TESTIMONY OF TOM FITZGERALD, DIRECTOR
KENTUCKY RESOURCES COUNCIL
REGARDING HOUSE BILL 3

Mr. Chairman, members of the Committee, Chief Justice Minton, Representative Massey:

Thank you for the opportunity to testify today in opposition to House Bill 3. I appreciate the opportunity to address a bill that I believe has significant constitutional infirmities <u>and presents numerous negative practical</u> impacts on the Judiciary and on injured parties seeking redress where the constitutionality of laws, executive orders, regulations, and orders of administrative agencies are involved.

Let me start by briefly outlining the constitutional provisions that I believe the bill, as drafted, presents, and then discuss practical problems.

First, I believe the bill is *Special Legislation* in violation of Kentucky Constitution Section 59, which prohibits the passing of local or special acts, including acts "to regulate the jurisdiction, or the practice, of the circuits of the courts of justice;" and "to provide for changes of venue in civil or criminal causes."

The bill is special legislation for these reasons:

It singles out constitutional challenges against state officials and the General Assembly and LRC and requires those claims to be adjudicated not in the venue where the defendant resides or the injury arose, as would normally be the case, but before a three-judge panel selected by the Chief Justice in a manner dictated by the bill.

An injured party raising such a constitutional challenge would be deprived of the right to a convenient venue for the case and would be required to try the case before a three-judge panel that could be many miles away at much greater expense.

If the goal is to standardize consideration of constitutional challenges in a three-judge panel of circuit judges, the bill fails, since it singles out constitutional challenges against state officials and the General Assembly, while allowing the numerous constitutional challenges that are raised in litigation between private parties, and those involving local governmental bodies, to continue to be litigated as they have for decades in front of one circuit judge across the many circuits in the commonwealth.

Even <u>among</u> constitutional challenges involving state officials or the General Assembly, the bill treats cases in a disparate manner. If a <u>complaint</u> raises a constitutional challenge against a state official, it is required to be referred by the circuit clerk to the Chief Justice. Yet many constitutional challenges, *particularly involving a statute, regulation, or executive order <u>as applied</u>* is involved, are not necessarily raised in the complaint, but may be raised as a defense to action *by* a state official. The bill does not require referral of those cases, so that even cases involving constitutional issues against state officials where constitutional issues are raised as a defense, would continue to be heard under traditional venue provisions.

Second, I concur with Representative Nemes that the bill violates Kentucky Constitution Section 110(5)(b), which grants the Chief Justice of the Supreme Court the sole authority to determine the assignment of judges in the Commonwealth as "he deems such assignment necessary for the prompt disposition of causes." This bill would direct the Chief Justice to make such assignments randomly from among three newly-minted geographic areas encompassing numerous judicial circuits <u>not</u> because the Chief Justice has determined it necessary for the prompt disposition of causes, but instead based on the nature of the civil claims asserted and who they are asserted against.

Third, the bill implicates Kentucky Constitution Section 112(2), which limits the power of the General Assembly to reduce, increase, or rearrange judicial districts by allowing such actions <u>only</u> on certification by the Supreme Court. The directive to the Chief Justice to appoint a new "panel" composed of three Circuit Judges selected from geographic areas dictated by the General Assembly, has the effect of creating new super-districts.

I take at face value the representation that this bill is not an effort to avoid litigation of constitutional cases against state officials or the General Assembly challenging the constitutionality of statutes, regulations, executive orders, and agency orders is in Franklin Circuit Court. But it has that effect, while not providing this robust 3-judge review of constitutional questions in many cases. I can tell you, based on 41 years of civil practice involving numerous constitutional issues before state and federal courts in the Commonwealth, that there is great value in the familiarity of the Franklin Circuit Court Judges with complex constitutional issues, which benefits all parties to regulatory and constitutional litigation, that would be lost.

Finally, as to the numerous practical problems created by the bill, let me briefly enumerate them:

1. The bill would require transfer of civil actions that may include a count against a state official but may also have numerous other factual and legal issues; for example, dependency, neglect, and termination of rights cases. Under the bill, it appears that the entire case would be transferred to the new 3-judge panels, at potentially significantly greater expense to the plaintiff and other parties, and embroiling this super-panel in trying a multitude of issues unrelated to the constitutional challenge to a statute or regulation *as applied.*

2. The bill places a significant burden on the circuit clerks to review each complaint and to be the gatekeepers determining "immediately" from the face of the complaint whether the conditions in the bill that would trigger notice to the Chief Justice, are present. I have great respect for our Circuit Clerks, particularly those in Garrard, Clark and Estill County who took me under their wings back in the early 1980's, but this new burden to parse which complaints need to be referred for a change of venue is not usually their province or burden.

3. While the bill calls for the referral to be done "immediately," there will necessarily be some lag time. During that time, it is unclear who would entertain emergency requests for injunctive relief, but it appears that there will be a delay in obtaining such relief. Additionally, while the bill states that before the 3-judge panel is selected and assigned the case, that the Chief Justice could "grant a temporary restraining order as provided by law," the jurisdiction of the Chief

Justice and Supreme Court under Section 110 of the Kentucky Constitution is "appellate jurisdiction only," except "it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice." It is unclear whether the Chief Justice would have the constitutional authority to grant a temporary restraining order at the onset of a case filed in circuit court and then referred by the clerk, or whether such a request made to the Supreme Court or Chief Justice would be consistent with the Rules of Court, which are also the exclusive province of the Judiciary under Ky. Const. Section 116.

In closing, this bill presents numerous constitutional and practical problems that need to be considered and resolved before the bill advances. I would ask that the committee not act to approve the bill today, so that the concerns raised by the Chief Justice and by myself be considered prior to any further action on the bill.

Thank you, Mr. Chairman, members of the Committee, Justice Minton, and Representative Massey, for indulging my concerns.