part of the costs in each case").

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.}
marked "To be reported," and those not so marked, resulting in seven or eight printed volumes a year. The court called it "absurd" to suppose that all cases could be reported in twenty days because "[i]t sometimes happens that enough decisions are handed down in one day to make three volumes of Reports." This fear became a reality when 149 cases were decided on January 4, 1892. Previously, when only a few decisions—those ordered by the court—were to be published, the twenty-day rule was possible. The court noted that "when the legislature ordered all cases to be reported," it became physically impossible to adhere to the twenty-day rule. Thus, the court opined that it must be assumed that the legislature intended to repeal the twenty-day rule. This assumption was based on the absurdity of requiring a reporter to perform an impossible task. Therefore, the court repealed the twenty-day rule because it was "inconsistent" with the Act of 1889.

Because Crumrine was no longer the reporter and could no longer perform any official acts, it was Monaghan's responsibility to complete the reports. Section six of the Act of 1878, which provided for final payment once the reports were completed, was held to apply only to the reporter who was still in office, not to one who had left office. It was "unavoidable" that Crumrine left cases to his successor; furthermore, the court expected Monaghan would necessarily do the same with his successor. Crumrine's failure to complete the job did not signify a neglect of duty. The court stated that "Crumrine had been commendably prompt during his entire term of office, and, if his successor shall prove equally so we shall

129 Id.
130 Id.
131 Id. at 908.
132 Id. at 909.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id. at 910.
138 Id.
be well satisfied in this respect.\textsuperscript{139} In answering the concern that excusing an out-going reporter from reporting backlogged cases would encourage negligence and unduly burden the successor, the court curtly answered that "[t]he reporter is an officer of this court, and to some extent under our control. We are quite sure the incumbent will not need prodding. If he does, we know how to do it."\textsuperscript{140}

The opinion concluded that "it [was] the duty of Mr. Monaghan . . . to report all the cases left unreported by Mr. Crumrine."\textsuperscript{141} The court, however, also noted that Crumrine "will, of course, complete any unfinished volume he may have on hand" from the final quarter.\textsuperscript{142}

2. 	extit{Musmanno v. Eldridge}

The second case, \textit{Musmanno v. Eldridge},\textsuperscript{143} was a dispute between Michael A. Musmanno,\textsuperscript{144} Associate Justice of the Supreme

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 114 A.2d 511 (Pa. 1955).
\textsuperscript{144} Associate Justice Michael A. Musmanno was born April 7, 1897. He graduated from George Washington University with B.A. and M.A. degrees. He earned an LL.B. from Georgetown University Law School, an LL.M. from National University, and an S.J.D. from American University. Musmanno held a Doctor of Jurisprudence from the University of Rome. He was admitted to the Pennsylvania bar in 1923 and then worked in private practice from 1923 to 1931. He served as a judge of the county court of Allegheny County from 1932 to 1934 and then was elected as a judge to the Court of Common Pleas of Allegheny County from 1935 to 1951. He served as a captain in the United States Navy in World War II and later served as President of the United States-Soviet Commission on Forcible Repatriation of Soviet Citizens. He gained fame as a judge at the International War Crimes Tribunal II, Nuremberg Trials. Musmanno returned to his position as a common pleas judge before being elected to serve as an associate justice of the Supreme Court of Pennsylvania from 1952 to 1968. Musmanno died on October 12, 1968. 5 WHO WAS WHO IN AMERICA: 1969-1973 523 (1973); JOEL FISHMAN, JUDGES OF ALLEGHENY COUNTY, FIFTH JUDICIAL DISTRICT, PENNSYLVANIA (1788-1988) 109 (1989). He wrote numerous books and articles. See Fishman, \textit{Reports of the Supreme Court, supra} note 1, at 110-11. His writings as a Pennsylvania Supreme
Court of Pennsylvania and Laurence H. Eldredge,\textsuperscript{145} Court

Court Justice have never been fully studied, but one recent article portrays a lighter side of his opinions. See Steven B. Spector, 	extit{Judicial Activism in Prose: A Librarian's Guide to the Opinions of Justice Michael A. Musmanno}, 86 LAW LIBR. J. 311 (1994). This dispute among the brethren probably hurt his relationship with his colleagues, for he was a forthright, outspoken person as his law review article on this case demonstrates. See Michael A. Musmanno, 	extit{Dissenting Opinions}, 58 DICK. L. REV. 139 (1956).

\textsuperscript{145} Eldredge was born on March 18, 1902. He graduated from Lafayette College in 1924 with a B.S. degree and received his LL.B. from the University of Pennsylvania Law School in 1927. He was admitted to the Pennsylvania bar in 1927 and later to the California bar in 1972. He received an honorary Litt.D. from Lafayette College in 1970. He had a long distinguished career as a law professor, first in the 1920s to 1940s at Temple University and University of Pennsylvania Schools of Law and Medicine, and in the 1970s as professor of law at the Hastings College of Law and other law schools. He held a life membership in the American Law Institute and was an adviser on torts and evidence. He served as the reporter for the 	extit{Restatement of the Law of Torts}, held a variety of positions within the state bar association including editor of the 	extit{Pennsylvania Bar Association Quarterly} (1938-42), and was the chairman of the Board of Governors of the Philadelphia Bar Association (1960-61). He served on the boards of various hospitals and other non-profit organizations. He held the post of governor of the Society of Mayflower Descendants and the Colonial Society of Pennsylvania (governor from 1962-64). He was the Secretary of the Society of Colonial Wars. Eldredge died on July 17, 1982.

8 WHO WAS WHO IN AMERICA: 1982-1985 124 (1985). He authored several books and many articles. Eldredge's writings include:

Restatements: 	extit{Pennsylvania Annotations to Restatement, Torts} 1, 2 (1938); 	extit{Pennsylvania Annotations to Reformation, Torts} 3, 4 (1953).

Books: 	extit{The Law of Defamation} (1968); 	extit{Modern Tort Problems} (1941); and an autobiographical work, 	extit{Laurence H. Eldredge, Trials of a Philadelphia Lawyer} (1968).

Reporter, both of whom were respected figures in Pennsylvania. The dispute arose when, in the case of the Tribune Review Publishing Co., Eldredge did not publish Justice Musmanno’s dissenting opinion. The other justices believed that the opinion was not a proper dissent because, “instead of confining itself to the subject matter of the order, [it] went on to discuss and decide the merits of the controversy which the petitioner had endeavored to litigate prematurely and as to which [the supreme court] had expressed no views whatever.” Ultimately, Justice Musmanno filed an action in trial court against Eldredge because he failed to publish Justice Musmanno’s dissenting opinion. The Dauphin County Court of Common Pleas found in favor of the reporter and the case was appealed to the Supreme Court of Pennsylvania, which also held for the reporter.

In the Tribune case, from which the dispute between Justice Musmanno and Eldredge arose, John Wesley Wable was accused of

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Consequences in Negligence Law, 23 PA. B. ASS’N. Q. 158 (1952); Should Contributory Negligence Be a Complete Defense?, 10 PA. B. ASS’N. Q. 64 (1939); The Spurious Rule of Libel Per Quod, 79 HARV. L. REV. 733 (1966); Tort Liability of Insane Persons, 26 PA. B. ASS’N. Q. 176 (1955); Tort Liability to Trespassers, 12 TEMP. L. Q. 32 (1937); Vendor’s "Duty" to Inspect Chattels: A Reply, 45 DICK. L. REV. 269 (1941); Vendor’s Tort Liability, 89 U. PA. L. REV. 306 (1941).


146 Musmanno, 114 A.2d at 511.
148 Musmanno, 114 A.2d at 511.
149 Id.
killing two motorists on the Pennsylvania Turnpike. This case was heavily covered by the local newspapers and sparked the public’s interest. The Westmoreland County judges had recently passed a rule prohibiting the use of cameras in the courthouse, and the sheriff warned newspaper photographers that they could not take pictures either in the courthouse or jailhouse. As a result of this ban, the Tribune Review Publishing Company sought a restraining order in the United States District Court against the Westmoreland court’s ruling. The court directed a stay until the Supreme Court of Pennsylvania could hear the motions. Without delay, “the Tribune Review Publishing Company and the Pennsylvania Newspapers Publishers Association applied to the Supreme Court of Pennsylvania for a writ of prohibition against the judges of the Court of Common Pleas of Westmoreland County to prevent the enforcement of the Rule of Court in question.” The case was heard on May 25, 1954, before the Supreme Court of Pennsylvania. The justices offered contrasting opinions on photographing individuals, and they discussed whether there was actually a cause of action for determination when no rule was broken. After oral argument, some of the justices wished to have an amicable test case prepared on the issue, and after consultation with the other justices, the chief justice decided that was the best option.

On June 28, 1954, the justices again met to consult on the case. The chief justice prepared a per curiam opinion that called for the dismissal of the writ of prohibition. The consultation date came so soon after the writing of the opinion that there was no time

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152 Musmanno, *supra* note 144, at 140.
153 *Id.*
154 *Id.* at 140-41.
155 *Id.* at 141.
156 *Id.*
157 *Id.*
158 *Id.* at 140-42.
159 *Id.* at 142.
160 *Id.*
161 *Id.*
162 *Id.*
to prepare a dissenting opinion.\textsuperscript{163} The chief justice informed Justice Musmanno that if he waited for an amicable test case, then he could present his dissenting views, and a written dissent to the per curiam opinion would not need to be prepared or written.\textsuperscript{164} The majority opinion was filed on June 29, 1954, but an amicable test case was never brought forward.\textsuperscript{165} Justice Musmanno, therefore, prepared his dissenting opinion and filed it on July 8, 1954, "with the Prothonotary of the Supreme Court, Western District of Pennsylvania, who entered the Opinion on the docket" and then distributed it to the other justices, publishers, and persons entitled to supreme court opinions.\textsuperscript{166}

After four months of not publishing the majority or dissenting opinion of the court, the chief justice, at a routine consultation meeting of the justices on November 9, 1954, stated that "the Dissenting Opinion should not be published because it was filed 'too late.'\textsuperscript{167} This refusal took place even though the chief justice asked Justice Musmanno to temporarily delay his writing of the dissent.\textsuperscript{168}

In his article, Justice Musmanno argued that this situation was not unprecedented because other dissenting opinions were filed after the majority opinion, even as recently as June 1955, after the current case had been determined but obviously before Justice Musmanno's law review article was written.\textsuperscript{169}

On November 11, 1954, court reporter Laurence Eldredge stated that he did not intend to include the dissenting opinion of the \textit{Tribune} case in the state reporter.\textsuperscript{170} Justice Musmanno indicated that Eldredge's decision was "distressingly unprecedented."\textsuperscript{171}

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\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 142-43.
\textsuperscript{167} Id. at 143.
\textsuperscript{168} Id.
\textsuperscript{169} Id. (citing Commonwealth v. Yiddisher Kultur Farband, 116 A.2d 555 (Pa. 1955)).
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\end{flushright}
The failure to print this Dissent would place not only the writer [himself], but the Court itself, in an anomalous position, because while the State Reports would be announcing a unanimity in the Wyoming case decision, the official docket would show the contrary. To that extent, the State Reports would be proclaiming a falsehood.\textsuperscript{172}

Justice Musmanno filed a complaint in mandamus in the Dauphin County Court of Common Pleas.\textsuperscript{173} The case was argued in the trial court on December 22, 1954.\textsuperscript{174}

The trial court filed a per curiam opinion in Musmanno on January 5, 1955.\textsuperscript{175} In that opinion the court noted that although the supreme court issued a unanimous opinion, it was with the understanding that a justiciable case would be presented for Musmanno to express a dissenting opinion.\textsuperscript{176} After quoting two definitions of per curiam opinions as indicating no dissent,\textsuperscript{177} the court recognized that dissenting opinions were filed with other per curiam opinions: “We do not feel, therefore, that as a matter of law we can hold that a per curiam opinion, at the present time, is of necessity a unanimous opinion, nor do we predicate our conclusions upon the grounds that the Wyoming per curiam opinion was unanimous.”\textsuperscript{178}

The court then turned to the statutory law relevant to the issue of minority opinions.\textsuperscript{179} Of the two statutes cited, the Act of 1845 and the Act of 1868, the court noted that only the latter was still in force.\textsuperscript{180} The Act of 1868 provided in part that “the reporter [was]
authorized to publish minority opinions of the said court on all constitutional questions.” Justice Musmanno asked the court to “construe 'authorize' as equivalent to 'direct'” in the Act of 1868. The trial court disagreed, finding that “the statute [did not make] it mandatory for the reporter to publish all dissenting opinions,” but rather made it mandatory only at the direction of the supreme court. Because the Supreme Court of Pennsylvania had held that the Tribune case did not include a justiciable controversy, the trial court saw it as an advisory opinion: “This being the holding of the Supreme Court, we are bound thereby and must conclude that no case was presented for decision, let alone one raising a constitutional question.”

The court also noted that because “the Supreme Court has already ruled that the dissenting opinion should not be published in the State Reports, we feel that such ruling is conclusive upon us. We cannot be expected to reverse the Supreme Court.” The court thus entered judgment in favor of Eldridge. Justice Musmanno appealed, and the Supreme Court of Pennsylvania heard arguments on April 26, 1955, after which it handed down a decision on May 25, 1955. Later that same year, on June 13, the court refused to hear reargument. The arguments in the case presented to the court are well summarized in Justice Musmanno’s law review article, Dissenting Opinions, which was published soon after the court’s decision.

Eldredge responded in his answer to the complaint by stating that he was acting upon the order of Chief Justice Stern. He also defended his position by relating partial discussions from the consultation chambers, something Justice Musmanno omitted in his

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181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
186 Id. at 539.
188 Id.
189 See Musmanno, supra note 144, at 144-47.
190 Id. at 144.
complaint.\footnote{Id.} Both sides chose highly regarded lawyers to argue their positions: Eldredge employed the “former United States Supreme Court Justice Owen J. Roberts, the former United States Senator George Wharton Pepper, and the prominent Philadelphia lawyer Robert T. McCracken.”\footnote{Id.} Justice Musmanno was represented by “former Common Pleas Judge J. Dress Pannell, former Pennsylvania State Senator George Kunkel, and the prominent Philadelphia lawyer James J. Davis.”\footnote{Id.}

Eldredge claimed that because the supreme court has the power to determine what makes up the State Reports, the court can prohibit the publishing of the dissenting opinion for any reason.\footnote{Id. at 144-45.} Although he cited to the Act of June 12, 1878, this act has been repealed by the Act of August 16, 1951.\footnote{Id. at 145.} Eldredge’s counsel also cited to the Act of March 12, 1889, but the 1951 Act had also repealed this Act.\footnote{Id.} Justice Roberts further argued on Eldredge’s behalf that because the two acts had given some discretion to the supreme court concerning the publication of the opinions, the elimination of the acts “now conferred upon the Supreme Court complete and untrammeled authority in that matter.”\footnote{Id.} Justice Musmanno believed that Roberts’ argument was one “that one assuredly would never find in a text book on logic . . . . It was like saying that by withdrawing the authority which allowed one to enter only two floors in a 50-story building, he was now authorized to possess the whole fifty stories!”\footnote{Id.}

In response, Justice Musmanno’s counsel, Judge Pannell, quoted Chief Justice Evan Hughes of the Supreme Court of the United States indicating that “[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a
future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.\textsuperscript{200} Justice Musmanno argued that the *Tribune* case came under the Act of 1868 because the petitioners were arguing for their First Amendment privileges of freedom of speech and press.\textsuperscript{201} Thus, because "a constitutional question was involved," it was "of paramount importance" to print minority opinions.\textsuperscript{202} Justice Roberts argued that the Act of 1868 gave the State Reporter discretion in determining whether or not to publish Minority Opinions on constitutional questions; but it is unthinkable that the representatives of the people would place in the hands of a State employee, in no way particularly qualified for such selectivity, the power to decide what Minority Opinions on the Constitution should be printed. The conclusive proof that the State Reporter did not have any such power is demonstrated in the fact that since 1868 (and for many years prior thereto) ALL Dissenting Opinions, on constitutional questions and non-constitutional questions, have been published in the State Reports.\textsuperscript{203}

Justice Musmanno stated that the supreme court clearly lacked the authority to select which opinions would be printed.\textsuperscript{204} He wondered, however, "[w]hat would happen to our whole system of jurisprudence if the highest appellate court of a State could, without reason, explanation, or citation of statute or precedent, reverse a practice which has been accepted and officially followed for over a hundred years?"\textsuperscript{205}

The Dauphin County Court of Common Pleas ruled in favor of Eldredge, primarily based upon Justice Roberts' argument that the

\textsuperscript{200} Id. (quoting William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 106 (1948)).

\textsuperscript{201} Id. at 146.

\textsuperscript{202} Id. Justice Musmanno argued that minority opinions concerned with constitutional questions must be printed so that the people would "know whether the Constitution is meeting the requirements of the sovereign State." Id.

\textsuperscript{203} Id.

\textsuperscript{204} Id.

\textsuperscript{205} Id.
Dauphin County Court of Common Pleas could not disobey a supreme court order. On appeal to the Supreme Court of Pennsylvania, Justice Musmanno first pointed out that he did not hear the appeal because he was the appellee, but the other judges heard the case even though they were responsible for suppressing the dissenting opinion. Justice Musmanno argued that Justice Bell alone could actually hear the case as an uninvolved justice. Eldredge argued that the Act of 1951 made him an agent of the supreme court. Furthermore, Justice Musmanno found Eldredge's argument to be a "strange proposition" because the act never referred to the reporter as an agent. Furthermore, Justice Musmanno argued:

An agent binds his principal. It is bizarre even to assume that anyone without judicial qualifications or position could bind a judicial tribunal on the principle of respondeat superior. Mr. Eldredge's role is an obvious one: he is a State official charged with supervising the printing of State Reports. To call the State Reporter an agent of the Court is as absurd as it would be to call him an Assistant Justice.

Unable to find statutory authority or case law to support this position, Eldredge's counsel then argued that the state reporter should not print any dissenting opinions at all. Yet, such a claim was inconsistent with the fact that Eldredge had printed numerous dissents in the past. For instance, in *May v. Fidelity*, he printed an 8000 word dissent. Additionally, Justice Musmanno's counsel

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206 *Id.* at 146-47.
207 Justice Musmanno stated: "The Chief Justice and Justices Stearne, Jones, Chidsey, and Arnold were in effect litigants on the other side since they had issued the order which suppressed the 'Dissenting Opinion.'" *Id.* at 147.
208 *Id.*
209 *Id.* (citing Commonwealth *ex rel.* The Attorney General v. Mathues, 59 A. 961 (Pa. 1904)).
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *Id.* at 148.
cited to other cases where Eldredge published dissenting opinions. This caused Eldredge to argue, in what Justice Musmanno termed "sophistry and equivocation," a denial of freedom of speech that "[t]he Court as a whole should have discretionary power to decide in a given case that the publication of a particular dissenting opinion would be contrary to public policy." Justice Musmanno believed that Eldredge's failure to print his dissenting opinion was an affront to "the inalienable right of every American citizen to register a protest against what he regards to be injustice." Eldredge argued that "[t]he right of an individual Justice to record dissent is indisputable; but to have a dissenting opinion published is not an absolute right but one which must be subordinated to considerations affecting the dignity of the Court as an organ of government.

Justice Musmanno countered by questioning "what use would be a dissent that does not inform the legal profession of the misapplication of law, of misinterpretation of facts, and ignoring of constitutional guarantees that the dissenter sincerely believes he has found in the Majority Opinion?" Justice Musmanno argued that to suppress a dissent in order to preserve the dignity of the court gave "a false meaning to the word dignity." In addition, Justice Musmanno was quick to point out that in the cases brought before Justice Roberts, who represented Eldredge, he dissented 185 times.

Next, Justice Musmanno pointed out that dissenting opinions often become the view of the majority in subsequent cases. He referred to a decision from a Pennsylvania court that was reversed

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\begin{itemize}
  \item 217 \textit{Id.}
  \item 218 \textit{Id.}
  \item 219 \textit{Id.} (quoting Eldredge's argument).
  \item 220 \textit{Id.}
  \item 221 \textit{Id.} at 148-49 (quoting Eldredge's argument).
  \item 222 \textit{Id.} at 149.
  \item 223 \textit{Id.}
  \item 224 \textit{Id.}
  \item 225 \textit{Id.}
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by the Supreme Court of the United States,\footnote{Id. In the case of Thomas v. Hemp Bros., 89 A.2d 776 (Pa. 1952), Justice Jones wrote for the majority while Justice Musmanno authored the dissenting opinion. The Supreme Court of the United States reversed the decision. See Thomas v. Hemp Bros., 345 U.S. 19 (1953).} and a second case reversed by the Supreme Court of Pennsylvania.\footnote{Musmanno, supra note 144, at 149. In the case of Meixell v. Borough Council of Hellertown, 88 A.2d 594 (Pa. 1952), Justice Bell wrote the majority opinion and Justice Musmanno again wrote the dissent. The decision was reversed a year later. When the case came before the court again, Justice Musmanno later wrote the unanimous opinion for the court. See Meixell v. Borough Council of Hellertown, 97 A.2d 822 (Pa. 1953).}

The court would not have answered Justice Musmanno but for the fact that he “publicly voiced a grave charge against the other members of this court which cannot be permitted to go unanswered.”\footnote{Musmanno, 114 A.2d at 511.} The court denied any attempt on its part to prevent a properly filed dissent from being published in the official State Reports.\footnote{Id.} The court pointed out that Justice Musmanno filed more dissents in three years on the bench “than all the other members of the court combined.”\footnote{Id.} The court further claimed that Justice

Moreover, Justice Musmanno elaborated on his opinions in a law review article published only one year after the Court’s decision in Musmanno v. Eldredge when he wrote that

[a]n enormous amount of hard work goes into writing Dissenting Opinions,—work dedicated to truth, reason, and the majesty of the law. Dissenting Opinions are so integrally a part of our legal system that to defend them is as superfluous as carrying common law to Blackstone. Yet, in the year of our Lord 1955, the Supreme Court of one of the oldest States in the Union suppressed a Dissenting Opinion. And an ex-Justice of the United States Supreme Court and an ex-Senator of the United States supported that suppression. This would seem to point out quite dramatically that we cannot assume that our liberties are always so safe that they can never be lost or damaged. We can never take for granted that representatives elected by the people, whether in the Courts or in the Legislative Halls, will always be immune from harassment as they speak out their honest conviction.
Musmanno's dissenting opinion in the *Tribune* case was never circulated or shown to any of them before its filing in the prothonotary's office after the Tribune's petition for a writ of prohibition was dismissed.\(^\text{231}\) The court stated that an opinion sought to be published by a mandamus "was not, in reality, a proper dissent."\(^\text{232}\) The court reasoned that its order in the *Tribune* case merely held that there was no justiciable issue.\(^\text{233}\) Therefore, the petition was dismissed without discussing the merits of the case.\(^\text{234}\) Justice Musmanno's dissent actually discussed the merits of the controversy that the petitioner had litigated "prematurely."\(^\text{235}\) The court observed that "[i]t is, to say the least, unfortunate that appellant saw fit to write and hand out for publication an opinion prejudging a question which has yet to come before this court."\(^\text{236}\) By filing the dissenting opinion after the court adjourned for the summer, the court noted that it was
effectually denied the opportunity, indeed the fundamental right, of seeing, reading, or considering the dissent before the appellant made it public. It need hardly be said that if such a breach of the basic rules of appellate court practice were to be permitted a court could not properly perform its functions.\(^\text{237}\)

Justice Bell filed a concurring opinion.\(^\text{238}\) Although agreeing with the majority, he stated: "Unfortunately there are no applicable statutes or rules, and there is a difference of opinion as to (a) what constitutes a real dissenting opinion, and (b) exactly what practices have been established."\(^\text{239}\) Justice Bell noted that for 169 years,
regardless of its name, all opinions were published in the official reports with the stipulation that “it is first circulated and thereafter filed of record simultaneously with the majority opinion or at such subsequent time as the majority permit.”\textsuperscript{240} He recognized the importance of dissenting opinions which are circulated and sometimes “cause[ ] the majority opinion to be modified or rewritten.”\textsuperscript{241} Justice Bell recognized the historical importance of dissenting opinions and stated “that to arbitrarily deny the right to publish them in the official Reports would be utterly repugnant to the spirit of the times, to our fundamental ideas of fair play and justice, to our lifetime practice, and to sound public policy.”\textsuperscript{242}

In a corresponding footnote, Justice Bell cited to the dissenting opinion in \textit{Chisholm v. Georgia}\textsuperscript{243} as an opinion that influenced the passage of the Eleventh Amendment; the minority opinion in \textit{Scott v. Sanford},\textsuperscript{244} which produced the Fourteenth Amendment; and the dissenting opinion in \textit{Pollock v. Farmers’ Loan and Trust Co.},\textsuperscript{245} which was the impetus for the Sixteenth Amendment.\textsuperscript{246} Furthermore, he referenced the dissenting opinions of Justices Holmes (122 dissents), Brandeis (75), Stone (80), and Roberts (128).\textsuperscript{247} Although Justice Bell agreed that “Justice [Musmanno] had an absolute right ab initio to have his dissenting opinion published in the official State Reports,”\textsuperscript{248} he concluded that

an absolute right to have a dissenting or other opinion (irrespective of what it be called) published, may, like many other rights, be waived or lost. Appellant agreed in this case to the Opinion of the Court and thereby, in my

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\textit{Musmanno, 114 A.2d at 512. Justice Bell also thought this was the practice of the United States Supreme Court and the highest court in New York. Id.}
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\textsuperscript{240} \textit{Id.}
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\textsuperscript{241} \textit{Id.}
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\textsuperscript{242} 2 U.S. (2 Dall.) 419 (1793).
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\textsuperscript{243} 60 U.S. (19 How.) 393 (1856).
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\textsuperscript{244} 157 U.S. 429 (1895).
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\textsuperscript{245} Musmanno v. Eldredge, 114 A.2d 511, 512-13 n.2 (1955).
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\textsuperscript{246} \textit{Id.}
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\textsuperscript{247} \textit{Id. at 513.}
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judgment, waived his right to have any dissenting opinion of his published in the official Reports.\textsuperscript{249}

Justice Musmanno, in his law review article,\textsuperscript{250} addressed each of the findings of the court and was able to dispose of each of them.\textsuperscript{251} First, in regard to the court's finding that the dissent was filed after the decision was rendered and the justices had dispersed, Justice Musmanno contended that he continued to work on his dissent even though the justices were content to "scatter like boys at the end of school" at the end of the session.\textsuperscript{252} Moreover, he sent copies of the dissent to each judge four months before the question of the publication arose.\textsuperscript{253}

Second, in response to the court's finding that the merits of the \emph{Tribune} case were not discussed, Justice Musmanno stated that "a Dissenting Opinion is not limited to matters discussed in the Majority Opinion. It often happens that a Dissenting Opinion is written for the precise reason that the Majority of the Court failed to discuss or decide a very important question in the case."\textsuperscript{254} Furthermore, the justices "discussed at length from the bench the merits of the controversy."\textsuperscript{255} Justice Musmanno indicated that [t]he fact then that the Majority failed to pass upon an issue which it had discussed and considered did not preclude the writer from directing attention to it in his Opinion. It is ridiculous to assume that because the Majority, as we see it, neglects to discuss a very important constitutional question before it, a Justice of the Minority should compound the neglect by a similar silence.\textsuperscript{256}

Justice Musmanno proceeded to criticize the majority opinion in the \emph{Tribune} case, stating that it was "very fragmentary and [it] conveyed no idea to the reader what propositions had been argued

\textsuperscript{249} \textit{Id.}

\textsuperscript{250} See Musmanno, supra note 144, at 139.

\textsuperscript{251} \textit{Id.} at 150-51.

\textsuperscript{252} \textit{Id.} at 150.

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} \textit{Id.}

\textsuperscript{255} \textit{Id.}

\textsuperscript{256} \textit{Id.} at 150-51.
and how the Court arrived at its conclusions. 257 Justice Musmanno indicated that various problems in the majority opinion resulted in the Tribune opinion “remain[ing] as a vague, meaningless statement on one of the most important problems ever to come before the appellate court of any State in the Union.” 258 Justice Musmanno’s dissenting opinion addressed the freedom of the press, but the court concluded he was merely “prejudging a question which was yet to come before this court.” 259 He indicated that each “case is decided on its current merits and not on what may arise in future litigation.” 260 Justice Musmanno argued that taking the court’s position literally would mean the Chief Justice could not hear another case dealing with the Westmoreland County Court of Common Pleas’ local rule precluding the use of cameras in the courtroom because he had approved the rule of court before its promulgation. 261 In a subsequent speech, Chief Justice Stern stated that dissenting opinions should be written “only on really important problems.” 262 Justice Musmanno sarcastically responded to this statement:

But who determines whether a problem is important or not? Is there a litigant who has felt that the problem which has been gnawing at his spirit, corroding his soul, and robbing his nights of sleep is not an important one? Was the problem in the Tribune case not an important one? It dealt with nothing less than freedom of the press. Is that not important?

257 Id. at 151.
258 Id.
259 Id.
260 Id.
261 Id.
262 Id.
263 Id.
264 Id.
Furthermore, Chief Justice Stern commented in the speech that "he did not read Justice Musmanno's Dissenting Opinions." This statement drew the latter's ire:

This was indeed an extraordinary admission because the most important function of a Chief Justice is to ascertain the vote and views of the Justices of the Court over which he presides. Failing to read and to give consideration to Dissenting Opinions may not only lead the Court into embarrassing situations; it may well throw particular branches of decisonal law into alarming chaos.

Justice Musmanno illustrated this by pointing to two motor vehicle accident cases, with the same fact situation, in which the court issued two inconsistent decisions. In one case the plaintiff was denied recovery, but in a subsequent case, which was decided only three months later, the court granted recovery to the plaintiff. Justice Musmanno wrote a dissenting opinion in the first case, which became the unanimous majority opinion in the later case. He criticized Chief Justice Stern for not reading the dissenting opinion in the first case in which "the Court may not have been placed in the incongruous position of handing down law in two different ways over a period of only three months." Justice Musmanno asked "[h]ow are lawyers to advise their clients when the Supreme Court fluctuates in its appraisement of cardinal principles of law in this fashion?"

Justice Musmanno concluded his article with a passionate plea for dissenting opinions that, although lengthy, does deserve full quotation:

The subject of Dissenting Opinions has become an interesting topic for discussion at judicial conferences and

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265 Id. at 152.
266 Id.
267 Id.
270 Musmanno, supra note 144, at 152.
271 Id.
272 Id.
bar association meetings, but no one can seriously believe that without Dissenting Opinions the law would progress as it should and must. Dissenting Opinions are often the pillars which are ready to take over the burden of supporting a sagging principle of law when the reasons of the Majority in a given case may weaken and fall. Dissenting Opinions have often been the shock troops in the battle for justice on the battlefield of reason versus formality and intelligence versus blind technicality.

The filing and printing of Dissenting Opinions is part of the classic American system of checks and balances. If Majority Opinions are to be regarded as infallible and as the expression of a unanimous Court when in fact they may not be, a system will have been developed which will perpetuate error, stifle correction, and paralyze progress in the law which must ever command the needs of today.

If the day should ever come that the majority may suppress minority views, it would be a devastating blow to democracy, because the history of the human race establishes conclusively that no power or institution, no matter how honorably disposed, can have absolute power without some day exercising that power to the grave detriment of the people.

The quest for truth must be unceasing. There must always be a challenge to smugness, there must ever be a protest against an over-assurance born of uninhibited power. Secular infallibility is either a product of the imagination, or of the ego exerted through absolute force, or through the supine indifference of those it would enslave. In any event, it cannot co-exist with the living, breathing spirit of the Law.  

273 *Id.* at 152-53.
III. CONCLUSION

The statutory history of the official court reporter in Pennsylvania is rather straightforward in describing how the office developed over its 150 year history. The reporters succeeded in producing over 1100 volumes of court reports for the appellate courts of the Commonwealth. Thus, this Article discloses two important principles of court reporting: first, the reporter is responsible to produce reports in a timely manner; and second, the whole opinion, including dissenting and concurring opinions, serves an important purpose and should be published.
Appendix

The Court Reporters of the Supreme Court of Pennsylvania

<table>
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Miscellaneous Reporters

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Official Reporters

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Francis X. Diebold 226-262  
Carl Rice 263-285  
Kathryn Bann 286-456  

**Assistant Court Reporters**  
Edward P. Allinson 1-15  
Albert B. Weimer 16-70  
Spencer Gilbert Nauman 71-114  
Norman Lindenheim 115-170  
Carl Rice 256-262

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**The Reporters of the Commonwealth Court of Pennsylvania**

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