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**PUBLIC MEETING**

before

**SENATE JUDICIARY COMMITTEE**

(Reappointment of Chief Justice Robert N. Wilentz  
of Perth Amboy to succeed himself, for the term prescribed by law.)

July 29, 1986  
Room 424  
State House Annex  
Trenton, New Jersey

**MEMBERS OF COMMITTEE PRESENT:**

- Senator Edward T. O'Connor, Jr., Chairman
- Senator Raymond J. Zane, Vice Chairman
- Senator John F. Russo
- Senator John A. Lynch
- Senator Carmen A. Orechio
- Senator Richard Van Wagner
- Senator Joseph Hirkala
- Senator Donald T. DiFrancesco
- Senator John H. Dorsey
- Senator William L. Gormley
- Senator Lee B. Laskin

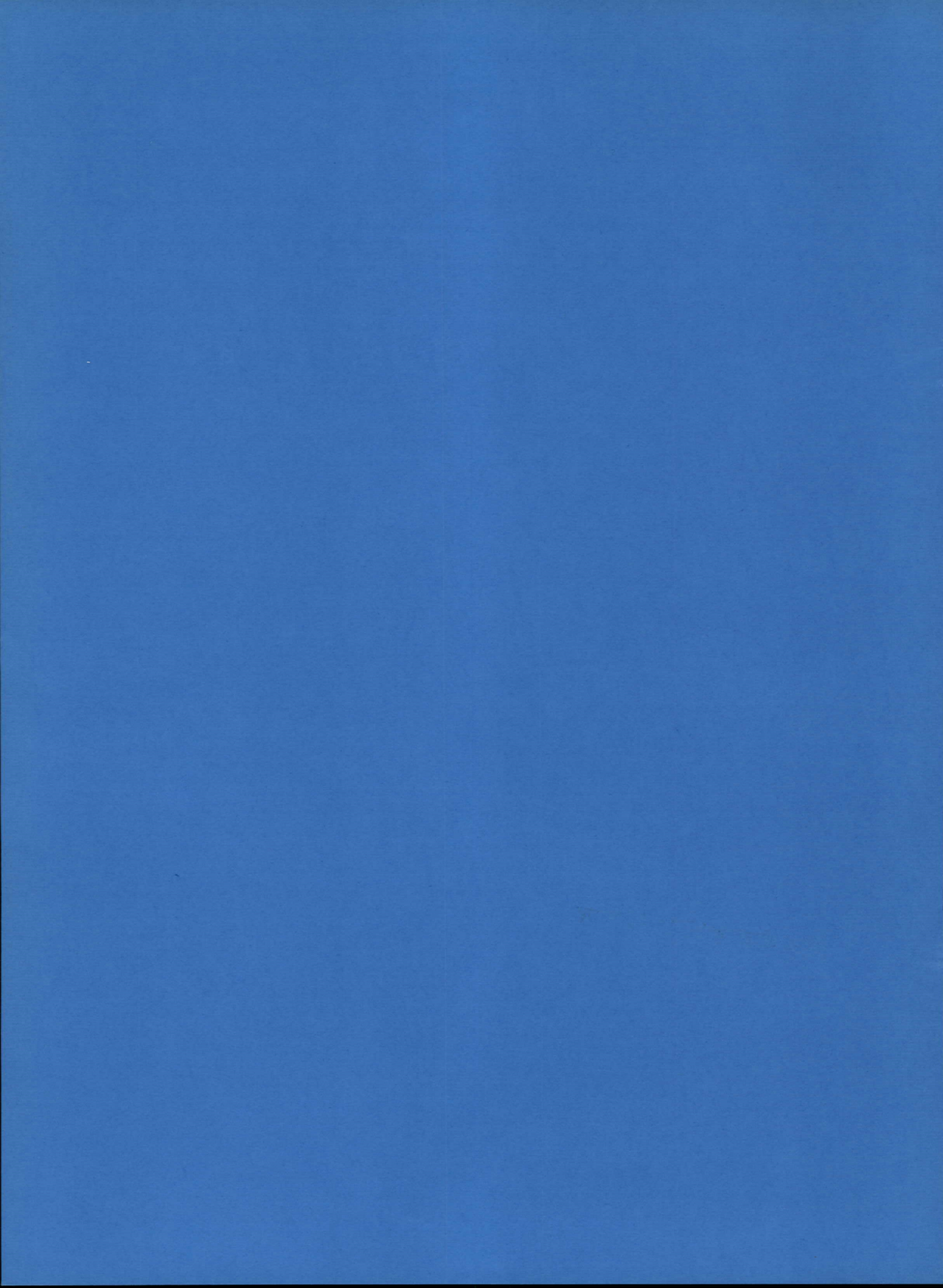
**ALSO PRESENT:**

John J. Tumulty  
Office of Legislative Services  
Aide, Senate Judiciary Committee

**New Jersey State Library**

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State House Annex  
CN 068  
Trenton, New Jersey 08625



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SENATOR EDWARD J. O'CONNOR (Chairman): This hearing will come to order. We are going to begin this morning with Mr. John Tomicki, who had signed up as a witness and is the last of the witnesses to testify before we continue with the questioning of Chief Justice Robert Wilentz. Mr. Tomicki.

J O H N T O M I C K I: (Some of the statements are indiscernible because the witness is speaking from the audience.) I'm here to testify at this time (indiscernible) the Justice Pollock hearing. I still prefer to hear the further testimony of Chief Justice Wilentz because (indiscernible) more information that may well change or modify my testimony.

SENATOR O'CONNOR: Well, Mr. Tomicki, without trying to force you now, it's the wish of the Committee that you do address the Committee at this point. All the other witnesses have preceded you.

MR. TOMICKI: There is however, on the desk, something I've turned over. It says confidential. I don't know what it is. Good morning members of the Committee and Senators.

MR. TUMULTY: Push that button in front of you.

MR. TOMICKI: Good morning Senators and members of the Committee. Specifically to Senator Hirkala. I'm glad to see that you are recovering. The best wishes of our organization go to you for a full, speedy, and complete recovery.

SENATOR O'CONNOR: Mr. Tomicki, excuse me. Last week -- though it wasn't always adhered to -- we were swearing witnesses in as they testified. So do you swear that the testimony that you'll give will be the truth, the whole truth, and nothing but the truth, so help you God.

MR. TOMICKI: I do, so help me God. I would furthermore like to thank Mr. Tumulty of your staff, who has been very, very cooperative with us, in assisting us in any questions that we had of the Committee procedures.

Today continues another important day in the history of the State. These are probably the most important hearings that we've had, that will alter or change the form of government by which we live. The second paragraph of our Constitution, which was adopted in 1947, opens with the following phrase, "We the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which he had so long permitted us to enjoy, and looking to him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, ordain and establish this Constitution."

Unimpaired -- the key phrase-- How has our Constitution fared under the Wilentz court? Has it been impaired. How will you, these Senators today, vote to pass our judiciary on unimpaired to succeeding generations? This issue is larger than any of us sitting in this room today. It is larger than the gentlemen, the Senators, who will vote today on -- I presume vote today on -- this most important advice and consent.

SENATOR RUSSO: Excuse me. Could we ask the witness-- John, speak louder if you can. I'm having difficulty hearing you. Maybe if you could move closer to the mike--

MR. TOMICKI: Is this better, Senator Russo?

SENATOR RUSSO: Yes, a little better.

MR. TOMICKI: We are a government of rights, not of powers. That's why the least of us should be able to walk through our lives in this society unafraid -- the smallest of us. How tenaciously will you Senators guard those rights? How zealously would you protect the balance of powers?

Washington, we know, was a surveyor. One wonders why there were three branches of government? When you think of a surveyor working with a tripod-- If you take a tripod and extend one of the legs longer than the other, then the plumb of

the line goes askew. So if you take one of the co-equal branches of government and make one of the branches more powerful than the other, the government goes out of plumb. If you make one of the branches of government weaker, again the surveyor's line will go askew. You will have erratic government.

What will be the standard to be used by this Committee, to give your advise and consent? Despite the comments made by one Senator in this room, that he believes that sometimes judges are there to make decisions that legislators don't have the courage or the guts to make, I don't really believe that sits within all of you. I don't even think that system of belief sits within that Senator. We're asking that you search your lines and your consciences on how today you will cast your vote.

Justice Frankfurter stated, "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Judges must be kept mindful of their limitations and their ultimate public responsibility by a vigorous stream of criticism expressed with candor, however blunt." Chief Justice Stone states further, "When the courts deal, as ours do, with great public questions, the only protection against unwise decisions and even judicial usurpation is careful scrutiny of their action and fearless comment upon it." This Committee, despite press statements to the contrary, I hope will not work as a rubber stamp. The conduct of the hearings last week indicates that we see great hope that this will not occur. Judges are not above the law, but are part of the legal system.

When this issue was debated before, relative to judges, Thomas Jefferson, when they were framing the Constitution, set forth the following quote: "You seem to consider the judges as ultimate arbiters of all Constitutional questions; a very dangerous doctrine indeed, and one which

would place us under the despotism of an oligarchy." Abraham Lincoln later commented, "The candid citizen must confess that the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the people will have ceased to be their own rulers."

The concept of a judicial oligarchy has moved from a political metaphor to a political fact in this State. There should be three points to judicial confirmation:

1) Does the candidate defend or destroy the Constitution?

2) Has the candidate avoided all taints of impropriety?

3) What is the education, experience, and in effect, what is the resume of the individual?

Now we do know we are not -- as members of the public -- allowed to examine the resume. So we must only deal with what we have heard in the public hearings, and what we are aware of from public records.

Point one -- on defending or destroying the Constitution: Our organization of over 50,000 family members in the State of New Jersey is aggrieved by numerous decisions. Some of you gentlemen have the belief that you cannot inquire into the judicial philosophy of a candidate. What more important role would you have to see how a candidate would uphold the rights of an individual? The Equal Protection Clause of the Constitution is so subject to interpretation elasticity, that I believe it is incumbent upon you gentlemen to really inquire into the judicial philosophy of a candidate. It is done on the Federal level; it should not be escaped on the State level.

The three cases that cause great difficulty are obviously the Right to Choose vs. Byrne case, the Karen Quinlan, and the wrongful life case. It is not the time today, nor do I believe this is the forum to debate again those issues which have been settled by the court. And unfortunately, when

I use the word "settled," obviously our organization still looks for the legal way to change those rulings. But I'm mindful of something said by Justice Pashman in a letter to the public in the defense of the Pressler nomination, and I quote from that letter, which appeared in The Bergen Record: "The function of the judge is to administer the law by referring to established precedents. The notion that judges wield arbitrary power is false" -- the first sentence.

By referring to established precedents, what precedent do we have in New Jersey that-- According to Justice Pollock, he said he found this right in Article One, Section One of the New Jersey Constitution. When our Constitution was adopted in 1947, abortion -- except to save the life of the mother -- was a crime in this State. How could you possibly have this concept incorporated by reference? If you read the right to choose case, you will find that in effect the linchpin goes to a footnote in the Constitutional convention minutes thereof, a monograph which cited a particular case many years prior, and that case had to do with the right of privacy relative to fingerprints. I find no legal connection; I find that this is tortured legal logic to say that our State must pay for abortions. That is a side comment.

I understand our State today is going to be visited by Jesse Jackson. In a statement that Jesse Jackson makes -- it was a one-statement in 1977 was as follows-- "As a matter of conscience, I must oppose the use of Federal funds for the policy of killing infants." One wonders if he would like to come forth today, since he's in the State, to say does he still adhere to that, and what does he feel about the State of New Jersey's policy of using State taxpayer's dollars to kill our most innocent of citizens. We believe that the Chief Justice, in his support of the Karen Quinlan decision, moved beyond legal precedent when he in fact said that food and water are medical treatment. That is legal insanity.

I do not wish to go at this time into the wrongful life case because I'd rather move onto the second point, which is has he kept clear of all possible impediments involving impropriety? Except to Senator Hirkala, who was not here on Thursday, most of us have a vivid memory of the Chief Justice's testimony, how time after time as to certain issues that were raised, he said, "I made a mistake. That was a horrendous error. I apologize for that."

The canons are very clear. Canon Two: "A judge should respect and comply with the law, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Now unfortunately this canon, and the subsequent issue of residency are fully entwined. They cannot be separated. Article 52, Section 14-7 clearly sets forth as plain meaning where, "Every person holding an office in this State shall reside in the State." The Chief Justice's own comments, his own testimony has acknowledged the fact that he is no longer a resident in that meaning of the statute. As I read plain meaning, he resides with his family in New York. I don't think there is a person in this State or in this room today that does not have empathy or concern for Judge Wilentz and his family. That would be contrary to what we as a society and we as our own organization believe in, that many times men as head of the households are faced with family decisions that force them to change their employment, if indeed the health of either their spouse or their children-- The judge apparently moved to New York many years prior to the inception of that particular illness.

All of our comments today that relate to Judge Wilentz are related to his actions, not to him as a person. Please do not misconstrue anything I say, if I say it inarticulately, or inartfully (sic). Senator Zane, I'm having (indiscernible) again, I guess. We will always believe that a person's public

service must be looked at and examined carefully. As to impropriety, when I spoke to Assemblyman Bishop regarding that piece of legislation, there's no need to go through the history of it. His recollection of the conversation is slightly different than that of the judge's.

One of the questions he said that the judge asked him at that hour of the morning -- which was 8 o'clock -- was, "Are you a lawyer?" What was the purpose of that question? The judge did subsequently apologize for interfering in a legislative matter. He had to write a letter to that effect. Why ask an individual, "Are you a lawyer?" A simple check of the "New Jersey Lawyers Diary," Martindale Hubble, or a phone call to Legislative Services could have ascertained that knowledge. Why does the judge ask that question? Why did the judge seek to embroil himself into a controversy involving the reappointment of Judge Pressler? Because, as he stated, he was trying to protect the independence of the judiciary.

An independent judiciary does not mean an irresponsible judiciary. Those actions, as he said he kind of believes now -- it was thought an error to get involve in it. How zealously you gentlemen guarded your rights as Senators to conduct your business, and how carelessly and callously the judge moved forward to embroil himself in that particular controversy. So much so that -- I use the term -- he issued a gag order to all other judges in the State, to say that they alone could not get involved in the public debate. He was correct. Not only should they have not gotten involved, nor should he.

Relative to the question of residency, the law is clear. Despite the memorandums which we've heard referenced in the media and here in this room today, when you examine the one case in New Jersey that clearly sets forth the interpretation of that statute, Judge Weintraub said it was very simple. It required continual residence, a stake in the outcome, a real concern and involvement.

Now frankly, I was a little stunned by the Chief Justice's comments, when he said he had not examined the statute. He has sat before you as a candidate; he has acknowledged by his course of conduct that he reads newspaper articles because he responded many times to newspaper clippings, and would call or get involved in an issue. Here's the most important point of one of the three parts of the tripod that affect his reappointment. He would have us believe that he came here that day and said, "I didn't research, but I know what was in the executive session." Well, if he didn't research it-- I am hard-put to believe that statement if he in fact did not, and I do believe it, though it was incumbent upon him to fully research the issue before he came forward.

In the questioning done by the representative of the Bar Association, I noticed in all the areas that were examined, the question of residency never arose. Apparently, as history would tell us, this issue had been brought forth at a prior hearing, and the Bar Association's recommendation therefore, I believe, is inadequate and insufficient. As we examine therefore the entire parameters of Judge Wilentz, his conduct, the canons clearly set forth that family matters should not influence your conduct. And of course because of the hardship, they have influenced his conduct, because now he's had to absent himself from New Jersey, and stay with his family in New York. As a former speaker said, "We have not only lost the Statue of Liberty to New York, but we have also lost our Chief Justice."

Gentlemen, I even wonder why we are here today, because the question should be well settled. I believe it's well settled in the public's mind. But certainly we can find an individual in this State, man or woman, who does not have this cloud as to residency, who does not have this cloud of impropriety hanging over the Judiciary. The Chief Justice is the highest legal official in the State of New Jersey. His

conduct must be such, or her conduct should be such that the public, when it comes to looking and upholding decisions of the court, must never question ulterior motives, or was that person really fit to make a decision.

There is now a large cloud that exists over this Chief Justice's sitting in that chair. I think the only way it could be dispelled is for him to no longer occupy it, so that the decisions that are made by the court, sometimes unpopular, would at least be respected. Because decisions of the court that are respectable will be respected. We believe the Chief Justice's conduct has gone so far as to say that I'm not only above the law, but I am the law."

In closing, I would ask you to be mindful of one issue alone. It's a quote from history. Because most of you I have been able to talk to either by telephone, or in your offices, and I know, or at least I think I know how some of you feel about the issues of our day. But it's how you're going to be remembered after you leave this room that's the most important thing.

We are encouraged, in the Bible that I read, to pray for our governmental leaders, whether we agree with them or not. And we do, as an organization, and we do, as individuals. But when another individual who was entrusted with the powers of government was faced with difficult decisions, he summarized it with a two-line statement: "When statesmen forsake their private conscience for the public duty, they begin to lead their society on a short route to chaos." You have ample evidence before you not to give advise and consent to the Governor's recommendation.

As to our abortion issue, as I've stated before in this room, if we have a judge standing before you who had ruled similarly in the Dred Scott decision, that a black person was not an individual and was property, you would not reaffirm that appointment. When an individual stands before you and in

effect is saying a child in the womb is not a child in the womb, I ask you, I beg you, I implore you not to reappoint a New York resident who has acted improperly in this State, to conduct the judicial affairs of this State. Thank you.

SENATOR O'CONNOR: Mr. Tomicki what you raised regarding the canons of judicial conduct-- In your confession that the Chief Justice has permitted his wife's illness to affect his actions-- In what sense do you contend that, other than the issue of the residency?

MR. TOMICKI: I would like to break that question, if I could, into two parts. I'd like to read the canon: "A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment." We must not forget that the move to New York City occurred, as I understand the testimony, much prior in time to the inception of his wife's illness. I believe that at that time there probably was -- at the time of his confirmation -- a violation of Article 15, Section 14-7? It must be a very painful decision that we are calling upon the judge to make upon himself, to say that, "Okay, I've had a family illness."

Now, we can possibly understand the strain that may cause upon him. He had, as we have seen, great empathy and concern for his family. I would expect nothing less of him, that he would have this kind of compassion and concern. But I believe that therefore, since you have this statute, since, as he has stated-- Senator Russo was constantly inquiring: "Will you move back? Will you consider yourself-- Will you come back to New Jersey?" The judge repeatedly, repeatedly in the most forceful terms said, "No, I will not come back. I will not come back and return to the lifestyle that I was leading before."

So we believe therefore, it's not a question, Senator, of compassion. The illness in his family has furthered this move to New York. I do not understand the concept of

split residency. I mean, the case Kennedy vs. Newark raises it. The question of residency -- to domicile. He has been domiciled in New York. So it is incumbent upon him as the chief legal officer of the State to carefully examine that canon, and to carry it out to its ultimate and proper conclusion, if that answers your question.

SENATOR O'CONNOR: Not really. Is it your contention that the effect of his family situation and his decision to reside, for whatever purposes, and for however much time in the city of New York-- Is it your contention that it somehow affects that manner in which he has decided matters before his court?

MR. TOMICKI: No, but I believe the decision and his move to New York occurred prior to his wife's illness. On that basis alone, on the narrow issue of residency in and of itself, it's a clear violation of that statute. His wife's illness is a secondary situation. It's a secondary situation. It's another intervening event, but it's a secondary situation. If his wife had no illness, and he still continued this concept that he has conjured up of split residency -- where he comes back to his home, but he goes over there for dinner and then sleeps there at night and then comes back over to work -- we would maintain, putting his wife's illness aside, that at that stage he's a resident of New York. What we are saying, when you read the canon, it says that no family relationship should influence his judicial conduct. Because it points this out--

Maybe I can answer it this way, Senator. If one of your children became very ill, and the doctors advised you that the only solution for that illness was for you to move to San Diego, now I don't believe that you're admitted to practice in the State of California. You might have to go back and take the bar exam again. But Senator, I don't think you would hesitate too long. It would be a difficult decision, but you

would do what you have to do. If San Diego was the best place to go, that's where you would go.

It's a situation now where we have the Judge in New York, whose wife needs the medical care that apparently is available there for her, and the other support mechanisms that he talked about. He may have to make, and should make the very hard decision to say, "I am in fact a true resident and domicile of New York." He may have to make, and he should make that very hard decision, because the statute is clear -- the plain meaning of it -- "every public official shall reside." Now have I answered your question?

SENATOR O'CONNOR: Well, you haven't really answered it, but you've made an effort to answer it. I don't think we're going to get the answer to it. There is no case that you point to, or no example that his living in New York is actually affecting his determination of a particular case. It's your contention that it's the underlying factor that he is not a resident of New Jersey, and that was affected by his family relationship, correct?

MR. TOMICKI: Senator, I think we can sit here and discuss the issue back and forth. We come down to some very similar decisions. We have empathy for his family problems. We have concern for them and we would hope for her continued and speedy recovery also. But it still does not escape the statute. The statute is clear -- every public official shall reside.

The Kennedy vs. Newark case clearly sets forth, and his own testimony stated that now he is domiciled, he is living in New York. On that basis alone, he should not have allowed to even be named, to come forth. Now, specifically, he has full knowledge of the statute. I will assume since Thursday, the judge has had the chance to fully research the statute. How has it possibly affected? Well, other people have commented upon that, Senator. Does he really have a stake in the outcome of certain decisions? I'm not going to get into

that relative to other decisions, whether it be the Social Host Liability Statute, the Mount Laurel decisions. As individual residents of New Jersey, various members of our organization might have opinions relative to those. But as an organization, no, we expressed no side opinions as to those.

SENATOR O'CONNOR: Are there other questions from the Committee? Senator Russo?

SENATOR RUSSO: Just one point. Mr. Tomicki, you used the words residence and domicile almost interchangeably. I thought, be careful. There's a significant difference. Without getting into a legal discussion, one can be resident of one state and domiciled in another. Frankly, if the statute -- let's assume for the moment -- applies, and if you use the word "domicile," any State official including the Chief Justice would be in a far better situation than when he used the word "resident." Because domicile is pretty much signified by a state of mind, not be the actual facts of where a person spends his night. I think there was one case where a person lived in another state for five years, who was ruled a domicile of the former state -- a domicilliary I think is the correct word. So I just think you have to be careful to keep the two words separate. They're not synonymous at all. So, as you discuss it, they may not at all be synonymous.

MR. TOMICKI: Senator Russo, although I appreciate the candor of your remark, I would ask-- It's presumptuous of me. It's not my job to cross examine or question a Senator. I will not do that. But if you read the Kennedy case as I read it, I go through it and I see the words "continual residence," and "a stake in the outcome," it's talking about firemen and policemen. And they're really talking about living, truly living. So that to use your term of legal art, that case, and Chief Weintraub's decision raise the word residency to the level of the word domicile, although the word domicile is not used.

But you now in fact raise a very important point. In effect there is a cloud. It's not clear. It would be wonderful if they used the word domicile. Then we would know what to do very clearly. But you, I believe, as Senators, cannot vote on the basis of a cloud. It has too long of a shadow. It casts too long a shadow. So that when you examine that case-- I would suggest that you read the case, if you haven't already, and I presume you have. I believe it does raise it to the level of domicile. Yes, I use the word interchangeably. So if we say it's an argument, it's an argument. As the judge himself said, Senator, he believes that a Chief Justice should reside in New Jersey. His own testimony in effect, says: "Well, I hope I do. I think I am, but I'm not certain." When you're not certain with the Chief Judge, I believe that you cannot move forward with the nomination.

SENATOR RUSSO: Well, leaving that-- Incidentally, the Chairman will announce the Committee has voted that the legal research, the opinion that we receive from Legislative Services, will be released. I'm sure a copy will be available for you, as well as the press. But let me just comment on one thing you said. You said if the issue is not clear, if there's a cloud, you suggest we have an obligation to reject the nomination.

The first thing that I just want to offer is that if anybody on this Committee says the issue is clear beyond question, I envy them. I don't think there is any doubt that the issue of residency is a difficult one in this case. I'm not sure, certainly at this point, about the testimony to be heard, but I'm prepared though to accept and to suggest either way that if it's not clear, therefore, we have an obligation to confirm, or your suggestion that if it's not clear, then we have an obligation to reject. I think neither one of those conclusions necessarily follows. I think each member of the Committee is going to have to make a determination. Anyone who

say's he makes it and then he's absolutely satisfied he's right, I again say I envy them. Under the facts that we've heard so far and under the legal interpretations-- But that's for the Committee to decide.

MR. TOMICKI: In a very short and brief response to that, Senator, I'd like to say two things. One of the axioms that I'd like to follow is when in doubt, don't. The next question would be when you are sitting and talking to the ordinary layman in the street, and when he hears the plain meaning of those words, "every public official shall reside," have we come so far that we now must have to go through three volumes of Corpus Jurisprudendum (sic) to find out what the words domicile and residence, when it was probably very easily understood by those who were adopting laws at that time. You've got to have a stake in the outcome. You've got to live here -- the word "live." So of course the legal mind says, "Well what does 'live' mean?" So now we have residence, for tax purposes and we have domicile. Domicile is a state of mind. Okay, how do I read a state of mind? Don't leave a doubt, Senator. There should be no doubt, and when in doubt, don't.

SENATOR RUSSO: Mr. Tomicki, if I followed -- we followed -- but if I followed that philosophy, I'd probably abstain on about 89% of the bills that come before the Senate. I would have never sponsored the death penalty, or voted for it, to use an example. That certainty is something that I say I envy you. I envy fellow legislators who are absolutely sure what's right and what's wrong. That's a luxury I wasn't gifted with. I don't know about my colleagues here. "When in doubt don't," would I think freeze me into legislative inaction. I wish I could always be sure when I vote either way. So I'm not sure that I can follow that philosophy, "when in doubt, don't." I'm not saying that doesn't mean here we should do one thing or the other. That's a certainty that you should set up as a standard, that I don't think is available to us mere mortals.

MR. TOMICKI: Senator, one would not call you, knowing your public reputation, a mere mortal.

SENATOR RUSSO: I'm afraid to ask you what one would call me.

MR. TOMICKI: Because of the hat that I wear, I'm standing here as President of New Jersey Right to Life-- I will not go further than that, but we will continue that sometime down at the Jersey shore. However, I learned a long time ago that I used to think there was black and white, when I was a young person. When I grew older and I got wise, I found out that there wasn't black and white, it was just a lot of grey. Then something else happen to me. I found that if you search your heart, you can find whether it's really black, you know, to the other side of the grey or to the other side of the white. You have to look.

Now Senator, you're talking a death penalty. You're talking about a hard choice that you had to make. You probably did deep reflection upon it, and then you resolved the matter in your mind. Yes, don't mistake the word "concern" for "doubt." You have concerns, and sometimes I'm not really sure, but I have this to balance, that to balance. But when you finally come down to that, and that is, in fact, the legislative process, a decision had to be made. And we're saying-- I was rejoicing to your point before, "Well, it's not clear this way; it's not clear that way." On such a critical issue, on what the focus and the linchpin, therefore, when in doubt, don't. But if you're going to have to scale it out, Senator, and if you scale out the tripod of judicial imperative, judicial activism, eroding the Constitution, acts of impropriety, I apologize, I'm sorry. I believe there is no longer any doubt at least in this speaker's mind.

SENATOR O'CONNOR: Senator Zane?

SENATOR ZANE: Mr. Tomicki, I don't think there is any doubt in anyone's mind on what your position is on this

appointment. But there's one thing you said that I don't see as you saw it. I'd like you to show me where I'm wrong, if I'm wrong. If I'm not wrong, I'd like you to rethink your thinking. You mentioned about a violation of judicial canons. You suggested because of the family concern that was discussed, that in fact there was a violation. I'm sitting here saying to myself that's an unfair statement to make of the Chief Justice in that context. I understand your position on residency and some of the others, but I just happen to feel that to make reference to a violation of one of the canons of judicial ethics was improper. I'd like you to show me where I'm wrong, or defend your position or point it out so that it's clear to everyone. There are a lot of people here and you're affecting, I think in part, someone's reputation with that statement. It might be unfair.

MR. TOMICKI: All right, so that we can clarify a point.

SENATOR ZANE: To me, that would suggest that somewhere in one of the decisions that the Chief Justice was involved in, made, or took part in, that because of the family concern that's been discussed, that his decision was influenced by that. I think that was an unfair statement.

MR. TOMICKI: If I made any remarks that got you to that conclusion, they would be remarks in error.

SENATOR ZANE: Well, then, okay.

MR. TOMICKI: I would therefore have to go back and listen to my own testimony, come back and see what I actually did say word for word. Because I'm not reading a prepared statement, Senator. Let me therefore-- That's what the good purpose of a hearing is, so that we can really discuss, or you can ask me, "What are you really trying to say, Mr. Tomicki. What is your organization saying?" So let me try to answer your question.

SENATOR ZANE: What I would like you to do Mr. Tomicki is I would like you to read that canon again, as brief as it was, and I'd like you to tell me and this Committee the specific violation that you alleged took place.

MR. TOMICKI: I'm going to read both of them. "A judge should respect and comply with the law, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." So it's integrity, in my mind as I read that, becomes the key operative word.

Section II of Canon II says a judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. What is in my mind at that time is Article 52, Section 14-7. It clearly sets forth that he shall reside in New Jersey.

SENATOR ZANE: Why don't we stay just with the canon?

MR. TOMICKI: But you're asking me what my mental processes were.

SENATOR ZANE: Okay.

MR. TOMICKI: That's what I'm trying to do with you as respectfully as I can, Senator Zane. So when we look at that, and we look at that canon, we say the judge stood forth here and said he had this concept of split residency. And I say even at that stage -- this is before the illness began -- he had this concept of split residency. I think the statute is clear, even at that point. He was not residing continuously in New Jersey. He did not have, as the Weintraub decision, up to the level of domicile. Now we have the intervening numbers. By his own testimony he becomes even more involved in New York because he has to. What I'm saying there at that stage, he made a decision for his family which he had to make, and he said, "I must now spend all my time over there." He didn't use the word domicile, but he's going, and he's staying, and residing, and dwelling, and living within New York, but working in New Jersey.

SENATOR ZANE: May I interrupt you? How does that violate the canon?

MR. TOMICKI: Because-- The canon is violated because he's not upholding the law, which is Article 52, Section 14-7, which says you shall reside on a continual residence basis in New Jersey. I don't-- I do believe that it was then incumbent upon him, once he became fully aware of the law with all of its vagueness, as Senator Russo has pointed out, it was probably incumbent upon him to say, "I must make the hard choice. I must now resign from office," if that makes what I'm trying to say clearer to you.

SENATOR ZANE: I understand your position.

MR. TOMICKI: You understand my position. It's not our purpose at this time in the hearing to ask you how you'll vote, although we're interested. I'm available for further questions, if any Senator has them.

SENATOR O'CONNOR: Any other questions?

SENATOR LASKIN: Yeah.

SENATOR O'CONNOR: Senator Laskin.

SENATOR LASKIN: I just have one question which I think may simplify some of these other questions and answers. Let's assume that the Chief Justice is a bona fide resident of the State -- no question about it, never lived in New York, that's not an issue.

MR. TOMICKI: Bona fide resident of which state, Senator?

SENATOR LASKIN: New Jersey. Let's assume he never lived in New York even for five minutes. I just want to give you this hypothetical. Would your organization still be opposed to his confirmation, if that were not an issue at all?

MR. TOMICKI: Yes.

SENATOR LASKIN: You would still be opposed?

MR. TOMICKI: I would still be opposed to the issue.

SENATOR LASKIN: For other reasons?

MR. TOMICKI: I would-- For other reasons, as I shared-- On a three-part basis-- It's a tripod, and if you remove one of tripods, as we believe he has with regard to the Constitution by an improper reading of Article I, Section I--

SENATOR LASKIN: I understand that, but I just-- Because the residency issue you spent a lot of time on, and I really thought that the primary reason for opposing him because of these philosophical reasons that we've discussed, the reasons about Right to Life. I don't want to oversimplify that, but I thought that was the main thrust of the opposition.

MR. TOMICKI: We have-- Our position statewide is extremely clear, but may I turn your question inside out? If we had a judge who's decisions we agreed to, and we were very joyful with the decisions, and he had the same cloud of residency over him, we would have to come here and say, "I'm sorry. As a matter of fact, you shame us by conducting yourself that way."

SENATOR O'CONNOR: Senator Gormley?

SENATOR GORMLEY: Which Senator were you talking about at the beginning of your presentation?

MR. TOMICKI: I think you know the answer to that, Senator.

SENATOR GORMLEY: Then you were wrong in the beginning of your presentation. Thank you.

SENATOR O'CONNOR: Any other questions? Thank you Mr. Tomicki.

MR. TOMICKI: Thank you Senator.

SENATOR O'CONNOR: Chief Justice, would you come up to the table again, and then we'll resume? Good morning Chief Justice. I'm advised that there are some continuing questions on the issue of residency, so before we move onto another area, we'll stay with that and I turn the floor to Senator DiFrancesco.

SENATOR DiFRANCESCO: Mr. Chief Justice, I was given yesterday a document prepared by Legislative Services of approximately 15 pages. Did you receive this document, which relates to the residency, dated July 28th?

CHIEF JUSTICE ROBERT T. WILENTZ: It was the same one just handed to my special assistant about five minutes ago. It may have also have been given to him -- another copy of that -- twenty minutes ago. I have not read it.

SENATOR O'CONNOR: Excuse me for one second. Perhaps it would be appropriate at this point to make copies of the opinion available. Senator Russo sort of let the cat out of the bag. I've never known him to do that, but it was a vote--

CHIEF JUSTICE WILENTZ: When I said what I said, Senator, I assumed that the person who was walking around was passing that out, when I said five minutes ago. Was I wrong?

SENATOR DiFRANCESCO: That was another document being passed out.

CHIEF JUSTICE WILENTZ: Oh, well then my assumption of that five minutes ago was wrong. I thought that's precisely what was being passed out.

SENATOR O'CONNOR: We are going to do things. What we'll do is we'll pass out the documents. As Senator Russo did state, it was the vote of the Committee to release that, so we are. The press is getting copies right at the moment. We'll make a copy of it available to you. At the same time we'll do all the picture taking for the next five minutes. Then, when we get back into the questioning, the picture taking will stop.

RECESS

**AFTER RECESS:**

SENATOR O'CONNOR: Our meeting will come to order. It's been suggested that because of the temperature in the room, that we waive the jackets are required rule, so we will. Feel free to remove your jackets if you'll be more comfortable. Senator DiFrancesco, would you begin your questioning?

SENATOR DiFRANCESCO: Chief Justice Wilentz, on Thursday, you related some lengthy period of time the facts concerning your residency as best you could, in very much detail. You did indicate at that time that the statute that you made reference to that day, which I believe was 52:14-7. It has been called to your attention that you really had not researched it, or had anyone research it in the context of whether or not you are, in fact, a resident, or whether it applies to judges, or whatever.

Subsequent to your testimony on Thursday, and certainly I know the issue has become quite -- knowing that everyone in the State is now looking at it. I mean, I look at The Bergen Record and it says: "Wilentz admits he was in New York." The Trenton newspaper: "Wilentz: 'I stay in New York but my heart is in New Jersey.'" This has become a topic of conversation. Had you had an opportunity to have anyone on your staff determine since Thursday whether or not this particular statute would apply to a sitting Chief Justice?

CHIEF JUSTICE WILENTZ: Senator, before I address that question, if my prior testimony indicated that I had absolutely no one look at anything prior to Thursday, than my prior testimony was incorrect. My recollection of that exchange was that I was given a question that I thought vaguely recalled asked me for my conclusion about the statute. I think, although I'm not sure, that I indicated I haven't even researched it. I have not even been aware of it until fairly

recently, and that's the truth. But even before Thursday I had one of my clerks do one or two hours worth of research on it. Subsequent to Thursday, several -- two -- of my clerks did four or five hours each on it and reported to me on the telephone totally inconclusively.

It's hard to say what you would expect me to do. I haven't felt an urge to have thorough, intensive research on it, because I would assume that it would be-- I assumed the Committee would listen, but I would think it would be most awkward for me to tell the Committee that in my opinion as Chief Justice, I am a resident of New Jersey, with the degree of self-interest that attaches to that. I suppose the Committee would be relieved of many problems if I said in my opinion I am a resident of New York under the statute, but it just seemed to me inappropriate for me to-- I mean, I did it. I was curious. Obviously I wanted to get some opinion on it, but I didn't do it for the purpose of in-depth research so as to aid this Committee with my opinion.

SENATOR DiFRANCESCO: So that, if I can understand what you said initially, that your clerk felt that it was inconclusive -- or clerks -- thought it was inconclusive -- as to whether or not that statute would apply to you?

CHIEF JUSTICE WILENTZ: Yes, Senator, and I do not recall any opinion, even inconclusive, on the question of whether the residency referred to the statute is domicile or residency. They just gave me a couple of maybe this, maybe that. I really haven't asked for any more than that, unless it was easily available.

SENATOR DiFRANCESCO: Forgetting the legalities, do you, in your own mind, believe you're a resident of the State of New Jersey, within the framework of living in the State of New Jersey?

CHIEF JUSTICE WILENTZ: I have given the Committee the testimony. If you ask the question do you think I'm domiciled

in New Jersey, I would have no difficulty with it, because I do believe that I am domiciled in New Jersey. This is the place that I look to as home. This is the place that I always intend to return to. When you ask me whether I'm a resident of New Jersey, I mean you've got the facts. I mean, I've resided where I told you for the times that I've told you.

As my wife recovers, I would expect to resume my New Jersey residency. I would live in New Jersey all week, just as I did before, and she would join me, perhaps even more than she did before, because the kids are grown up now. They all live in New York. Each of them has an apartment in New York. I do not intend to get rid of my New York apartment under those circumstances. I would want us to be able to be together on weekends, and that makes that possible. I would also want to keep the New York apartment because my wife's art career is centered in New York, and for the possibility that she might need some medical treatment.

I will continue to live at my home at the New Jersey shore every summer, as my wife and I have ever since we've been married, and as she has ever since she was a little kid, and as I have ever since I was a child. In that respect, I regard myself as clearly domiciled in New Jersey, although again it's, I guess, a self-serving conclusion. The doctors' reports about my wife I regard as optimistic. It hasn't been perfect, but I expect her to recover. I expect to be able to resume that New Jersey residency.

SENATOR DiFRANCESCO: I don't have any other questions.

SENATOR O'CONNOR: Senator Van Wagner.

SENATOR VAN WAGNER: I just wanted to clear one thing, Mr. Chief Justice, and I think Senator DiFrancesco probably touched on that question, and you clarified that. In terms of you and your own mind, or be it that it may be somewhat, as you put it self-serving to consider yourself domiciled in the State of New Jersey. It would seem to me, at least from my reading -- my unpracticed reading of the decision in the Kennedy case

-- that a domiciled person is-- Or the issue of domicile, that statement or term "domicile" brings with it a higher degree of commitment, if you will, to that place to where you are domiciled than does the statement "residency." Someone may reside in a number of places over a period of time, depending on their lifestyle. But I wanted-- I think that you've addressed-- Through you, Mr. Chairman, I think the Chief Justice, in his answers to Senator DiFrancesco's questions pretty much addressed the issues that I wanted to raise on this subject. I would withhold any further questions until we get into the other areas that we will be questioning the Chief Justice.

SENATOR O'CONNOR: Thank you, Senator. I believe we're now concluded with any questions that the Committee has on this issue of residency.

SENATOR ORECHIO: I have-- Mr. Chairman, I have just a couple.

SENATOR O'CONNOR: Senator Orechio?

SENATOR ORECHIO: Mr. Chief Justice, your testimony the other day indicated that you did vote from your New Jersey address.

CHIEF JUSTICE WILENTZ: That is correct.

SENATOR ORECHIO: Do you belong to any country clubs or civic associations within the State of New Jersey?

CHIEF JUSTICE WILENTZ: I used to belong to a whole host of them. Now I don't except for the Ocean Beach Club. I don't think I belong to any other organizations, other than Bar Associations and things of that kind.

SENATOR ORECHIO: Does that answer also apply to New York as well?

CHIEF JUSTICE WILENTZ: No, I have belonged to the Harvard Club of New York, ever since 1945 or 1946. In other words when I graduated from college and went to Columbia Law School, I became a member of the Harvard Club of New York, and

have remained a member ever since then. It is not a new incident of my split residency life. It's been something that's been there all the time.

SENATOR ORECHIO: Are you admitted to the practice of law in any other state?

CHIEF JUSTICE WILENTZ: No, I'm not.

SENATOR ORECHIO: In New York?

CHIEF JUSTICE WILENTZ: No.

SENATOR ORECHIO: I have no other questions, Mr. Chairman.

SENATOR O'CONNOR: Thank you, Senator. Are there any other questions on residency before we move on?

SENATOR DORSEY: Just one.

SENATOR O'CONNOR: Senator Dorsey.

SENATOR DORSEY: Chief Justice, your answer this morning to Senator DiFrancesco's question is not in any way, I take it, to change your answer to the final question posed by Senator Russo on Thursday evening, relative to the fact that you would return to the routine of '79 and yet return to New York City every weekend, is it?

CHIEF JUSTICE WILENTZ: I don't believe it changes that answer. The only difference that might exist is I'm not sure how clear it was that the question assumed that my wife is all better, but I think it did. The difference is that the kids are grown up. It is possible, I hope, that my wife would be able to spend more time with me in Perth Amboy because of the fact that they're grown up. Other than that, I don't regard it as a change.

SENATOR DORSEY: Thank you.

SENATOR O'CONNOR: Senator Zane?

SENATOR ZANE: Mr. Chief Justice, there was an opinion that was prepared. I know that Senator Dorsey has a copy that he requested. Independent of his requesting, I've also requested the same copy. I'd be more than glad to share that

with you. It's also dated July 28th, 1986. It recited at the outset NJS 52: 14-7 provides that every person holding an office in this State under the authority thereof shall reside in this State and exclude such office" -- excuse me, "and execute such office." The clarification that I would want from you-- In your opinion, do you feel that you are domiciled in New York, a resident of New Jersey, or do you feel that you are a resident of New York, reside in New York, domiciled in New Jersey.

CHIEF JUSTICE WILENTZ: I believe I am domiciled in New Jersey. It is clear to me that I have a residence too, in fact, in New Jersey. I also have a place of residence in New York.

SENATOR ZANE: Okay, so domiciled primarily in New Jersey, is that what you are saying?

CHIEF JUSTICE WILENTZ: Domiciled, period, in New Jersey.

SENATOR ZANE: Residing in New York with a place of residence in New Jersey and I guess--

CHIEF JUSTICE WILENTZ: No, I wouldn't. For the past two years, Senator, obviously my pattern of life -- putting me in New York practically every night -- you might say residing in New York and having a residence in New Jersey, if you want to say it that way. If things revert to what they were, and I'm able to live in New Jersey all week as I always used to, then you could say residing in New Jersey with a residence in New York, where he would go in order to be together with his children on weekends.

SENATOR ZANE: Mr. Chief Justice, the opinion concludes by saying you are advised therefore, that for the reasons set forth here in NJSA 52:14-7 applies to State judicial offices, which obviously would include yourself. I recognize that we are not bound by that -- that's one lawyer's opinion. But would you have a comment using the word "reside,"

which is in the statute, and recognizing that this dates back -- the origin of the statute -- dates back to 1778 when the Legislature, the Governor, etc., Governor Livingston, I believe, was concerned about people holding office in this State -- at that time appointed by the Legislature -- people holding office in this State and not residing in this State. They used some pretty plain language about residing in this State. I think they said something like, "We don't want to find people holding in this State that live in Pennsylvania, New York, etc." Now, bearing that in mind, would you feel, if you would offer an opinion, that since you're saying that you are domiciled in New Jersey, reside in New York-- Would you then feel that your residency presently in New York is contrary to that statute?

CHIEF JUSTICE WILENTZ: Senator, I haven't researched the statute. I am not going to engage in an analysis about something that I have not done any work on. I just feel unable to comment on it. Were I able to, I'm not sure that I would want to because of my position, being so very much involved with whatever my answer is.

SENATOR ZANE: Do you feel that there is a free interchange in acceptable and legal standards between the word domicile and residency, or do you feel that they are decidedly distinct?

CHIEF JUSTICE WILENTZ: They can be decidedly distinct. In some instances, they're intended to be the same. There is a whole variety of contexts overriding statutes. They can be the same, they can also be decidedly distinct.

SENATOR ZANE: Okay. I have no further questions.

SENATOR O'CONNOR: Senator Russo.

SENATOR RUSSO: Mr. Chief Justice, tell me, aside even from the interest you have in this matter, whether this statement is-- Let me just say -- the preface of my saying is-- It seems to me that it seems to be so clear beyond

question -- and I would just like your thoughts on it as a sitting judge -- that a person can be a resident of more than one state, but a domicile of only one.

CHIEF JUSTICE WILENTZ: That's a very clearly settled law. No question of that.

SENATOR RUSSO: No question of that. You can never be a domicile--

CHIEF JUSTICE WILENTZ: That's my understanding of the law, Senator.

SENATOR RUSSO: Okay.

CHIEF JUSTICE WILENTZ: I haven't run across anything different from that in my entire experience.

SENATOR RUSSO: Okay, without-- You know, for the moment, without interpreting whether the statute implies, and what it means by "resident"-- Actually then, and it's sort of like we just-- I'm trying to get the issue in focus in my own mind and perhaps in some others. Actually, a person can be a resident at the same time, under the legal term residency, of three or four states.

CHIEF JUSTICE WILENTZ: That is correct.

SENATOR RUSSO: For example, hypothetically, a person spends four months of the year in Florida in the winter -- well, let's make that in the spring -- and then four months in Colorado skiing in the winter, and four months in New Jersey in the summer. That person can well be a resident -- a true resident of all three states.

CHIEF JUSTICE WILENTZ: That is my understanding.

SENATOR RUSSO: But domiciled in only one as determined by a state of mind, and of course all the other things, where they vote, and so forth. Is that--

CHIEF JUSTICE WILENTZ: That is my understanding, Senator.

SENATOR RUSSO: Thank you, Chief Justice.

SENATOR O'CONNOR: Any other questions on residency? (negative response) Mr. Chief Justice, when we adjourned on Thursday, you were in process of having your income tax returns brought to the room. I believe that's where we want to take up with the next series of questions. Senator Dorsey?

SENATOR DORSEY: Thank you, Mr. Chairman. Mr. Chief Justice, you testified on Thursday morning, I believe, that you had filed a New York State income tax for the calendar year 1984 and 1985. Is that correct?

CHIEF JUSTICE WILENTZ: That is correct.

SENATOR DORSEY: Could you pull out the tax return filed for the year 1985 in the State of New York?

CHIEF JUSTICE WILENTZ: The 1985 tax return in New York?

SENATOR DORSEY: Yes.

CHIEF JUSTICE WILENTZ: I have it.

SENATOR DORSEY: Is that tax return signed by you and your wife?

CHIEF JUSTICE WILENTZ: This is a copy. It does not have either our signature on it, nor a copy of our signature. In other words there is no--

SENATOR DORSEY: Well is it checked as being married, and filed joint return?

CHIEF JUSTICE WILENTZ: We do file joint returns.

SENATOR DORSEY: Okay. Up in the upper section of the return, does it carry the initials or form number IT-201?

CHIEF JUSTICE WILENTZ: Correct.

SENATOR DORSEY: And that is entitled resident income tax return for the State of New York?

CHIEF JUSTICE WILENTZ: Correct.

SENATOR DORSEY: Now, in the first series of blocks below that title, it asks for your name, and then it asks for mailing address. What address is inserted there?

CHIEF JUSTICE WILENTZ: 166 Water St., Perth Amboy.

SENATOR DORSEY: And then, jumping down approximately two lines, it says permanent home address. What address is inserted in that line and the following?

CHIEF JUSTICE WILENTZ: Blank.

SENATOR DORSEY: Blank?

CHIEF JUSTICE WILENTZ: Blank.

SENATOR DORSEY: Dropping down further and to your right, there is a heading that says "City, part-time residence." Did you fill in that blank?

CHIEF JUSTICE WILENTZ: No.

SENATOR DORSEY: In your testimony on Thursday-- Let me just ask you this. Are the same notations or omissions in your 1984 New York State return, as you testified as being in your 1985 tax return?

CHIEF JUSTICE WILENTZ: Correct.

SENATOR DORSEY: On Thursday you testified--

CHIEF JUSTICE WILENTZ: Senator, might I clarify one thing, or would you prefer continuing?

SENATOR DORSEY: No, please do.

CHIEF JUSTICE WILENTZ: So that you don't have any implication as to the leaving blank of the part that says "part-year residents" -- that's E-N-T-S -- my understanding is that is for someone who has lived in New York from January through October, for instance, and then moves to another state in November and December, or who has lived in California from January through March, and then moves to New York April to December. It has nothing to do with the kind of unusual -- at least, this is my understanding -- the kind of unusual arrangement I have.

SENATOR DORSEY: I accept that, but you didn't check of anything under "C: Part-Year Residence," and therefore you didn't attach IT-360 form referred to therein.

CHIEF JUSTICE WILENTZ: I didn't check it off, Senator, and if it's attached, it's attached. I don't know what that form is, but I assume it's not attached.

SENATOR DORSEY: Okay, I'll accept that. On Thursday you testified that you filed both a New Jersey return and a New York state income tax return.

CHIEF JUSTICE WILENTZ: Correct.

SENATOR DORSEY: You also testified you filed a Federal income tax return for the years in question.

CHIEF JUSTICE WILENTZ: Correct.

SENATOR DORSEY: And you testified that your income tax paid to the State of New York was not diminished by any tax paid in the State of New Jersey, and vice versa. Is that correct?

CHIEF JUSTICE WILENTZ: I'm not sure I said that. I don't think I said that. I wouldn't mean it. My income tax paid for the State of New Jersey was not diminished by any amount paid to the State of New York. I believe, although I am not certain, that my tax paid to the State of New York was diminished to some extent, however that works, by the tax paid to the State of New Jersey.

SENATOR DORSEY: Did you pay more taxes or less taxes to the State of New York than you paid to the State of New Jersey?

CHIEF JUSTICE WILENTZ: Oh, I think I paid much more to the State of New York, because I think the tax rates are much higher.

SENATOR DORSEY: All right, one final question on the tax matters. In filing Federal returns, do you deduct from your Federal returns income taxes paid both to both the State of New York and the State of New Jersey?

CHIEF JUSTICE WILENTZ: I would assume that if one is permitted to, that my accountant deducts both, yes.

SENATOR DORSEY: Mr. Chairman, I have no more questions on the tax returns. I do have other questions when that's appropriate.

SENATOR O'CONNOR: Does anyone else have questions regarding the tax returns? (affirmative response) Senator Laskin.

SENATOR LASKIN: Yes, I have one simple question. The address that you used in the filing of your Federal return, could you tell us what that is?

CHIEF JUSTICE WILENTZ: 166 Water St., Perth Amboy, New Jersey.

SENATOR O'CONNOR: No other questions? (no response) For now we will open the questioning up to other general questions that other members of the panel might have. Senator Dorsey.

SENATOR DORSEY: Mr. Chief Justice, it is my understanding that the first cases involving the death penalty statute in New Jersey were tried in the fall of 1983. The prosecutor of Essex County advises me that he was required to submit his briefs to the Supreme Court in September of 1984, in that the matter was argued before the Supreme Court in February of 1985. Do you generally agree that historical chronology of events--

CHIEF JUSTICE WILENTZ: I don't agree with all of the dates except the argument date I do recall, and I assume he had given you an accurate account.

SENATOR DORSEY: February 1985, you'd agreed to?

CHIEF JUSTICE WILENTZ: Yes, I think that's right.

SENATOR DORSEY: Now at this point in time the Supreme Court has not rendered a decision in connection with that case, has it?

CHIEF JUSTICE WILENTZ: That's correct.

SENATOR DORSEY: And is there a time fixed upon which the Supreme Court will render that decision?

CHIEF JUSTICE WILENTZ: No, there is no time fixed. I would assume that a decision in that matter would be rendered fairly soon, but no time fixed any more than fairly soon.

SENATOR DORSEY: Now I don't want to ask what the decision will be, or the substance of the decision, but can you tell us why over approximately 16 months, that decision has not been rendered considering--

CHIEF JUSTICE WILENTZ: I'll do my best.

SENATOR DORSEY: --the importance and all of the people that are affected by that decision.

CHIEF JUSTICE WILENTZ: I'll do my best, Senator. The more complicated a case, the more issues involved in a case; the more important a case, the more likely it is that it may take a fair period of time. The death penalty cases have all of those aspects, plus a tremendous amount of decision on statutory material in every state of the nation. For instance -- not for instance as to the death penalty cases, but as to important cases in general -- the Mount Laurel I case had about 15 months between argument and decision. The Oakwood and Madison case, also involving important Mount Laurel issues had about 16 to 17 months between argument and decision. That is, if you don't count the earlier arguments, in which case it would be four years. But 16 months is, I think, a fair number.

Mount Laurel II had more than two years between argument and decision. The death penalty cases have one thing that even those important cases do not have, and that's a very, very severe responsibility of deciding between life and death. I would ascribe the amount of time the case has taken to that, and sometimes a case is better not decided if there are certain important activities that are pending. On occasion it may be clear that the Legislature may be doing something that may have an effect on that very case, even though done afterwards. On occasion, there are court decisions -- usually the United States Supreme Court pending -- whose resolution might affect the case when it might be well-advised to wait. We don't wait in order to help a Chief Justice get confirmed, Senator.

SENATOR DORSEY: I'm glad to hear that. It does appear that the longer we wait, some of the worst decisions come down, from our standpoint. Chief Justice, how would you respond to this statement by Miles Feinstein, defense counsel from Passaic County, who stated recently the delay in the courts rendering a decision, is disgraceful, it is unfair to the defendants, citizens, courts, and attorneys?

CHIEF JUSTICE WILENTZ: I regret that he feels that way.

SENATOR DORSEY: Chief Justice, is there any possibility -- again, not asking as to what the decision will be -- that assuming that the court shall strike the death penalty, that the persons who were tried and convicted under that death penalty would have to be tried again?

SENATOR RUSSO: I'm sorry, could you repeat the question?

SENATOR DORSEY: Without asking what the decision may be, is it a possibility that if the court should strike the death penalty, that all of those who have been tried and convicted under that statute would have to be tried again?

SENATOR RUSSO: Could I comment before the Chief answers this. With all due respect to Senator Dorsey, I would ask that he give some further thought to pursuing that type of question. I think it's inappropriate under these circumstances. I just think it puts the Chief Justice in a position of either saying, "No, I won't answer it," -- which I would think he probably would have to say -- or commenting in such a matter that-- I just don't think it's appropriate under these circumstances. I understand that in no way does that bind Senator Dorsey, nor am I asking the Committee rule the question improper. I just make the plea that Senator Dorsey directly-- I don't think we ought to consider it.

SENATOR DORSEY: Senator Russo, I will accept your request. I did think that I had phrased it in such a manner

that it would not eventually cause the Chief Justice to excuse himself from the decision in the case by asking what might be a hypothetical legal question based upon what might occur.

CHIEF JUSTICE WILENTZ: I can't answer that question, Senator.

SENATOR DORSEY: Mr. Chief Justice, I want to say that I did not imply that the decision had not been rendered to further your confirmation here today.

CHIEF JUSTICE WILENTZ: No. I realize that but there were--

SENATOR DORSEY: You are correct. There have been those assertions.

CHIEF JUSTICE WILENTZ: Yes.

SENATOR DORSEY: I did not say that this morning, nor have I thought that was necessarily true. Mr. Chief Justice, in November of 1984, you gave what I considered to be a very interesting lecture at Drew University entitled "Judicial Legitimacy Finding The Law." Do you recall that lecture which has subsequently been published?

CHIEF JUSTICE WILENTZ: I'm aware of that.

SENATOR DORSEY: And in that lecture-- Have you recently reviewed that lecture by any chance?

CHIEF JUSTICE WILENTZ: No, I have not.

SENATOR DORSEY: And in that lecture--

CHIEF JUSTICE WILENTZ: To read it once was enough.

(Laughter)

SENATOR DORSEY: I have now read it three times. I don't know what that says for me. In that lecture you recall that you enumerate the various methodologies by which judges and courts arrive at their decisions.

CHIEF JUSTICE WILENTZ: I recall that.

SENATOR DORSEY: And the most interesting one, of course, is the approach which is entitled, "Public Policy Approach of Judicial Decision-Making." That one you're certainly familiar with.

CHIEF JUSTICE WILENTZ: Yes.

SENATOR DORSEY: And in that discussion on that approach to the rendering of decisions, you said essentially it is the only one that involves the explicit insertion of new principles of law into the existing body of law, and went on to say the basic underpinning or source for those decisions by a court, by a judge, were essentially economics and philosophy. Do you recall that?

CHIEF JUSTICE WILENTZ: No, you'd better say that again.

SENATOR DORSEY: At the end of the lecture you said there are several bodies of scholarship upon which judges often call when they are making policy on their own. That is part of the discussion of the public policy approach. You said the two most prominent are economics and philosophy.

CHIEF JUSTICE WILENTZ: Well, Senator, I would have to go through that speech. If I conveyed that impression, that would be a rather serious change from what I understand our function to be where the law is not clear. I do not want to appear to be deferring at this moment to the Legislature unduly, but when we're in the area of determining what policy should govern a matter where the law is not clear, we don't look to economics and-- What was the other?

SENATOR DORSEY: Philosophy.

CHIEF JUSTICE WILENTZ: Philosophy. We look to see if the Legislature has spoken on policy in that area, if there are laws, if there are directions, if there is some coherent body of statutes. Obviously, not directly on point, otherwise that would dispose of it. I would find it hard to believe that in my lecture I spoke as if that was the first place you look to.

SENATOR DORSEY: Well do you-- I didn't say the first place.

CHIEF JUSTICE WILENTZ: Primary, or something like that.

SENATOR DORSEY: I didn't mean to say that.

CHIEF JUSTICE WILENTZ: Okay, well that's--

SENATOR DORSEY: I say let's assume-- Well, is not what I say correct, i.e., where you examine the basic statutory law at the moment, and determine that the Legislature has not acted, or hasn't acted to address that particular problem? You then draw upon such things as economics and philosophy to render your decision.

CHIEF JUSTICE WILENTZ: Sure, those are things one would consider. One would consider what the apparent policy is concerning the matter, presumably the economics of the matter may be involved in the apparent policy. I say apparent policy again Senator, to indicate that where one can detect a general policy on the part of the Legislature, that should be the most important thing and the starting point.

SENATOR DORSEY: So, essentially when you determine that the Legislature has not acted to your satisfaction--

CHIEF JUSTICE WILENTZ: Pardon me? You mean that you determine to your satisfaction that the Legislature has not acted?

SENATOR DORSEY: Has not acted from your standpoint. You then enter into the policy approach through rendering a decision. You're essentially going through the same exercise and function of the Legislature, are you not?

CHIEF JUSTICE WILENTZ: No, I don't think it's the same. The Legislature can write on a blank slate. The Legislature could say, "We don't like the policies that have existed before, that we the Legislature have written." It could go on a totally new direction.

What we do, what judges do -- which is as they should do, I think, where the questions is not clearly answered by either prior precedent or by statute -- is to look at prior precedent and try to see what kind of policy seems to emerge from that. You look at the statutes on nearby subjects and try

to see what kind of policy is implicit in that, and you try to think about what the jurisdiction is in which you're ruling, what that jurisdiction seems to regard as sound public policy. You try your very hardest, even though it's difficult obviously, not to allow your own individual notion of policy to be the guide. It may turn out that your examination of these other sources leads to a conclusion that's in accord with your own. It may turn out that they don't.

SENATOR DORSEY: Let me ask you this, Mr. Chief Justice. Based upon this lecture, in which you discussed public policy approaches and judicial decisions, which decisions have you rendered in the last seven years that would fall into that category?

CHIEF JUSTICE WILENTZ: You mean the decisions where there was no clear answer found in the Constitution, or in a statute, or a prior case law, is that what you mean?

SENATOR DORSEY: I mean a decision rendered by you that comes within the definition of public policy approaches as you define it.

CHIEF JUSTICE WILENTZ: I suspect that there were many, many such decisions. It is not rare to have a case before the court that doesn't have a clear answer. Put differently, it is rare to have a case before us that does have a clear answer. Usually there would be no point in taking that case. So you're talking about a whole raft of cases that almost any one of which, my guess is, have an element of searching for policy, or searching for precedents that are near. Some have more obvious aspects of that than others.

SENATOR DORSEY: Are there any of your own decisions that stand out in your mind that you've defined that?

CHIEF JUSTICE WILENTZ: Well, the Kelly vs. Guinel decision stands out in my mind since there are so many people who have made it stand out in my mind.

SENATOR DORSEY: Well in Kelly vs. Guinel-- That's very interesting because in that case, if I recall the decision properly, you went through a very extensive analysis -- all right, I assume -- credit you with having done so -- with every state in the nation as to how the courts in that state and the Legislature in that state had dealt with that issue, is that not so?

CHIEF JUSTICE WILENTZ: Well, we analyzed the cases from other States.

SENATOR DORSEY: And you came to the conclusion that there was only one state, namely Oregon, which has essentially adopted legislatively, the policy which you and the court shows in Kelly vs. Guinel, is that not so?

CHIEF JUSTICE WILENTZ: I don't-- I'm not sure that's so. Let me say a little bit, at least in accordance with my recollection. I think we found a fair number of states where courts have decided similarly with the way we decided in each of which the legislature followed by undoing the court's decision. The Oregon difference was-- This is my recollection, I'm not certain.

SENATOR DORSEY: Yes, that's my recollection.

CHIEF JUSTICE WILENTZ: The Oregon difference was that the Legislature didn't really undo the decision. It left most of the decision intact, but made it clear that the courts could not go any farther.

SENATOR DORSEY: But basically, then, every other state except Oregon had not only adopted legislatively the philosophy which you endorse, but where a court had done it, they, in essence, had overturned it by an act of the legislature, is that not so?

CHIEF JUSTICE WILENTZ: Yes, they hadn't adopted what our decision endorsed. Most every-- If what you mean most every other state, you mean those states which passed judicially on the question. There were a fair number of them

-- not many, but a fair number of them -- that had decided it the way we decided. In that fair number of states, invariably it was followed by legislation that undid the decision in whole in most cases, but in part in the case of Oregon.

SENATOR DORSEY: Notwithstanding that experience throughout the nation, your court felt compelled to, in essence, broaden tort law and place a new responsibility on every homeowner, correct?

CHIEF JUSTICE WILENTZ: Our court decided that: given the prior law, given the apparent policy of this state concerning drunken driving, that is was a legitimate, sensible, and desirable extention -- to the extent it was an extention, and I think it was -- to apply that law to the facts of the case that we have.

SENATOR DORSEY: In making that determination, you give essentially two bases in the decision. Number one was the State policy dealing with drunken driving, but I saw no discussion in that the Legislature had in fact addressed that problem through various upgrading of drunk driving as an offense, starting with Senator Orechio's initiatives eight years ago -- and in essence, found it appropriate to extend tort liability into the situation of the host, the guest-host situation. Did you give any consideration to the effect that decision would have on the insurance industry and the insurance crisis in the State when you reached your policy decision?

CHIEF JUSTICE WILENTZ: I will not comment on what we did or did not give any consideration. The opinion indicates things that we did consider. The opinion goes into some -- not detail, but the opinion mentions the insurance problem. I will not say more than that.

SENATOR DORSEY: Mr. Chief Justice, there is one statement in the decision, and I'll read it to you. It's on page 555. It says, "in any event" -- let me read the whole paragraph: "This court has decided many significant issues

without any prior legislative study. In any event, if the Legislature differs with us on issues of this kind, it has a clear remedy." I consider that to be a rather cavalier approach by your branch of government to our branch of government, in terms of what we at least conceive to be our primary function. Don't you feel that is a rather cavalier statement?

CHIEF JUSTICE WILENTZ: Obviously I don't, Senator. The comment is sort of an obvious kind of comment. We don't decide a case in the face of a dissenting opinion that tells us that she disagrees, that she thinks it's the Legislature's function. We don't decide that case ourselves, even though one of the justices argues that this is not an area where the court should be involved, but should leave it to the Legislature. We don't decide that case simply by the observation that if we're wrong, the Legislature can remedy it. We decide the case based upon so many things that are in that opinion. The entire history of this State, through the court system without any objection by anyone, imposing liability on the owner of the tavern, on the bartender. In most states that was done by legislation. The thought that-- The fact that we have a common area on which both the Legislature and the court system can operate with legitimacy, which is the tort area, I have never regarded it. I know of no judge who has never regarded it. The fact that the Legislature has practically the entire field of tort liability as its potential domain has meaning that therefore the court should not act. We don't feel that way. I mean, certainly there are areas that seem more appropriate than areas that seem less appropriate for the court to act. This was a controversial one, obviously.

SENATOR DORSEY: Well, if this is an area in which it's not inappropriate for the court to act and essentially make public policy, we don't disagree that that decision was in essence making a public policy, do we?

CHIEF JUSTICE WILENTZ: There is an element of policy decision in that matter. There is an element of policy decision in practically every case that the New Jersey Supreme Court decides. There was no big element of policy decision in the underlying question of liability for something that is that foreseeable. That has been clearly the term. There was no policy question in the application of that to someone who serves drinks. That had been clearly decided. The question was what is its applicability? Does it extend to someone's home when they're serving someone drinks head on, host to guest? Yes, that was a public policy aspect. And we looked at what we thought were the important indicators of public policy, one of which was the enormous concern shown by the Executive and the Legislature, about drunken driving.

SENATOR DORSEY: The Legislature's concern about drunken driving was reflected in the various criminal laws that were adopted, rather than in any policy to further extend tort liability, is that not so, Chief Justice?

CHIEF JUSTICE WILENTZ: Yes, criminal laws that were characterized as the toughest in the nation.

SENATOR DORSEY: Doesn't this, in essence, put the Legislature-- This decision, this type of decision put the Legislature in a position where it's almost catch-up ball, to react and respond to public policy decisions by the court? Is that not the implication of your statement if the Legislature differs, it has a remedy?

CHIEF JUSTICE WILENTZ: No, the implication of that statement is simply to reassure everyone about what should be obvious, namely, that the case apparently does not deal with any Constitutional issue. It deals with the matter in which the Legislature can take different action. Now I don't regard it as playing catch-up ball, or anything like it. There are times when we act in areas where the Legislature could act. Usually, there is not much objection to the fact that we do

act. There may be disagreement with the decision. But many times-- It happens all the time. I don't know how that gets to something that you call catch-up ball. Certainly it calls a problem to the Legislature's attention. If that's catch-up ball, so be it.

SENATOR DORSEY: Well, if you're ever in doubt--

SENATOR O'CONNOR: Excuse me, Senator Dorsey.

SENATOR DORSEY: Yes.

SENATOR O'CONNOR: It's now 10 minutes after one. We have a one o'clock quorum call. I was waiting for you to finish this particular line of questioning, but it appears that you are going to be some time, so this might be the appropriate time for us to take our luncheon break. We'll resume at 2:15. All Senators should go down immediately for the quorum call.

#### RECESS

#### AFTER RECESS

SENATOR O'CONNOR: This meeting will come to order. We will resume with the questioning by Senator Dorsey.

SENATOR DORSEY: Mr. Chief Justice-- Let me see if I can speed this up a little bit before I bore my colleagues. Mr. Chief Justice, are you familiar with the opinion matter of Egg Harbor Associates 94: NJ 358? Justice Pollock rendered that decision.

CHIEF JUSTICE WILENTZ: Somewhat.

SENATOR DORSEY: Is that not a classic example of judicial activism?

CHIEF JUSTICE WILENTZ: No, I don't think so.

SENATOR DORSEY: Why is that not so, Chief Justice? The statute under which the court upheld the action of DEP had found that DEP had authority under that statute to impose Mount Laurel II obligations. It was a statute adopted prior to Mount Laurel II, prior to Mount Laurel I, and your decision was rendered after this Legislature had, in essence, rejected the concept of Mount Laurel II in legislation proposed by Senator Greenberg.

CHIEF JUSTICE WILENTZ: First of all, Senator, what you're suggesting is that the proposition of law that the court adopted was an incorrect proposition, was a misreading of a legislative intent. It was ultimately a decision that affirmed the actions of the agency. No matter how wrong you may think we were, I don't regard that as judicial activism. In other words, judicial activism to me has to do with the design of remedies that are unusual actions by a court, that seem to go beyond what one would think of as ordinary adjudication of a particular dispute.

SENATOR DORSEY: Let me tell you what I do think is wrong. In order to sustain a decision by the Commissioner of the DEP, the decision which he rendered under the CAFRA law -- your court and Justice Pollock admitted that this was so -- found--

CHIEF JUSTICE WILENTZ: Admitted that what was so -- what you're about to say?

SENATOR DORSEY: Yes, what I'm about to say.

CHIEF JUSTICE WILENTZ: Okay.

SENATOR DORSEY: --was that the CAFRA statute had employed within it a Mount Laurel II obligation and/or the authority of the DEP to exercise that authority with a Mount Laurel II obligation included. And why we think that is wrong -- and the Senate President agreed with me on this point anyway -- that there is no way that this Legislature could have considered Mount Laurel II at the time it adopted CAFRA,

because it didn't arise until years after the CAFRA law was adopted by the Legislature.

CHIEF JUSTICE WILENTZ: Well, the court, judging from the opinion, was aware that CAFRA had been adopted prior to the Mount Laurel decision. It's mentioned in the opinion -- that fact is. I'll try to give you my recollection of the sense of the opinion as to what you're talking about. You had a statute that gave an agency enormous power over tidelands, or wetlands, or whatever coastal area facility. It had a veto power, in effect. I think the veto power was the ability to condition a veto.

In essence, it had the power, on an overall basis, to say how this very substantial amount of land was going to be developed, or was not going to be developed. I think the sense of the opinion was that accompanying this power was a responsibility that went beyond just environmental considerations. In other words, it went beyond just whether there would be pollution, or beyond just whether the land would be in some way harmed.

The power that it had necessarily excluded a power to consider other public interests, in addition to the environment. There were indications in the legislation itself that it was the case. And when you think of the administration of that statute, the agency exercising that power-- If it did not exercise such considerations, if it did not consider those things, it might find itself with that very limited portion of this very big amount of land, that limited portion which is allowed to be developed to have developments that did not take into account of the many, many needs of a huge area, larger than one municipality, but a huge area. So that if all it did was say, "No dice, it's going to hurt the environment," or "Yes it's okay. It won't hurt the environment," and said yes on every occasion to that, you might find some very important needs not being satisfied. We took the position essentially

that those public interest considerations weren't frozen as the day CAFRA was adopted, that the Legislature would not have wanted the Commissioner to consider only those things which were then identified as bearing on the public interest, but that as that public interest got redefined, as policies perhaps changed, whether it be in terms of Mount Laurel or some other way, that those considerations concerning the use of land were legitimate for the Commissioner, and that the Legislature would have intended that.

SENATOR DORSEY: Mr. Chief Justice, based upon that theory then, and the admission that CAFRA was adopted by the Legislature before Mount Laurel II, are you not putting the Legislature almost in the position that almost every year, or every time one of its pieces of legislation granting authority to an executive branch of government is involved in litigation, the Legislature must adopt a law to say that the original grant of power shall contain no more, and not be expanded beyond what it was when that legislation was adopted?

CHIEF JUSTICE WILENTZ: If that's what the Legislature intended, yes they'd have to say that. It would be a rare occasion that the Legislature would not want the court to consider the changing scene, the change in philosophy, the change in policy, all different kinds of changes. Obviously, on occasion, following that kind of change may be contrary to the legislative intent. A court has to be very careful about that. But I would say that in most occasions, where there is a general grant of power, and implicit in that grant is a consideration of the general welfare, I don't believe that the Legislature means, and we mean only the general welfare as it exists today in our consideration. It's quite possible that what the court defines as a change in policy within the State may be something that the Legislature would not want considered under a particular statute, that can make a question difficult.

SENATOR DORSEY: Then as I-- I don't mean to argue now, because I understand you're giving your analysis. As I understand it, your position is that when the Legislature adopts a law, and some period of time elapses between the time that law is adopted, and the court -- it comes before the court for consideration for construction or interpretation, that the Legislature in essence invites in an implicit way the court to then interpret that law as it sees fit based upon whatever societal changes may have occurred from the time the law was adopted by the Legislature till the time you rendered your judgment.

CHIEF JUSTICE WILENTZ: Not nearly that broad. There are certain kinds of laws that the Legislature adopts that clearly have no relationship to whether policies surrounding it, or not surrounding it, change. The law says what it says and it's clear. But there are other laws that are of a general nature, carrying a very general grant of power. I'm not suggesting it's an easy assignment to figure out to what extent clear changes in policy, clear additional societal considerations, clear changes of emphasis. I'm not saying it's easy to say under what circumstances the Legislature would have intended those to be considered. I'm simply saying that there are, I think, probably, a fair number of statutes where the Legislature would want that, and that accord should do that.

SENATOR DORSEY: And in leaving aside all other situations, in the case of the CAFRA statute, that is the decision which you arrived at. The Legislature wanted you to interpret it, and you then interpreted it based upon events that had occurred subsequent to CAFRA.

CHIEF JUSTICE WILENTZ: To say that we thought that the Legislature wanted it, in the sense that meaning that this was an active desire on the Legislature's part, no. In the sense of this was within the Legislature's contemplation, this was the probable legislative intent that these things be considered, the answer would be yes. That's what we thought.

SENATOR DORSEY: Well, you didn't feel restrained, however, not to interpret it based upon the lapse of time and so-called societal changes.

CHIEF JUSTICE WILENTZ: With that kind of statute we would feel less restrained. With an agency that has that broad a grant of power over that important -- a decisionary -- a decisional matter, yes.

SENATOR DORSEY: Does anything that you have said-- Was anything that you have said affected by the fact that the president of the Senate testified in connection with Justice Pollock that he was here when the CAFRA statute was adopted or amended, and that at no time was Mount Laurel II a concept which was in the minds, or was an active principle or an active concept at that time?

SENATOR RUSSO: Excuse me, Senator. I don't understand you correctly. Who did you say was here when the CAFRA statute was adopted?

SENATOR DORSEY: Justice Pollock-- You were here. Oh, I thought you said that. You were here when it was amended.

SENATOR RUSSO: No, I'm not even sure of that. That was adopted before I was ever elected to the Legislature.

SENATOR DORSEY: Oh, I thought you said that. Well, I'm mistaken. I think what he said was that there was no one here in the Legislature when CAFRA was adopted that could have thought of Mount Laurel II. That's really of no consequence, because the court reached the decision. You reached the decision in your mind.

CHIEF JUSTICE WILENTZ: I wouldn't say it's of no consequence. What I'm trying to convey is that the state of facts, the state of societal considerations, these existing sets of values I would think would not be intended by the Legislature to be frozen in deciding what kind of things the people administer this act are allowed to consider. It could be wrong, obviously. It could be wrong in the sense that the

Legislature may have had a different point of view. We just try our best to figure that out when the cases come before us. And we tend, as most courts do, to give very, very significant deference to the agency that has been given the power by the Legislature.

SENATOR DORSEY: This morning, as I understood your testimony, you indicated the court tends to make policy decisions when in fact, the Legislature hasn't acted. Now, in the case of Right to Choose vs. Byrne, which again is not one of your opinions but one of Justice Pollock's, the Legislature had adopted a very specific piece of legislation, made a very specific policy decision to limit the use of Medicaid funds, and yet the court set that aside, when the legislation that was there in question was of fairly recent vintage to the decision, not like the CAFRA legislation. How do you justify both of the positions that you've stated?

CHIEF JUSTICE WILENTZ: The second position, Senator, is not based upon any notion of what legislative policy was. Because obviously, legislative policy was very clearly indicated in that statute, and we did not follow that policy because we felt it was unconstitutional. In other words, when you interpret the Constitution, most often you are required to interpret it under a contention that some legislation that's being challenged is not in conformance with the Constitution, that some policy isn't in conformance. So the two things could conflict. There are two very, very different areas of the law. When someone raises a Constitutional issue and says this is what the Constitution means, or should mean, the question isn't well, will that Constitutional determination conflict with the policy of the Legislature? Almost invariable, the Constitutional contention is, what is admittedly the policy of the Legislature, cannot be affected because of the Constitution, which is what essentially Right to Choose was all about.

SENATOR DORSEY: It gives us-- It gives me the feeling that from time to time, when the court uses the mechanism of saying that we must update a statutory policy decision for the Legislature, where-- It begins to make me feel from reading these cases that there is a consistency in that the court will achieve what it believes to be right, whether it does it on the basis of a Constitutional right, or it does it on its belief that it is entitled to reinterpret this statute on the basis that time has lapsed since its adoption, and there had been societal changes notwithstanding what the clear implication of the legislative acts have been.

CHIEF JUSTICE WILENTZ: If time has elapsed, and there have been substantial policy changes but it is clear that the Legislature did not want any such changes to affect what appeared to be its initial meaning, then our court, if we nevertheless made some change, would be wrong. In other words, the ultimate question in many of these cases was what was the Legislature's intent. That sometimes translates into a question of to what extent would the Legislature have intended, to what extent did the Legislature intend concepts which have not even existed at that time, concepts which are emerging, things of that kind. To what extent would the Legislature have intended that they be considered within the statutory framework? We try, all of us -- it is a constant problem for a judge -- to make sure that one's decisions are rationally based, are legitimately based, and are not what simply what you're asking me about, namely a reflection of what a particular judge thinks the results should be. That's a difficult task for every judge, because most people have a reaction in every case, as to what they think the results should be. But we're not a judge, we're not judges to tell you what we think the results should be. We're judges that try to figure out in a conscientious manner what "the law is."

SENATOR DORSEY: Well let's get back to one point. In Egg Harbor Associates -- the matter of Egg Harbor Associates --

what was there-- What occurred in the legislative history from the time the adoption of CAFRA, which came before Mount Laurel I, came before Mount Laurel II, that indicated to the court that the Legislature would want that statute interpreted as the Supreme Court did in that case?

CHIEF JUSTICE WILENTZ: Nothing in the legislative district, but just a simple reflection. For instance, let's assume that a developer had proposed a large-scale development that was a planned unit development, a planned unit residential development, one of those new kinds of zoning concept developments that did not exist, I suspect -- I'm sure did not exist at the time of CAFRA. No one would say -- I'm sure I don't think anyone would say -- that simply because it did not exist at the time of CAFRA -- the time CAFRA was passed -- that the Commissioner would have to veto that proposed kind of development because the Legislature never had that kind of development in mind. As a matter of fact, I suspect no legislator would say that a proposed development that the Commissioner felt gave more consideration to the many objectives of CAFRA, that on that basis he might not veto a conventional, single-family residence, one house and a loft, and say, "I think given the need for land in this area, there ought to be greater density. There ought to be more apartments. There ought to be a planned unit residential development. You will use a bit less of the sensitive land and you will get the amount of density that you need."

So the point I'm making is that it's clear to me that not every concept that emerges, every way of thinking, every means of accomplishing that, develops after the day CAFRA becomes law, is somehow denied the Commission. Whether something as important and as controversial as Mount Laurel and the concepts that are within Mount Laurel could have been said to be the kind of thing that the Legislature would understand should be considered by the Commissioner is not quite that easy. We decided that the Legislature so intends.

SENATOR DORSEY: Why wasn't it just as easy for you to say as a court if the Legislature meant for Mount Laurel to be in CAFRA, it would have updated the legislation and specifically included it? Would that have not been more charitable for the legislative function of the Legislature?

CHIEF JUSTICE WILENTZ: I don't know what the word charitable means in that connection.

SENATOR DORSEY: More respectful of the function of the Legislature?

CHIEF JUSTICE WILENTZ: No, we don't think so. I don't think so. I think it is quite respectful of the function of the Legislature to assume in that kind of a law that the Legislature would want those policies which become generally accepted legal considerations and policies, to be considered in administering that kind of a law.

SENATOR DORSEY: You're familiar with the legislative efforts of Senator Greenberg to have adopted a bill which was known, I think, as S-535, which in essence, in a general sense embodied the Mount Laurel II concept, are you not?

CHIEF JUSTICE WILENTZ: I'm generally familiar with that effort. I am no longer familiar at all with the detail of the bill.

SENATOR DORSEY: Are you familiar with the fact that the bill failed to get legislative approval?

CHIEF JUSTICE WILENTZ: That is correct.

SENATOR DORSEY: And your decision on Mount Laurel II came after that defeat?

CHIEF JUSTICE WILENTZ: Yes, that is correct.

SENATOR DORSEY: And am I right in thinking that at the time the Mount Laurel II decision was rendered by your court, that no other legislature in the country had adopted statutes which embodied the Mount Laurel II principal?

CHIEF JUSTICE WILENTZ: I think that's correct. I think that's correct, Senator. I think that Pennsylvania,

perhaps not by statute but by litigation, had something similar, but it was not for the benefit of lower-income peoples, it was for the benefit of multiple dwelling units. California had something, but I think your statement is essentially correct.

SENATOR DORSEY: So it's essentially correct both as to legislative action and judicial action?

CHIEF JUSTICE WILENTZ: I think so.

SENATOR DORSEY: And yet I take it that in Mount Laurel II, you and the court felt that there was, I think, an absolute obligation to establish the Constitutional principle espoused by you in that decision, is that correct?

CHIEF JUSTICE WILENTZ: Well, yes and no. It is correct that we felt obliged to continue that Constitutional obligation, continued to do what we felt was the judiciary's obligation concerning that Constitutional duty which had, as you know of course, been pronounced long before Mount Laurel II.

SENATOR DORSEY: Not as well as you do.

CHIEF JUSTICE WILENTZ: Pardon me.

SENATOR DORSEY: Not as well or as articulately as you do.

CHIEF JUSTICE WILENTZ: You mean the court in Mount Laurel I, didn't go as far as we do?

SENATOR DORSEY: No, I mean to say that in my opinion, the prior decisions whether they would be Mount Laurel I, never so clearly defined what you defined in Mount Laurel II.

CHIEF JUSTICE WILENTZ: I think there was a clarity of definition only in the sense that our court decided that remedies had to be more particular. Mount Laurel I decision is very clear. What it doesn't do is to go into the question of the various problems that arise in the event Mount Laurel I and its doctrine turn out not to be followed.

SENATOR DORSEY: But didn't you do something else, aside from remedies in Mount Laurel II, and that was to establish the basis for what we now generally refer to as Mount

Laurel II, as being a product of our Constitution?

CHIEF JUSTICE WILENTZ: I think you'd better give me that question again, Senator.

SENATOR DORSEY: You made some references as to the fact that in Mount Laurel II, you updated -- you more thoroughly defined the remedies. That had not been done in Mount Laurel I. Am I incorrect in thinking that in Mount Laurel II, aside from remedies, you established for the first time a Constitutional obligation for persons to be entitled to the so-called affordable housing?

CHIEF JUSTICE WILENTZ: No, there's nothing new in Mount Laurel II about the obligation to make affordable housing available -- nothing new in the sense of the doctrine itself. There's a lot new in Mount Laurel II. But in terms of the Constitutional obligation, if I get your question right, the obligation in Mount Laurel I was that every municipality that was called a developing municipality was obliged to provide through its zoning ordinances a realistic opportunity for its fair share of the region's lower income housing needs. Mount Laurel II has the same obligation.

SENATOR DORSEY: No, but isn't Mount Laurel II based upon a slightly different concept? I'm almost through, Mr. Chairman. In Mount Laurel II, is not the concept based upon the due process clause in the Constitution, and the finding that it entitles certain low and moderate income persons to so-called affordable housing?

CHIEF JUSTICE WILENTZ: No.

SENATOR DORSEY: A basis quite different that saying developing municipalities must provide--

CHIEF JUSTICE WILENTZ: No, no, the same thing-- There are some differences. In Mount Laurel I, the court referred to three Constitutional bases. One was equal protection under the New Jersey Constitution, one was due process, and the third, which was the one that it really-- The

other two were simply-- As I read the opinion, I mentioned very briefly what's the obligation in the Constitution, the power given to the Legislature to zone, which the Mount Laurel I court found was a power that had to be exercised to promote the general welfare. Our court followed that completely. In other words, we found that the Constitutional obligation precisely-- We followed Mount Laurel I precisely. We mentioned due process and equal protection, referred to the page where the Mount Laurel I court mentioned due process and equal protection, but we too relied most heavily on the obligation to zone with the general welfare in mind -- Constitutional obligation.

SENATOR DORSEY: In Mount Laurel I they speak in terms of finding this obligation to be imposed on so-called developing municipalities.

CHIEF JUSTICE WILENTZ: Yes, I did say there were some changes, yes.

SENATOR DORSEY: You go far beyond that by finding that--

CHIEF JUSTICE WILENTZ: We go different than that. Far beyond-- I don't know if far beyond is right. We go different.

SENATOR DORSEY: Well it's certainly beyond to then find the obligation exists in every municipality, and not just in developing municipalities.

CHIEF JUSTICE WILENTZ: No, I think if you read Mount Laurel I, implicit in Mount Laurel I is that every municipality has an obligation for its resident poor -- not the region's poor, but for its resident poor -- to attempt to provide that group with their fair share -- not their share -- with decent housing. We did go different from Mount Laurel I if we decided that the State develop a guide plan. It would more likely guide to legislative intent for development than was the developing municipality concept. But we do not have an

obligation. In Mount Laurel II there is not an obligation on every municipality. As a matter of fact, it's only those municipalities in the growth area that have any obligation to satisfied the prospective need, the need for the future.

SENATOR DORSEY: In Mount Laurel II?

CHIEF JUSTICE WILENTZ: In Mount Laurel II, correct.

SENATOR DORSEY: What about the so-called indigenous poor in every municipality?

CHIEF JUSTICE WILENTZ: The indigenous poor, yes. That's the existing poor. That's correct.

SENATOR DORSEY: I simply credit you with more innovativeness than you will take credit for in that decision, Chief Justice. Chief Justice, one final question for myself. In the discussion dealing with the transfer of the Nelson case -- and I'm not interested in that -- you made a remark that you referred it to Judge Breitkopf.

CHIEF JUSTICE WILENTZ: No, I referred it to-- I transferred it to Judge Beglin.

SENATOR DORSEY: Excuse me. Let me rephrase that. You said Judge Brycroft had made an inquiry of you relative to the case. You then made the statement -- that's not terribly important. You made the statement that you were of a different-- You were of a different political stripe than was Judge Breitkopf. What was it that you meant by that, Chief Justice?

CHIEF JUSTICE WILENTZ: Well I meant that some of the articles in the--

SENATOR DORSEY: At least you smiled at that.

CHIEF JUSTICE WILENTZ: Some of the articles in the press suggested not only that I was trying to do a favor for someone, when anyone who thought about it for a few minutes would realize that was really not a very sensible observation, but that I was doing so because of my politics. I guess my observation was to the somewhat irrelevant fact. I hope and

I'm sure, that 100 and some years ago when Judge Breitkopf first became a judge, he was thought to be of a different political stripe from my political stripe. Do you understand that?

SENATOR DORSEY: You're not supposed to think in terms of political stripes.

CHIEF JUSTICE WILENTZ: No, you're certainly not. That's why it's rather upsetting to read about accusations of that kind --- more than rather upsetting.

SENATOR DORSEY: I just have one short statement, Chief Justice. Although you and I disagree on the judicial philosophy of some of these decisions, I do wish to commend you on your candor in terms of answering the questions dealing with residency, and indeed at the outset making statements against interest, as that term is sometimes used. I have sat at various hearings of the Judiciary Committee. I sat before the U.S. Senate Judiciary Committee in connection with the review of the nominee to the Federal Bench now sitting in New Jersey, in which questions were posed, and the "right" answers were given. You did not do that. I think you've answered the questions as to residency honestly and openly.

I have to tell you that I disagree with the conclusion that you are a resident of this State in terms of the statute that is applicable. I think there is a case that you might ever want to look at. It's called Marcanti vs. City of Paterson, in which two firemen and policemen in the city of Paterson found themselves almost in the same situation that you were in. They maintained apartments and such in the city of Paterson. In essence, however, lived with their families in their homes. One owned a home-- Both of them owned homes outside of Paterson. It was decided against them. But I do wish to commend you on your candor and your honesty, and that's to your credit.

SENATOR O'CONNOR: Senator Russo, do you have a question?

SENATOR RUSSO: Yes, I do. I have a few, Mr. Chairman. Chief Justice, let me preface these questions by saying that with all due respect, I do not agree with Senator Dorsey that the opinions written by a justice or judge are relevant to a confirmation hearing such as this type, although I have no criticism at all of his view, or any other legislator's to the contrary. But the same issue came up with Justice Pollock here, and I personally -- before I get to these questions -- can say, and I think it would be a shock to you if it were different, that you have written a number of opinions I don't agree with. As a matter of fact, in every one of those books on the walls in your library, half the lawyers didn't agree with the opinions that were written. So, when I say that I don't agree with some of those opinions, I don't at all mean to suggest that it's in any way relevant to this issue before us today. Because there hasn't been a judge-- I can remember some of Oliver Wendell Holmes' opinions that I thought were outrageous, but none more outrageous than Egg Harbor. I'd like to comment on that a moment, to take advantage of this opportunity, even though having said I think it's relevant, now I'm going to waste a few minutes time to get a point across, if I might. I listened carefully to your answers to Senator Dorsey. I thought the Egg Harbor opinion was probably -- and it was a unanimous court, as I recall-- It was not? It was Schreiber, Justice Schreiber--

CHIEF JUSTICE WILENTZ: I think Justice Schreiber was one dissent.

SENATOR RUSSO: Okay. But in any event, six members of the court joined you?

CHIEF JUSTICE WILENTZ: I think so.

SENATOR RUSSO: I thought the opinion was probably-- -- as Senator Dorsey, I think, correctly put it -- the most extreme example of judicial activism I have seen come from this court. You see, some of the things you mentioned perhaps make

me think that way, and I may be wrong, so I'd like to cover them. It's been, I guess, 25 years since I've worked with these kind of things daily, when I worked with the Supreme Court, but I have always understood the principle to be that it was the intent of the Legislature at the time it passed the statute, and you used the expression, "what the Legislature would have intended."

CHIEF JUSTICE WILENTZ: Should I comment right there, Senator?

SENATOR RUSSO: Yeah, surely.

CHIEF JUSTICE WILENTZ: The intent that I was talking about-- I agree with your formulation of the intent at the time the statute was adopted. The question is, at that time, did that Legislature intend to restrict the person who would administer CAFRA to only those concepts, only those considerations, only that kind of social policy which would then accept it, or did the Legislature that passed CAFRA at that time intend to give that administrator both the power and the obligation -- as he made his terribly important decisions about development in New Jersey -- to consider not only those things that were socially important then, economically important matters of policy that were important then, but also patterns of policy as they developed in the future? So, it would be-- To say what the Legislature would have intended, if I said it that way, it isn't quite the right way to say it.

SENATOR RUSSO: Well, a couple other things you said in apparent justification of the opinion, where you referred to the fact that to affirm the actions of the agency, meaning DEP-- Do you recall saying that?

CHIEF JUSTICE WILENTZ: To Senator Dorsey?

SENATOR RUSSO: Yes.

CHIEF JUSTICE WILENTZ: Yes, I said that we-- Right, I said that.

SENATOR RUSSO: In other words that seemed to be a justification in part.

CHIEF JUSTICE WILENTZ: I said that it-- Yes, there is a certain deference that one starts out with.

SENATOR RUSSO: Yes, deference to the agency was the other statement. Now do you realize, Chief Justice Wilentz, and as a former legislator I think you would, those agencies and those bureaucrats are our biggest problems when we pass legislation that ends up under regulations that do not even resemble what we passed?

CHIEF JUSTICE WILENTZ: If that has a question mark at the end of it, Senator, I'm not going to respond.

SENATOR RUSSO: Okay. Isn't that really though almost the very issue that was before the court, namely, the agency did something that--

CHIEF JUSTICE WILENTZ: Yes, yes, you're right. When the challenges as to whether or not the agency has the power to do something, it isn't a very intense analysis that reaches the conclusion, "why yes, they must have had the power because they're an agency, and we show deference to agencies." I understand that. What I was trying to say was that one of the things that one's thinking starts out with is the fact you're dealing with the expert, the agency that's had charge of this subject matter for some time, and that agency concludes that this is within its power. There is a certain initial presumption of validity, especially if you've had an appellate division that also agreed with the agency's exercise of power, as this Appellate Division did, I think. Yes, I'm sure.

SENATOR RUSSO: Well, in the opinion -- and I refer to 94:NJ Page 364, and I know you don't recall it, or at least, maybe you don't recall it.

CHIEF JUSTICE WILENTZ: I do not.

SENATOR RUSSO: But the court outlines the primary purpose of CAFRA, and it says it's to protect the unique and

fragile coastal zones of the State. Then it goes on to talk about environmental effects. The opinion was quoting the purpose behind the act as the Legislature passed it, and talks specifically about environment, environment, environment, the fragile coastal environment. Now, I don't necessarily agree -- maybe it's better to say I don't agree in many respects with Senator Dorsey's view of Mount Laurel, but how in the world did this court ever conclude that made any difference on the fragile, coastal environment whether a rich family or a poor family lived on it?

CHIEF JUSTICE WILENTZ: Well, Senator, I'll give you two responses to that. One is, my recollection of the opinion is that one of the things the opinion attempted to demonstrate was that it was not solely environmental factors that CAFRA was to consider. Now, that's my recollection. My recollection was that the opinion went at some length in an attempt to indicate that there were other considerations that were appropriate.

The other part of the answer would be what I described to Senator Dorsey is what I think was the sense of the decision. The sense of the decision was that CAFRA is not there solely to protect the environment, not there solely to see that this very, very large amount of land isn't environmentally hurt. That's not its sole function. Since it's got this veto power with conditions, one would assume that part of its function is to say that out of this tremendous amount of New Jersey land over which it has a power, where it's going to stop development in an awful lot of places, it has perhaps a consequent obligation to see to it that where the development is allowed -- and that's a lot less development than would be allowed if there were no CAFRA -- that where it is allowed if there is some relationship to a sensible notion of the public interest.

Put differently, you could probably capsulize the decision as saying that the agency must have believed that if

after it was done with its business, this 90% -- or whatever the percentage is -- of the lands under its jurisdiction that should not be touched because they're so very, very sensitive, that if, when it was done with its business, that's all it had done was to protect that 90%, and allow the other 10% to be inhabited by homes worth \$10 million, with one person in each home, because the various municipalities thought that's what was right, it would have failed. It had an obligation in exercising its veto, and conditional veto power to consider interests in addition to simply preventing the harm to the land.

SENATOR RUSSO: Well, Mr. Chief Justice, fortunately, today I can say this, I'll probably get another chance, assuming you're confirmed or not. I mean I find that so extremely unbelievable. I mean, I may use the strongest terms. There is not one word in the legislative history of CAFRA that you referred to. Let me ask another way. Did you ever find one word, one report, even a newspaper account that when CAFRA was debated and passed, that the Legislature ever had anything in mind other than environment -- protect the fragile ecology of the area -- one word, anywhere, at any time, prior to and up to the time of passage, whether within the bill, newspaper accounts, or otherwise?

CHIEF JUSTICE WILENTZ: I will repeat what I told you before, Senator. I believe that the opinion itself included an analysis of the law intended to suggest, and I think explicitly so, intended to suggest that it is not solely environmental factors that CAFRA was intended to deal with. I also would suggest without repeating my answer that the fact that Mount Laurel was not in the mind of the Legislature when it enacted CAFRA does not, for me and for the court, put to rest the question of whether or not the Legislature at that time would have intended these more recent developments to be considered.

SENATOR RUSSO: Well, I know the opinion does say, "intended to deal with more than environment." I mean, that's the very issue of what we're suggesting.

CHIEF JUSTICE WILENTZ: Yes, I meant that the opinion points to parts of the legislation. At least, that was my impression.

SENATOR RUSSO: Now Mr. Chief Justice, correct me if I'm wrong.

CHIEF JUSTICE WILENTZ: I don't have the opinion in front of me, Senator.

SENATOR RUSSO: I have it, and I'll pass it to you if you want it, but the opinion relies upon the general welfare provision which would encompass anything imaginable, and the court, under that provision, could virtually do anything it wanted with a statute, couldn't it.

CHIEF JUSTICE WILENTZ: No, it couldn't do-- It could, I mean, if you want to make that kind of statement, a court could do virtually anything it wants with, I guess, any kind of statute. General welfare is not a rare kind of doctrine that the court depends upon. It's not even a rare doctrine that the Legislature uses on occasion for a grant of power.

SENATOR RUSSO: I think the bottom line of what some of us feel -- and I don't mean to suggest that's all -- is that something like Mount Laurel, something such as Mount Laurel is such a major policy decision that the court should have left that to the Legislature, and not expand what was obviously an environmental statute to include something that broad, whether we agree with the concept of Mount Laurel or not, as I may well agree with.

CHIEF JUSTICE WILENTZ: I understand your point. I would only-- I know you intended it differently, and I know it could be taken the same way. It was not the court that insisted upon expanding. It was the court that affirmed -- the Appellate Division that affirmed -- the Commissioner -- I guess it was the Commissioner -- who decided to require that.

SENATOR RUSSO: None of that matters. What the Appellate Division did doesn't matter.

CHIEF JUSTICE WILENTZ: I think there's a difference.

SENATOR RUSSO: What the Department did doesn't matter. What matters is what the Supreme Court did.

CHIEF JUSTICE WILENTZ: Senator, I am suggesting there is a difference in what you imply. I don't think you intended to imply-- It would be different if the Commissioner approved of a project, and it came before the Supreme Court, and we said we disapprove unless you include lower-income housing. There is a difference, in my opinion, between that and sustaining a Commissioner who, at the outset, includes lower-income housing.

SENATOR RUSSO: Though in effect, you were telling us, I think, if I understand you, and I probably don't, that there is a presumption of validity in what the Commissioner did.

CHIEF JUSTICE WILENTZ: No, what I was trying to show, Senator, was two different kinds of concerns for the Mount Laurel doctrine, one of which I could-- Either of which I could understand the Legislature disagreeing with me, obviously, but one of which would seem to me to be a much larger dose of activism than affirming the action of a Commissioner.

SENATOR RUSSO: Okay, just a couple of comments on the matter that was discussed earlier regarding the capital punishment issue. I just want to make it clear so there's no question about it -- since the issue has been discussed, and since I'm known to be the sponsor of it -- I, for one, have no difficulty with the time period that it has taken. I think the issue is so critically important -- as you put it, life and death. I wouldn't care if it took you another year to do it if that were necessary, so long as it were necessary to make the proper decision on something that critically important. Because I don't think any of us want the wrong decision in that case, whatever that might be. I don't think there is any

thought at all among most of us -- maybe all of us -- that has been delayed in any way because of these hearings. I can tell you now if you were confirmed by the Senate, and the day after, ruled it unconstitutional, it wouldn't concern me in the least, if that's what you in your heart believe, because if it is, it shouldn't be declared unconstitutional, and it wouldn't matter if the cases had to be tried again. We are not dealing with child's play in that issue, just so you understand.

CHIEF JUSTICE WILENTZ: Senator, I never, ever would have made the statement I made if I haven't read in so many papers, attributed it to so many different people that this was an important thing, and especially because there was some suggestion in the reports in the press that it was being delayed for the very ulterior purpose that I mentioned.

SENATOR RUSSO: Thank you, Chief Justice. That's all, Mr. Chairman.

SENATOR O'CONNOR: Senator Van Wagner, and then Senator Dorsey.

SENATOR VAN WAGNER: Did you want to follow up on that question?

SENATOR DORSEY: No, I just want to make it clear that my concern was the period of time, not how the decision turned out. But you having originally been the sponsor of the bill, it is no longer your bill. It is a law of the State. I did not indicate in anything that I have said, Chief Justice, that the delay was related to this. You didn't mean to infer that, did you?

CHIEF JUSTICE WILENTZ: I'd rather not answer that question.

SENATOR DORSEY: I think that is unfair. I have complained about--

CHIEF JUSTICE WILENTZ: Well, all right. Then I take it Senator, that the article that I read in the paper did not properly quote you.

SENATOR DORSEY: The article said that there had been speculation that was the reason for the delay, not that I said that was the delay.

CHIEF JUSTICE WILENTZ: I see. Then I apologize for having mixed up the speculation that you referred to, to speculating yourself.

SENATOR DORSEY: But I feel no better about the delay. I think it is an issue that the court has known about since the day the law was signed, which was over three years ago, and that we could have expected an earlier decision.

SENATOR O'CONNOR: Senator Van Wagner?

SENATOR VAN WAGNER: Thank you, Mr. Chairman. Through you, Mr. Chairman, if I might-- Mr. Chief Justice, I would like to pursue, if I could, somewhat the line of questioning that was pursued originally by Senator Dorsey and later by Senator Russo. Perhaps on a more conceptual basis, not in a specific case-by-case analysis. In your earlier testimony on Tuesday, at great length we pursued the issue of judicial independence, and your great concern with judicial independence, and the manner in which you've expressed your concern in the past. I wonder if you would, as briefly and as concisely as you could, give me at least, and the Committee, the definition that you utilized in determining whether or not there is in fact an infringement on the independence of the judiciary, in your view as Chief Justice.

CHIEF JUSTICE WILENTZ: Well, I guess, Senator, what you have to start with is a rather simple definition of judicial independence. Then the question becomes very easy. It just gets to be -- to me, anyway -- a question of common sense. Judicial independence is the functioning of a judge in connection with the case, and the decision by a judge in connection with the case, based solely on the judge's understanding of the law, the judge's best understanding of the law, and to whatever extent the judge's own conscience is

involved, his own learning, his own research. But on that judge's determination, regardless of what he thinks another judge wants, regardless of what he thinks his friends want, regardless of what he thinks anyone in the whole world wants, that is the simple concept that I mean when I refer to judicial independence. Your question was how do I identify the things that infringe on it? My answer is you just have to ask yourself as to any particular action, would it infringe on that judge's power, on the probability that he will decide totally independent of anyone else.

SENATOR VAN WAGNER: So that would be a definition as it would apply to a judge in the singular sense, as that judge exercises his responsibilities or her responsibilities in any specific case?

CHIEF JUSTICE WILENTZ: Right.

SENATOR VAN WAGNER: Now, in looking at that concept in terms of court, since you have the overall responsibility of preserving the integrity of the court, and the independence of the court, do you have any sense, or philosophy, or feeling, or barometer, or measurement as to when the independence of that judiciary -- judicial branch of government -- rather than the individual judge, begins to perhaps infringe upon the independence of what might be legislative prerogatives?

CHIEF JUSTICE WILENTZ: I suppose, Senator, that the kinds of things that Senator Dorsey was referring to, that when the court steps too often into an area that might be thought to be clearly the appropriate reserve of the Legislature, I guess one could consider that as interfering with legislative independence. Frankly, I don't think -- and I guess it's because I'm not sitting where you are-- I don't think that the situation arises as much, the Legislature having, I think, so much more power. When it comes to a Constitutional determination, that's probably the one area where one has to have the most concern about intruding into the legislative

domain. Under no circumstances can I think of what the court will do that would interfere with legislative independence in the same sense that I talk about judicial independence. There's nothing that we do that I can think of that would make a legislator vote one way rather than another way, thereby interfering with that legislator's independence.

SENATOR VAN WAGNER: So I might then conclude that when you use the words "judicial independence," you are primarily concerned with the independence of that jurist, or judge being able to make that decision in an unhampered manner.

CHIEF JUSTICE WILENTZ: Generally speaking, that's what I mean. There are certain kinds of things that affect the entire institution, salaries being probably one of the most important. In other words, as judges find that they are less and less able to keep up with the lifestyle that they thought they had assured by a prior salary, it tends to have some kind of inhibiting effect on judges, somehow or other, not exactly the same kind as I referred to before. It does something to both the morale of the bench, and I think, to some extent, its independence.

SENATOR VAN WAGNER: Can I extend this question into the basic question concerning the administration of the court?

SENATOR O'CONNOR: Senator, we're having open questions at this point, so--

SENATOR VAN WAGNER: Okay, I know before we had kind of established the format to stay within a certain subject area. I was wondering if I might pose that question in terms of independence -- judicial independence -- to the court itself, as you sit as the chief administrator of that court, in a sense, or the Chief Judge, with the chief administrator.

CHIEF JUSTICE WILENTZ: You mean the entire court system?

SENATOR VAN WAGNER: The entire court. Do you view that part of the administration under your jurisdiction should

be, and does, at this point, allow for the maximum independence for the judges who must operate within that system?

CHIEF JUSTICE WILENTZ: I hope so, Senator. I don't think there's anything I've ever done-- Well, in seven years maybe I did something, I don't know, but I don't really think there's anything I've ever done that ever suggested to a judge that he should decide a case in any way other than what he felt honestly the law required. The only area where my administrative actions may conceivably have affected some judges in their judicial function has been the extent to which I've tried to get the court system to dispose of more cases than had been disposed. And it's possible that the pressure to do a good job administratively may have gotten some judges to try a little harder to settle a case than they otherwise would have. So in that sense, it may have affected what could probably be called their judicial function.

SENATOR VAN WAGNER: You have a sense of the direction I'm going in, in terms this question.

CHIEF JUSTICE WILENTZ: I don't know, I'm not sure.

SENATOR VAN WAGNER: If you remember earlier on Tuesday, I had asked you about a report that had been given to us by, I guess, your chief assistant, Mr. Parks, I believe it is?

CHIEF JUSTICE WILENTZ: Mr. Parton.

SENATOR VAN WAGNER: Mr. Parton?

CHIEF JUSTICE WILENTZ: Oh, yes.

SENATOR VAN WAGNER: I had mentioned that I was certainly impressed with the report, and in fact, the accomplishments that had been outlined in that court, and the various--

CHIEF JUSTICE WILENTZ: But the numbers bothered you, the stress on numbers, as I recall.

SENATOR VAN WAGNER: I guess one of the concerns I have aside from the other concerns that have been expressed by

the members of the Committee is the morale of the court itself, and the morale of those individuals that serve on the court. I'm not at all implying that I have any sense of what that morale is. You touched upon one of my concerns when you talked about case disposition as being perhaps a paramount objective of the court. I become concerned as we moved toward an evaluation technique for judges, and we move toward perhaps a closer dialogue between that evaluation as it develops and this Committee, and whether or not we will ultimately develop a system that will simply plug itself into numbers and will not, in effect, be flexible enough to determine how those judges can best work within that system.

CHIEF JUSTICE WILENTZ: I hope not, Senator. I will not apologize for the stress that I have made in trying to dispose of cases. I think it's been absolutely essential. I think one of the aspects of quality of justice is not only how good the judge is, but how long the litigant has to wait to get to see the judge. If it's 10 years, and it's a very fine judge, maybe you had to wait too long, and it just isn't worth it. But that kind of stress will not interfere with the quality of justice. I've had numerous confrontations with different areas of the system, including judges, including support staff. We have begun to see each other's points of view. I understood better than I did at first, the things they were concerned about. I think we can have both an efficient system, a system that works quickly, a system that doesn't waste time, and a system that gives quality justice. We're not going to plug into the computer. That kind of concern I would like to dissipate.

SENATOR VAN WAGNER: Thank you. Thank you, Senator.

SENATOR O'CONNOR: Senator Laskin?

SENATOR LASKIN: Mr. Chief Justice, I have some questions, not on any specific cases because I wouldn't go into that. I don't think it's the right thing for me to do. With

regard to determining the intent of the Legislature, that really bothers me, not so much from the court's viewpoint but perhaps equally as well as from the Legislature's viewpoint. Should there be any time -- if the statutes are drawn properly and with a great deal of specificity -- should there ever really be any time where a judge has to determine what was the intent of the Legislature?

CHIEF JUSTICE WILENTZ: The definition that you gave the proceeded the question-- I have to answer the question, no there it shouldn't be. But the fact of the matter is that given the pressures of life, legislation can't always be that farsighted. I'm not sure if it ever can be. It certainly hasn't been, not just in New Jersey, but nowhere in the country.

SENATOR LASKIN: But it would solve a lot of problems if the bills were drawn better.

CHIEF JUSTICE WILENTZ: If a bit of legislation foresaw the precise problem that someone was trying to get to the Supreme Court, maybe it wouldn't get to the Supreme Court.

SENATOR LASKIN: Now when you-- Now this is question I want to ask that may sound strange, because I don't know that any courts do this, but when a case comes to the Supreme Court, where the intent of the legislation is really the primary consideration, you just don't know what they meant. And I assume some cases are like that. Has it ever-- I guess it's been a philosophical thought of the court to say at that point: "Well, we're not going to make a decision. We're not going to decide the intent of the Legislature. We're going to say 'case reversed,' because we don't know what the Legislature intended." And if the decisions say: "Legislature, we don't know what you meant. We really can't decide this case, unless we start speculating." And then when you start speculating, you run into different interpretations -- some legislators saying, "Well, we didn't mean that," and some saying, "Well, we did mean that." Wouldn't it be advisable -- I don't know if it

can be done -- for the court at that point to say, "Hey, we don't know what you meant, Legislature. We're not going to decide this case. We're going to send it back and say, 'Legislature, we don't understand you. You've got 90 days to amend the statute with some specificity, so that we're able to make a decision based upon what you really mean.'"

CHIEF JUSTICE WILENTZ: What-- If I may ask a questions, Senator. I was with you until you got to the 90 days.

SENATOR LASKIN: I just made that up.

CHIEF JUSTICE WILENTZ: Shall we leave the 90 days out for a minute?

SENATOR LASKIN: Yes.

CHIEF JUSTICE WILENTZ: It's something that perhaps should be done by some court. No matter how you slice it, by so doing, you are declaring the winner of that litigation. In other words, litigation means that Jones is suing Smith. Jones wants something Jones doesn't have. Smith has it. When that case gets up to us, and we say we don't know what the Legislature meant, therefore we reverse -- you don't really mean reverse whatever the Appellate Division said, you mean reverse and decline to pass judgment on that case. That means the plaintiff won that case. Maybe it's a better way to do it. The plaintiff lost, rather-- The plaintiff lost that case because we declined to give judicial relief.

SENATOR LASKIN: Well, there would be a loser on the basis of that decision, regardless of whether it's plaintiff or defendant.

CHIEF JUSTICE WILENTZ: In other words, you're in effect making a decision, but you certainly are doing it in a very different way. There are cases, of course, where the court rules that the legislation doesn't apply, but that's not what you're talking about. You're talking about a case where the legislation clearly does apply, but nobody can figure out

in what way it applies. I guess the decision the courts have made is that it's better to stumble as much as you have to, and try your best to divine that non-existent legislative intent, than to give victory to one of the parties by default. You're going to give victory to someone, it's clear. I don't know. It will make everyone's work lighter, I guess.

SENATOR LASKIN: Just a problem that I have personally. I don't know what the answer is, but certainly there are many cases where legislative intent can never be determined because the statutes are so poorly drawn.

CHIEF JUSTICE WILENTZ: Or because the Legislature understandably didn't foresee a particularly peculiar set of facts.

SENATOR LASKIN: That's very kind of you. I prefer the other. (Laughter) Thank you.

SENATOR O'CONNOR: Any other questions by the Committee? Going once, going twice-- Thank you, Chief Justice. The Committee is going to take a 15-minute recess at this point.

#### RECESS

#### AFTER RECESS:

SENATOR O'CONNOR: The Committee will come to order. Senator Russo, Senator Dorsey, please take your seats. We've concluded the testimony of the witnesses who have indicated an intention to address the Committee, and we've concluded our questioning of Chief Justice Wilentz. Gentlemen, what is your pleasure?

SENATOR LYNCH: Mr. Chairman?

SENATOR O'CONNOR: Senator Lynch.

SENATOR LYNCH: I would like the opportunity to favorably move the renomination of Chief Justice Robert Wilentz. But before I do I would like to compliment the Committee, the Chair, and all those who have participated in these hearings. I think they have been informative, and meaningful, and I think demonstrate that the process works, regardless of which side of the issue you happen to be on. We try and set the record clearly. We are here exercising our function, our Constitutional function of advise and consent on the renomination of the Chief Justice by Governor Kean. Governor Kean saw fit to renominate the Chief Justice, I assume based upon his competency and qualifications, and was armed with a comprehensive four-way check, as well as the advise of competent counsel.

Several issues have presented themselves that are meaningful, I think. Clearest are the qualifications and competency of the Chief Justice. With regard to the qualifications of the Chief Justice, the issue that presents itself is that of a residency. We have received several opinions outlining the meaning of residency as it is in the statute that's relevant to the issue at hand, in that the Chief, being an officer of this State, shall reside in the State of New Jersey. Regardless of whether that term "shall reside" translates into domicile or to residency, I think the facts indicate that the Chief is both a resident of New Jersey, and certainly a domiciliary of New Jersey. Clearly, he has a residence in New York. Clearly he has two residences in New Jersey. Clearly all of the incidents of domicile are here in New Jersey, and I think the record is clear on that issue. It can be debated and ongoing.

It may not be the most popular decision that this Committee will ever make because of some misunderstandings about what residency means, but it is not a new issue as it

relates to Robert Wilentz. This issue first arose in his career back in the 1960s when he ran for public office. This issue again arose in 1979, when he was appointed by Governor Byrne -- nominated by Governor Byrne -- to be the Chief Justice, when the issue of residency was raised before this Committee -- although I was not present at those hearings -- by a Senator who is no longer in this institution. The Chief Justice obviously has never hid from the fact of his multiple residences. If anyone felt that the law was unclear, that he was not qualified to sit as Chief Justice because of his residency, they could have attacked that throughout prerogative writ actions, or they could have introduced legislation to clarify what residency means in the statute that's relevant.

That has not happened. I think that we would be -- the Committee of us-- I'm sure no one in this room agrees with the Chief Justice in all of his decision-making, and I daresay that no one agrees with the Chief Justice in all of his administrative decisions. But no one that I've heard has legitimately questioned the Chief's competency, or his judicial acumen, or his administrative skills.

I might say parenthetically that there are a number of decisions that I don't agree with. There may be a lot of administrative decisions that are made by the Chief that I don't agree with. Often as a mayor I have seen decisions that affect some of our municipalities that I don't agree with. But that's not the test. That's not the issue before us.

I pray that we never get to the point where we have to give litmus tests to any judge up for renomination, or for any prospective judge that has been nominated in our State courts. Unfortunately, that's happening elsewhere. I think that would be a basic erosion of a fundamental part of the underpinnings of our free society, and the separation of powers. It serves, I think, no useful purpose for me to go into all of the facts that have been presented here, but I think it's clear that

those who presented the facts were all well-intended, and tried to get to the heart of the matter. We have a legitimate decision that has to be made. To delay that decision serves no useful purpose. It's my pleasure at this time to move the nomination favorably.

SENATOR O'CONNOR: Thank you, Senator Lynch. The nomination is moved by Senator Lynch. Senator Van Wagner.

SENATOR VAN WAGNER: Mr. Chairman, I would like at this time to second the nomination -- the renomination of Chief Justice Robert Wilentz to succeed himself as Chief Justice of the Supreme Court. I too would like to congratulate the Chair and the Committee, and all of those who have participated in this hearing. I believe that if there is an example of how the legislative process and how the legislative committee process works, it has certainly been demonstrated by this Committee throughout the two days of inquiry that were conducted through you, Mr. Chairman, and by the members of this Committee. The issues were presented, I believe, in a fair and factual manner.

I believe that the issues that this Committee had to deal with were in many cases difficult and required opinions not only from legislative counsel, but from all of the resources that the Legislature has at its disposal. Despite those analyses that were afforded to us, this Committee still had to struggle with some very difficult questions. However, as Senator Lynch has pointed out, throughout that questioning I believe the nominee has demonstrated -- if in fact, in some cases for some of us who sit on this side of the table, in a painful way -- his directness and his honesty. I believe that that directness and honesty has been a decided influence on the manner in which the court system in this State has been conducted under his tenure as Chief Justice. It is for that reason that it is a privilege for me to second his renomination.

SENATOR O'CONNOR: The nomination is seconded by Senator Van Wagner. Roll call?

MR. TUMULTY: Senator O'Connor?

SENATOR O'CONNOR: Before I vote I'll just make a brief statement. I would like to also join in what Senator Lynch and Senator Van Wagner said about the Committee's participation. I think this is the most thorough consideration that I've seen in the five years that I've been on the Committee, of a nomination. I would like to compliment the Committee for the very hard work that they put into this process. I'd like to thank Senator Hirkala for coming today, recognizing the fact that he has not been well, the extra effort that he made to get here today. I'd like to also thank the public for the participation that it had in this whole process, and the media.

I think that the Committee stood tall through this, and I think that we answered, once and for all, the unfair label that was given to us as rubber stamps. I think that we put that to rest for good. It was a difficult situation that we had. Certainly some of the questions that we presented were very difficult. Certainly the question of residency is one that we all struggled with, as you are aware, having sat through the hours that we spent on that subject.

I'll say for one that I was most impressed by Chief Justice Wilentz's candor. I think that his answers were honest beyond anyone's expectations in terms of all that he revealed. I don't think anyone expected that he would go into the personal aspects of his residency, his personal life to the extent that he did. Chief Justice, you have my respect for that. I appreciate that. I agree with what's been said by Senator Lynch, that there is a question of residency, but I'm satisfied that there are substantial significant contacts with the State of New Jersey. I'm satisfied that both the Chief's residence and his domicile are in New Jersey.

The other problem that I had with the nomination was that of a prior decision in the area of respect for life.

Those are decisions that bothered me somewhat. I've always been supported by the Right to Life movement, and I do agree with them on their positions with respect to abortion. But my respect for the judiciary and its independence is such that I can't allow my disagreement with those decisions to interfere with how I would vote on this decision. So I'm going to vote yes.

MR. TUMULTY: Senator Zane?

SENATOR ZANE: Well, first of all I guess I would be remiss if I didn't say that I'm both troubled and at the same time immensely impressed. I'm immensely impressed with a man that I find to be of high character, high morals, deeply devoted to his family, tremendous candor, and an awful lot of integrity. That's what I'm impressed with.

What I'm troubled with is not -- I've referred to him throughout these as Mr. Chief Justice, and I mean that respectfully -- but I'm not troubled with Robert Wilentz as a person. I think he has impressed me with his competence as an attorney, his knowledge of the law, his handling things before this Committee. I don't know of a nominee to come before this Committee, in the years I've been on it back and forth, that has impressed me more.

But I am troubled. I'm troubled in several areas. I'm troubled somewhat to the response regarding the handling of the Pressler matter. That I could have lived with. I felt the Chief Justice handled that improperly. I happen to feel that the area of the media, etc., belongs to those of us in this branch of government. I happen to think that those in the judiciary should refrain. I don't think they should participate in press conferences and other matters. But as I said, I could have lived with that.

I was up last night until 3 o'clock, and I started early, and I've looked at opinions, and I've researched, and I can't resolve in my own mind the issue of residency in the

favor of Robert Wilentz. I am deeply troubled by that. I wish I could. To not vote to support Robert Wilentz may well be something that would not be in the best interests of the State. But at the same token, I feel that this State, going back many, many years, has talked in terms and been concerned about residency, and about what it really means. For those reasons, I can't depart from what I feel was the original intent of one of the first Legislatures to meet, and I think something that should still prevail today I think the Chief Justice of this State, as well as any other high-ranking official in or near that capacity, should in fact be a permanent resident of this State.

My final decision, I guess, was really swayed in response to the question addressed by Senator Russo, which dealt with if the events regarding the Chief Justice's wife's tragic illness. If those events turned favorably, would things change substantially? I think that was the essence of it. Possibly I misheard that, but I believe the response was there might be some change, but there would not be an abandonment of a New York facility. That New York facility did not begin in 1980, or thereabouts, when Mrs. Wilentz became ill. It began in 1971. Rather than going on, I think I've made my point. I have to vote no.

MR. TUMULTY: Senator Hirkala.

SENATOR HIRKALA: Mr. Chairman and members of the Judiciary Committee, Chief Justice Wilentz is completing his first term of office. What an illustrious term in his service to New Jersey! His competence, his ability, his long and hard working hours for our State has made our judiciary the envy of the nation. Who better deserves to be reappointed to this high office? We can compare his term favorably with any of our prior chief justices. He has done a remarkable job. We certainly should return him to office. I am proud and honored that Governor Kean submitted the nomination. The Governor had

more responsibility, and he had more knowledge and facts about Chief Justice Wilentz. He saw fit to send the nomination to the Senate of New Jersey. I am proud and honored to vote yes.

MR. TUMULTY: Senator Lynch?

SENATOR LYNCH: Yes.

MR. TUMULTY: Senator Orechio?

SENATOR ORECHIO: Mr. Chairman and members of the Judiciary, many times during the Chief Justice's testimony during these two days of hearing: he did admit that he made some mistakes. I think he proved two things. Number one, that's he's more than imperfect, just as the janitor who cleans his building. I also think at this time we are judging the Chief Justice for his intellect, his integrity, and his judicial temperament. I did not agree with many of the decisions the Chief Justice participated in, but that isn't the issue before us. The issue is whether or not he should continue to serve, and whether or not we should grant him tenure.

I also feel that the issue of residency was dispelled with. I think what some may have characterized as an illustration of arrogance the other day in his response to Senator Russo's questions, I think that was pretty much of an emotional response. I think he didn't want to be misinterpreted as maybe abandoning Mrs. Wilentz during this period of illness. I think his lifestyle and his pattern of living prior to 1984 established very clearly in my view that he was domiciled in New Jersey. I also feel that if Mrs. Wilentz was confined to Sloan-Kettering Hospital for two years, and the Chief Justice took an apartment next door to the hospital, we would have the same circumstance. I believe his testimony today -- when asked as to whether or not he would return to his former lifestyle and reside and actually stay in that Perth Amboy apartment five nights a week, and he responded affirmative to that question -- I think again that's another

illustration of where his heart is, and where he really believes he's a resident of, and that's New Jersey.

I also don't in any way see where the impairment of justice or where the administration of the courts is in any way affected adversely or negatively, by virtue of his present lifestyle. I just want to conclude by saying that I don't think I've ever met anybody more honest, anybody more candid, anybody more forthright and responsive to questions that were posed to him today. I think that's a credit to the State of New Jersey in having a Supreme Court that has a nationwide reputation as one of the best. It certainly would have been a great tragedy if we failed to renominate the justice. I vote yea.

MR. TUMULTY: Senator Russo.

SENATOR RUSSO: Thank you. The first thing, Mr. Chairman, is I want to express my appreciation and compliments to you for doing a good job of running a Committee in probably the most emotionally charged issue we've had in many years. I think you were outstanding. You are to be complemented, as is every member of the Committee. I'm not going to pass up this opportunity to speak just for a brief moment as Senate President. It's self-serving, I understand, but I don't think I've ever been more proud of the work of the Senate on a matter as I have been of the work of this Committee, reminiscent somewhat of what I thought was another particularly outstanding job done under my predecessor, Senator Orechio, when we had an almost similarly charged concern involving the Pressler nomination a couple of years ago, although certainly not quite to this extent, because we're dealing here with the Chief Justice. I think it's a reflection of what the-- I hope that the Senate would do on all matters, deliberative, thorough, fair, and try to come out with the right position.

I was particularly, frankly, chagrined, if that's the right word, with the Chief Justice's response to my questions about the Pressler matter, and the press conference in the

Governor's office. I said then, I say it again now, I thought that was highly inappropriate; I thought it was an interjection of the judiciary into a political matter. I certainly respect Chief Justice Wilentz's views to the contrary that he felt the independence of the judiciary -- something which I would fight for too as evidenced by the fact that I won't judge a justice's renomination based upon his opinions because the independence is so important -- but he felt that was justification for what he did. I don't. I can only hope that if the Chief Justice is confirmed by the Senate, that we will never again see the Chief Justice, whether it be Chief Justice Wilentz or any other, interject themselves into the political arena, not only on the issue, but certainly the location of the conference that was held with the media-- I just thought that was highly inappropriate, and I was so sorry to hear the Chief Justice defend it, and in effect say that he would do the same thing again because he believes in the independence of the judiciary. But that's his judgment, and I disagree with it.

I also want to say a brief word concerning some of the groups that have opposed this renomination, particularly the Right to Life group, who, as in the case of Senator O'Connor, have always been close to me and there is a lot -- very much of their philosophy that I agree with. They, in spite of the fact of having been very close, have threatened -- not Mr. Tomicki, incidentally, but individual members in their phone calls -- and have pointed that should this vote be in favor of the nomination, or renomination, that they'll be there at the polls next year. And I think just as a justice of the court can't function worrying about whether a Senator will evaluate his renomination based on his opinions, I'd hate to think that I would function here as a legislator worrying about whether groups are going to oppose me or not oppose me, silly though it may be, especially since we have often thought alike on the issues. So, I certainly don't quarrel with the viewpoint they

take. I respect it, and most of their leadership -- particularly Mr. Tomicki who testified -- have always been intelligent in their viewpoint, without the threats and whatnot. But nevertheless, they have their viewpoint.

I think too, I should comment on this, when we consider how this process went for two days. There have been -- as we all have received, and I have -- numerous, numerous telephone calls, mail and so forth. Frankly there are a number of people who felt that we should not have subjected the Chief Justice to this process, particularly those in my party, the attitude being he's a Democrat. Of course, he's the Chief Justice now. He was once a Democrat. I don't know what he is today. We can't assume anything. And that we shouldn't put the court through this process, that it was demeaning; it was degrading. I say that's sheer nonsense. I think this Committee had an obligation on an appointment of this caliber, to explore every issue. I hope the Chief Justice agrees. I can't be concerned if he doesn't, because I think that was the highest obligation of this Committee. I think it performed it admirably, whatever the result here and on the Senate floor. The issues had to be explored. The public, I think expected it, and called upon us to do it. We did it.

As far as the issue of residency, let me say that there is not another issue in this proceeding-- I've made my point about my concern about the Chief's attitude on senatorial courtesy. That isn't involving himself in the process, but that would never have been a reason not to vote for the nomination. But the issue of residency is an extremely troublesome one, and I will not discount it. The issue of residency and the applicability of the statute that we've talked about is one that I think needs resolution in this State. We ought not to have people such as the Supreme Court, high officials, wondering what the law says. I think perhaps in that respect, it's fortunate that the issue came up today.

I'm filing today, with the cosponsorship of most members of this Committee, legislation that hopefully will clarify it once and for all -- legislation that not necessarily changes the law, but makes it clear that there is no doubt what this very old statute was meant to apply. Legislation that says that any judge, any cabinet officer, any department head will be not only resident -- not only domiciled -- but resident in New Jersey.

Now it should be made clear though that if that statute were the law today, it would not necessarily affect this nomination, because the issue here is whether or not the Chief Justice is a resident of this State. That statute just makes it clear. There is no doubt it applies to a justice; it applies to a judge; it applies to a cabinet officer, as most believe it does now under the present statute, and as the Chief Justice conceded when he said he felt a judge should be a resident of the State.

But the issue is one that's hardly clear. It would be I suppose politick to cast an affirmative vote, to take the flack for those who oppose it, but tell the Chief Justice how easy it was. Chief Justice Wilentz, I can tell you now. I'm going to cast an affirmative vote, but this issue of residency is one that I'm not comfortable with. I think that's probably obvious by the fact that in the vernacular, I kept throwing you softballs, looking for an answer that I guess I wanted because it would make my decision easier. Because it has been a tough decision. I was looking for an answer that no matter what happened in the past, that the people in this State deserve a Chief Justice that there's no doubt about it, lives in this State.

There is no question in my mind though, that there's not a citizen in this State -- very few, if there are any, who would not understand that that could not be accomplished under the conditions of your wife's illness, something we all share

your sorrow about, and your concern. Our prayers will be with you, as they have been, those of us who knew about her. But I was hoping that the answer would be that as soon as that allows, even though it might not be the thing I'd like to do, even though it might not allow me to be with my children as much, the people of this State deserve no less. Perhaps it's only optimism or rationalization, but I've got confidence that if this nomination is approved, that when the time comes, we'll see that happen. I'm going to keep my fingers crossed -- the nomination is approved by the full Senate -- that we will, in fact, see that happen -- that no one is ever going to be able to raise the question again, does our Chief Justice live in this State?

Now I fully recognize that if the nomination is approved, you will have tenure. There are some who have suggested that perhaps you shouldn't have been approved until August 10th, so we'd have another chance to review it. I think that would be demeaning to the Court. I think it would especially be demeaning to the Chief Justice, and there's no dispute about this anywhere up here.

There's no question about integrity, and there never has been. There's no question of brilliance, and there never has been. It's strictly a legal issue. We've received a voluminous memorandum. Now we know what you go through on that Court, Chief Justice, when you have to sit and split hairs on issues. Because that's what it amounts to. We have to sit here as judges and say, under the law, under the cases and the facts we've heard, is the Chief Justice a resident of New Jersey, or is he not? I think that's all this came down to. If the answer is no, we should vote not to confirm. If the answer is yes, we should vote to confirm.

This may not sound right, but let me say this. There is no doubt in my mind the Chief Justice, under the law, is domiciled in New Jersey. There's no question in my mind about that at all. The statute refers to residency. There's also no

doubt in my mind that the Chief Justice is a resident of New York. But you see under the law, as we pointed out in our questions, you may be a resident of more than one location. There's also no doubt in my mind under the facts, although I frankly prefer it the other way in the sense of the time spent and the connections with family, but there's no doubt that the Chief Justice, under the law is a resident of New Jersey. He could also be a resident, were it the case, of Florida. That's the law. I didn't make it. In this case the Chief Justice didn't make it either.

I think, though, it should be clear, and it is not under the law, that what we expect in New Jersey is full-time residence. We can hardly hold a Chief Justice, any cabinet member, any department head to that standard today because it has not been spelled out in the law, and would be grossly unfair. And to lose a Chief Justice of the caliber of Mr. Wilentz, on something that no one spelled out to that degree before would be, in my judgment, unfortunate for the State of New Jersey. So I interpret the opinion that we received, the facts of this case, that the Chief Justice does meet the residency requirements of this State. Now I'll just hope, maybe even pray, that some day he takes the question out of the realm of argument altogether. That will be his judgment and decision if he's confirmed by the full Senate. Mr. Chairman, I vote yes.

MR. TUMULTY: Senator Van Wagner?

SENATOR VAN WAGNER: Mr. Chairman, in seconding the nomination of the Chief Justice I indicated my reasons for my personal support of his renomination. But I would just like to say briefly before casting my vote, that I believe that beyond the issues that were raised over the renomination of Robert Wilentz, beyond the questions that were struggled with by this Committee in terms of the issue of residency, the issue of judicial activism, the issue of legislative prerogative, I

believe that beyond those issues as discussed before this Committee, the process by which this Legislature operates came into a light which it may not have had the opportunity to come into, had not we had the emotion-charged atmosphere, the kind of opinions that were expressed regarding this renomination. It's my belief that this process in a large way has reawakened itself to the fact that no individual, regardless of the reputation that person may have, regardless of the position that person may have achieved is above the inquiry of the Legislature, or the inquiry of the Judiciary Committee. I congratulate the people who participated in this process, pro and con the nominee. I congratulate the members of this Committee particularly, who conducted, I believe, perhaps one of the finest hearings that I've ever been involved in.

There is no question that the vote that I'm casting today is for an individual whose competency and integrity I believe are unquestioned, and whose service to this State, and everything that he believes in and everything that he is, is New Jersey. And he has stated that. His mind and heart, beliefs, energies and intellect have been directed toward the well-being of the people of this State, and the well-being of the system over which he has jurisdiction. I vote yea, Mr. Chairman.

MR. TUMULTY: Senator DiFrancesco?

SENATOR DiFRANCESCO: Thank you, Mr. Chairman. I too would commend you for your patience in conducting these hearings in the manner in which you have done so. I've listened throughout these two days of hearings to most of the testimony, except for the times I may have been in and out of the room for whatever reason. I've heard people testify, besides the Chief Justice, as to the reputation that the court enjoys throughout the country -- its national reputation. I've also hear people testify -- and I think I know somewhat

firsthand -- as to the tirelessness that the Chief Justice works within the State, and for the State, and for the quality and efficiency of the court system. I understand from the testimony -- not only his, personally, but that of other witnesses -- as to the deep roots that Chief Justice Wilentz has in the State. I call to everybody's attention that the leader of my party at least has chosen to renominate the Chief Justice, and has aggressively reiterated his comments just recently in favor of the nomination. I've heard favorable testimony from members of the State Bar, representatives of the State Bar and some other organizations, and I've heard the Chief Justice speak to his wife's condition which, in effect, altered his lifestyle with regard to his residency.

Today he has indicated to me that it is his hope and prayer that he'll be able to return with her to the State of New Jersey, as a result of this temporary absence, as I would frame it, or in effect, to resume residency. I've heard people testify about the fact that he is not a resident, and that he never will be a resident of the State of New Jersey. I've heard people testify and people make comments with regard to the question and answers about his attitude with regard to the legislative prerogatives on the reappointment process, for example, the Sylvia Pressler matter. I've heard questions and answers about some of the decisions that he's made, and I've also listened to the arguments of the Right to Life representative who we've heard before, and who I respect deeply. But with respect to those arguments, I must say that in order for me to be consistent, I cannot support a candidate purely on the basis of his position in that area. I've also heard some testimony from other people who feel they've been cheated by the system as an individual. There were three or four people who testified as to their personal experiences.

The biggest concern I have, of course, is the residency issue. I think the statute clearly applies to the

judges, including the Chief Justice. I think that based upon my personal hearing of the testimony that there is a grave doubt as to the fact that the Chief Justice is a resident and domiciled in the State of New Jersey, although he says he believes he is domiciled in the State of New Jersey. I believe that circumstances beyond his control have forced him to, in effect, create this situation of a residence and domicile perhaps in New York.

I think that my role here is one of listening to the testimony and making a judgment as to whether or not my colleagues in the Senate should have the opportunity to vote, as I have the opportunity today. I think that given the fact that everything I've heard is weighed one against the other, I certainly can and will support the release of this nomination for a floor vote. I say that even though I've just said, of course, that I don't believe that the Chief Justice is a resident and a domicile in the State of New Jersey.

As Senator Russo has aptly pointed out, that's everybody's personal opinion as to how they apply those facts. The Chief Justice himself has outlined to the law as set forth in any memorandum that we may have received. I think that's a matter that will not perhaps rest, and will continue another day, beyond any confirmation of the Chief Justice, and perhaps may be pursued by other individuals as they see fit to pursue it. I think that it is important that because it's the highest judicial position in the State, that all of the Senators have the opportunity to express their views and their opinions with regard to this appointment. But I do believe that I should vote yes, as I've already indicated, for release. Thank you, Mr. Chairman.

MR. TUMULTY: Senator Dorsey?

SENATOR DORSEY: Mr. Chairman and Senator Russo, I would like to begin by complimenting the Chairman and indeed, the President of the Senate for the latitude which they have

extended to me and to all members, not only in connection with this hearing and in connection with the Chief Justice, but also in connection with Justice Pollock's confirmation proceedings. It was very generous. It made the process a very good one, and I do appreciate the latitude that was extended to me.

I never have questioned the Chief Justice in his intellect, his competence. There is no doubt in my mind about that, that he is outstanding in those categories. I feel much better about Robert Wilentz today as Senator Zane said, as a person, because of his candor and his honesty in dealing with the question of residency that a month ago I never thought would be a focal point in these hearings. But in being candid and being honest, the Chief Justice has laid on the table some very pertinent facts that I feel reluctant simply to turn my back on my feelings, and to a large extent I concur with Senator Zane in his analysis. The residency in New York did not occur recently. The residency in New York occurred 15 years ago. It occurred apparently based upon a family decision which I certainly assume the Chief Justice participated in, to place his younger children in prep schools located in New York City. As a result of that decision, everything else follows and evolves with a home, a principal residence, if not the only residence, in New York City. I was particularly interested in the question, the repetitive question by the Senate President, as to what would in fact occur if Mrs. Wilentz's condition improved. I certainly hope it does, and I empathize with the pain and anguish which the Chief Justice may go through in that connection. But his answer is his answer. His answer was that he would not resume full residency in New Jersey, as I think I understood that term to be used by the President of the Senate. He concluded his answer by essentially repeating what he had said earlier in the day, that he would return to New York City every weekend. And the weekend, if there is no other time, is the time that a person, in my mind, lives and spends

with this family. To me, that absolutely resolves the question of residency in my mind.

I want to say in terms of asking the questions relative to the various decisions which I picked out, and relative to the lecture which the Chief Justice gave at Drew University, it's not my position or thought that one would vote against a judge or a justice based upon a single decision, or based upon a decision which was in direct conflict with groups that had supported me perhaps politically in the past. It goes beyond that. It is more encompassing than that. It has to do with the general philosophy. And in that instance I find the Chief Justice arguing vigorously for a position of total independence to a large extent in terms of the judiciary, objecting strongly to legislative interference with that judicial independence, but not reciprocating in terms of the independence of the Legislature as an establishment.

It seems to me that in the philosophy and the approach, whether it is the CAFRA case that we have discussed at length, or some of the other decisions, the philosophy is one of great activism, and pits the judiciary against the Legislature, or the Legislature against the Judiciary. That seems to me to be an unfair, if not inappropriate for the Judiciary to do, in as much as they do not have to face referendums from time to time. On that basis I vote no.

MR. TUMULTY: Senator Gormley?

SENATOR GORMLEY: I have really been extremely pleased with this Committee over the last two days of hearings. I think that this process will serve as a vehicle in the future and as an example for the Judiciary Committee for years to come with regards to the thoroughness of review, not only of Supreme Court nominees, but of other nominees. Of all the issues-- I think when you bring out a negative, I think you have to look at the total sphere of what you're talking about. You're talking about an individual who deals with hundreds if not

thousands of phone calls, hundreds if not thousands of decisions to be made on a weekly basis. So consequently, my picking out a single negative I think you'll find is only in terms of why I think the Chief Justice should continue to serve.

The handling of the Pressler press conference I think was one of the worst political moves of all time. I think the Chief Justice is a terrible politician. That's why I think he should be the Chief Justice. (laughter) I think you want somebody who is not going to look at the public opinion polls, who is going to be concerned about the needs of the State, the citizens of the State, making hard decision on occasion when we're not able to make those hard decisions.

We've referred on occasion, and Senator Russo-- By the way, I have to pay a very sincere compliment to Senator Russo. This Committee has been conducted through Senator O'Connor, and obviously our Senate President is intricately involved with this process in a nonpartisan manner. Republican and Democrat, in any of the discussions that have taken place has not come up whatsoever. He's to be complimented because he insisted on that tenor. That is not an idle compliment.

In dealing about the remark that was made about the softball, I'm glad the Chief Justice didn't hit the softball. Because the decisions and the matters that come before this Supreme Court on occasion are not lobbed. They're hard, they're fast, and they're difficult. They are decisions that on occasion we or other groups have failed to make decisions. If in fact you have a predicament where the Supreme Court would potentially have a leader who would take the softball instead of taking a hard look at the issues, I don't think that you would really have the separation of powers maintained as it should be.

I remember an instance which I think demonstrates to me the Chief's-- Of course, this is a case where I agree with

him, because you always pick a case where you agree with when you're saying yes for someone. But I had occasion to check out the Chief Justice in 1981. I checked out a vote that he had when he was in the Assembly. I didn't go to Brooks Brothers. I went to his record in the Assembly, and I found that in 1969 he had voted as an Assemblyperson against a Constitutional referendum on riparian rights. Myself, and other legislators, and other individuals were challenging then Governor Byrne, the person who had appointed him with regards to an interpretive statement that Governor Byrne had insisted on placing on a riparian amendment. To make a long story short, despite his vote as a legislator, he ruled differently as a judge. He understood in my opinion that you cannot take your political beliefs, and transcend them and place them in your opinion as a justice. He ruled directly opposite to that of how he voted as a legislator. That was an instance that I personally monitored.

So, from that instance I had an understanding of his ability to understand that once you leave the political process, you vote -- excuse me, you make your decisions based upon the law, and not upon your political motivation. So I am very pleased to cast a positive vote for somebody who was remarkably honest, and I think will continue to be a very tough Chief Justice. That's what you have to have when you have the complexities of this State, the pressures of this State, and the enormity of the position. So it is a pleasure for me to vote for him, and I would like to compliment all the members of the Committee, and I think everybody on this Committee.

Again, I'd like to compliment somebody that I've complimented at a recent hearing. I'd like to compliment Senator Dorsey. We might disagree on the vote, but his use of the process was more than legitimate, and a compliment to the Senate. Thank you.

MR. TUMULTY: Senator Laskin?

SENATOR LASKIN: Mr. Chairman and distinguished colleagues, at this point in the Committee hearing I don't think anybody really cares how I vote or what I have to say, other than me. (laughter) I don't know just how seriously people think I take this proceeding, but some people think I take these things too seriously.

I knew Chief Justice Wilentz when I called him Bobby Wilentz. He and I were elected to the Assembly-- I was elected in 1967 and so was he. I met him in 1968 in January. I only served one term -- two years. This young Bobby Wilentz at the time impressed me, and I'm not easily impressed at all. But I said to myself, "this is a real fine person" -- just in two years. We debated issues. He was intellectually far superior than most, to which I happen to have a great deal of respect. So, in all these years I've known him -- not too well -- and when he became Chief Justice I thought it was a good thing because I thought he had what I thought a judge should have, or a person should have, to be in that high position. I haven't changed my mind. I think from an intellectual standpoint, he does represent to me what I think a Chief Justice should possess.

These hearings, and his testimony, and this whole procedure has taken a lot out of me, because I too have been troubled by a couple of things. But for the hearings they would have bothered me and I would never have said much about them. But this gives all of us an opportunity to say what's on our mind.

The Pressler press conference to me was so bad that I guess I lost a little respect for the process at that time, because I hold the Judiciary in such high esteem. I helped the appointment of maybe 10 or 12 judges by virtue of being a Senator. I have a member of my family who is a judge. The day after they get appointed judge, I forget their first names. From then on they're "judge" to me. That's how I feel. A

member of my family is now "judge" to me. I don't even call him by his first name anymore. So when the Chief Justice had a press conference over a political issue, that hurt me a lot, because I think that was as far out of line as could be. On that one issue alone I could say to myself I'll vote against this man because he did such a terrible thing in my opinion, not in the opinion of everyone else.

Then the residency issue came up. I'm sure we can as lawyers, as members of the Judiciary Committee who are not lawyers, we can say, "Well, he's really a resident, or he's really not a resident." But you know, we're talking about the Chief Justice. There shouldn't be any question. If a man running for Governor had that issue around his neck, that could kill his chances. Should a Chief Justice whose residency is questioned be any less? I don't think so, and that issue bothers me a lot.

Then I have to say now here's a guy who is really a great Chief Justice. He can think better than most. He has brought great honor and prestige to that system. I tell you this from talking to lawyers and judges all over the country. The New Jersey system I think is probably the highest respected judiciary in the United States. If not the highest, it's right at the top. The Chief Justice who runs the system has a lot to do with it. Not all to do with it, because you have justices who vote as they wish, and collectively make up the system. That's the way it should be. The Chief Justice would be the first to agree. He's not going to tell the other justices how to vote, because he respects their independence.

So in the way all these things, and you say to yourself, "Well what are the two big problems you have?" You've got Pressler press conference, which to me was very honestly reprehensible. I can't think of another word. I feel very strongly about that. Then the other issue is the residency, which is questionable, which we have 93 legal

opinions of because you know, when two lawyers are in a room, you have two opinions automatically, and when you have a residency issue before you, you have as many differing opinions on the residency issue as there are lawyers. I guess we ought to do something about clarifying the statute. I think Senator Russo has something in mind about clarifying that statute, so this question will never, ever raise its ugly head again.

But when you weigh all these things on the balance, and are able to go around and see people who have such a high regard for our system in New Jersey. As I've said so many other times, I see the low regard that people have for the system across the river from here in Pennsylvania. You're talking about the top to the bottom. I guess when you weigh all these things, it comes down to are you proud of this system? Are you proud of the man who runs it, whether you agree with his decisions or not? How many instances are totally immaterial to me. That means absolutely nothing to me whether I agree with a specific decision or not, because I believe in the independence of the system. When you weigh all things on balance, you have to come down to the decision that this Chief Justice should stay there, because he's good to the system, he's a good Chief Justice, and he's a man that I can look up to. I think when you weigh all those things, I have to vote yes.

MR. TUMULTY: The nomination is released by a vote of nine to two.

SENATOR O'CONNOR: Thank you ladies and gentlemen. We're now adjourned. Chief Justice, did you want to address us?

CHIEF JUSTICE WILENTZ: I just wanted to say that I thank the Committee for its affirmative vote. These have not been the two most pleasant days that I have spent. I must say however that the Committee's work has not only been probing, but it has also been quite conscientious. I agree with the Committee that the issues had to be examined in this way.

SENATOR O'CONNOR: Thank you. We are now adjourned.

**(MEETING CONCLUDED)**



