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Court Review



Volume 42, Issue 3-4
Fall/Winter 2006

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

**Special Issue:
Judges, Elections,
Politics & Public Opinion**

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
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Fall/Winter 2006

EDITOR'S NOTE

This issue presents four viewpoints on current issues involving judicial elections, politics, and the effect of public opinion on the courts. In our lead article, Shira Goodman and Lynn Marks of Pennsylvanians for Modern Courts tell the story of Pennsylvania's 2005 retention election for the Pennsylvania Supreme Court. With very little warning, public opposition developed to the retention of two justices: one was retained with 54% of the vote and one was thrown out of office with only 49% voting to retain him. The election was unusual because it did not relate to opinions issued by either justice. Rather, the court and its judges got caught up in controversy over pay raises for the judiciary, which passed only as a package with raises for other governmental officials. Goodman and Marks explore both the story and its implications.

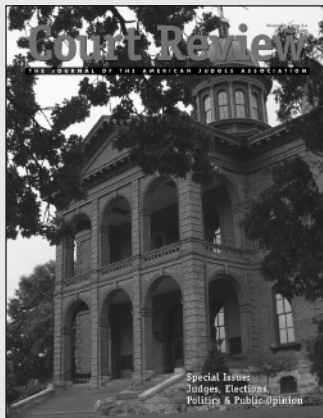
Jan Baran, an election-law expert, reviews the methods used today to select judges and the ethics issues presented in a post-*Republican Party of Minnesota v. White* world. His survey notes recent caselaw answering some of the questions left open in the *White* decision.

Bert Brandenburg, executive director of the Justice at Stake campaign, presents the results of their comprehensive national survey on the public's views about the judiciary. He discusses how judges and others defending the court system can communicate effectively with the public about these issues. The American Judges Association is a partner organization in Justice at Stake. Brandenburg and others from Justice at Stake will hold a workshop for attendees at the AJA midyear meeting in Newport, Rhode Island, in April 2007.

Frank Cross, a political science professor, provides empirical data that support the proposition that judges rely on precedents, not their own personal ideological views, in making most of their decisions. Contrary to the views of some court critics, he found substantial disregard of precedent to be quite rare.

In addition to these articles, John Barkai, Elizabeth Kent, and Pamela Martin present the findings of a detailed study in the Hawaii courts on what leads to case settlements, when in the process cases are most likely to settle, and what factors lead to settlements. One of our student editors, William Hurst IV, presents a review of two books on the rule of law.

In the next issue, we will have an exciting announcement about plans for *Court Review*.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 14. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: Mary Watkins (marywatkinsphoto@earthlink.net). The cover photo is of the historic Washington County Courthouse in Stillwell, Minnesota. Stillwell is often referred to as the birthplace of Minnesota; in 1848, a territorial convention that began the process of making Minnesota a state was held there. The courthouse, originally opened in 1870, was placed on the National Register of Historical Places in 1971 as the oldest standing courthouse in Minnesota. County offices moved out of the building in 1975. For more information about the building and its history, go to http://www.co.washington.mn.us/info_for_residents/parks_division/historic_courthouse/.

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President's Column

Michael Cicconetti

During the past 12 months the slogan of Morton Salt, "When It Rains It Pours," did not bring to mind images of the "Morton Salt Girl" walking in the rain accidentally dropping salt behind her. However, this slogan was a real and literal statement of water disasters in various parts of this country.

Living in Northeastern Ohio, we are constantly promoting this part of the state as an area virtually free of natural disasters. Oh sure, we have our lake-effect snow, which we have learned to treat as more of an inconvenience and annoyance than a danger. Hurricanes? Those are reserved for the coastal states. Tornadoes? Hello, Kansas! Northeastern Ohio hasn't experienced one in 35 years. Droughts? We may have an occasional dry spell during the summer but we always have the Great Lakes as a plentiful water source. Mudslides? Never. Forest fires? Doesn't happen. Earthquakes? Minor blips on the Richter Scale.

Our so-called "Greatest Location in the Nation" suddenly became a misnomer during the last week of July. The rains in Lake County, Ohio, began on Thursday morning and continued, nearly nonstop, for the next 17 hours. Some areas within three miles of the Painesville Municipal Court received up to 10 inches of rain. The ditches, creeks, and rivers reached unprecedented levels. Storm and sanitary sewer systems exceeded capacity and forced water into the basements of hundreds of homes. In places where the river crested and continued to rise, residents were pulled to safety by firefighters, in boats, from second-story bedroom windows and rooftops. The media and meteorologists were calling this a "hundred-year flood."

As the time for the opening of court approached on Friday, July 28, it soon became evident through the phone calls of employees that many of them had suffered water damage in their homes. Others were prevented from coming to work due to the closure of major highways and roads. Fortunately, we were able to open with a skeleton crew to handle the overnight lockups, but full operation of the court was impossible due to a lack of staff and ancillary services. Law-enforcement officers, who were available, directed their resources to the flooded areas.

The weekend provided enough relief time for many of the lesser flooded areas to sufficiently clean up and become operational. Other areas of the city represented a microcosm of some areas I viewed a few months ago in New Orleans.

On Monday morning, the court was 100% functional and most employees returned to work. That morning also brought to the forefront the obvious questioning of our ability to operate if a natural or man-made disaster caused devastation to interrupt or suspend operation of the court. Coincidentally and ironically, an e-mail was sent and delivered on the day of our shutdown and opened by me, on Monday, eerily reflecting the then-present predicament of our court.

The e-mail was sent by Pam Casey from the National Center for State Courts inviting me, as president of the American Judges Association, to appoint a representative for a national coalition to guide a new project in the emergency management area. Funded by the United States Bureau of Justice Assistance,

this project will develop a plan for the continuity of court operation during an emergency. As described by NCSC, this plan establishes processes and procedures to quickly deploy pre-designated personnel, equipment, vital records, and supporting hardware and software to an alternative site to sustain organizational operation for up to 30 days. The plan designates the leadership decision process to determine the best course of action for response, recovery, and



implementation of the continuity-of-operations procedures. NCSC further states this will be a 19-month project for developing an online planning guide as well as a series of online curriculum modules to facilitate effective continuity of operations planning for America's courts.

Of course, any continuity-of-operations plan requires coordination with a variety of organizations and agencies such as corrections, emergency management, law enforcement, the private bar, prosecution, public defender, and public health officials. Hopefully, this project will provide resources and answers to assist courts in the event of a disaster, emergency, or a pandemic flu.

How many times have we said to ourselves, "This kind of disaster could never happen to us!" Well, I wasn't around 100 years ago to see the last flood in my area, but I have lived through, and experienced, this devastating flood and discovered we were ashamedly unprepared for its consequences. I certainly urge your endorsement of the National Center for State Courts' efforts through the Bureau of Justice Assistance in designing a blueprint to assist all of us when events require the suspension of court operations.



A Judge's Role in the Rule of Law

William F. Hurst IV

Brian Z. Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY*. Cambridge University Press, 2004. 180 pp. \$28.99.

Ronald A. Cass, *RULE OF LAW IN AMERICA, THE*. Johns Hopkins University Press, 2001. 214 pp. \$19.95.

President Bush's 2005 nominations to the Supreme Court of the United States intensified the discussion over the role of judges in the American judicial system. The majority of that discussion has focused on the rule of law and how it pertains to the scope of judicial power. As a nominee before the Senate Judiciary Committee, now-Chief Justice John Roberts proclaimed, "It is [the] rule of law that protects the rights and liberties of all Americans. It is the envy of the world. Because without the rule of law, any rights are meaningless."

Two recently published books, *On the Rule of Law: History, Politics, Theory* by Brian Z. Tamanaha, and *The Rule of Law in America* by Ronald A. Cass, provide an in-depth analysis into what the rule of law means today, its history, and what impact its meaning has on the current American judiciary.

Tamanaha is quick to point out the uniqueness that exists when it comes to the idea of the rule of law. The rule of law as an ideal has received unprecedented endorsement that no other single political idea has ever achieved. Chinese leaders have supported the establishment of the rule of law in their own country. President Bush is frequently quoted as supporting "democracy and the rule of law." Iranian leaders have embraced the importance of the rule of law. Even a former Afghan warlord, campaigning for a position in the post-Taliban government, was quoted as saying, "Now is the time to defend ourselves not with tanks and armed corps but by the rule of law." Similar endorsements can be attributed to many more political leaders, leaders of governments that seem to have very little respect for the values, such as individual rights, capitalism, and democracy, that are essential to judicial system in the United States.

One of the questions that Tamanaha attempts to answer is what role the judge plays in the rule of law. In searching for the answer, Tamanaha writes at great length about the history of the rule and how it has developed as a concept throughout the ages. Tamanaha describes how the rule of law was started as a vague concept in Greek thought, how nobles used the idea during the Middle Ages to protect themselves against the tyranny of the kings, and how numerous political movements and theorists had influence on what the rule of law means today.

Of these movements, the classic liberalism movement of the late-seventeenth and eighteenth centuries had the greatest

impact on what is understood today to be the rule of law. Classic liberalism stressed many ideas, such as individual liberty, capitalism, and government based on the consent of the citizenry. In terms of the rule of law, however, it was key that classic liberalism stressed a competitive interdependence within the government. With the idea that no single institution should accumulate total power, liberals saw the division of government into separate compartments as essential in the preservation of liberty. This division of power included creating a supreme independent judiciary, one that could rein in the other branches of government when they threatened the liberty of the citizenry. No single individual was above the law, every citizen and government actor was accountable to the law. This model of judicial independence is what today's American legal system is built upon. Many skeptics point out that such a system does not always protect liberty as it was originally designed to do, but Tamanaha points out while the system is not perfect, "Law is the skeleton that holds the liberal system upright and gives it form and stability."

In a classic liberal system, judges were allocated a special place as the final preservers of the rule of law. The laws of the land were seen as being different from morality or politics in the sense that they were not arbitrary or subject to the passions of a few, but rather the laws were formed by the consent of the citizenry, and it was the judge's role to ensure that those laws were followed. It was seen as the judge's role not to change the law or interpret it in a manner that best suited his desires. The judge was seen as a mere conduit for announcing what the law required.

The classic liberal ideal of the rule of law began to decline with the increasing demand for a social welfare state in the end of the nineteenth century and continuing throughout the late twentieth century. One clear downside to the economics of classic liberalism was that while it fostered an unprecedented expansion of commercial activity, its rewards were spread unequally, creating disparity among social classes. One of the more glaring inequalities was the working poor toiling long hours in abominable conditions, and doing so for little pay and few benefits. This inequity appeared not only to be harsh but grossly unfair, as those who benefited the most appeared to labor the least and therefore be the least deserving.

In response to these inequities, governments began to shed themselves of their laissez-faire economics and began to increase the amount of economic regulation and social welfare. This increase in the United States began in large part as a response to the Great Depression, and except for intermittent episodes of deregulation and welfare reform, has continued into the new millennium. During this time, the rule of law

come under fire, as it was often viewed as a blockade for many of the progressive changes that were sought by many during the twentieth century.

The role of the judge changed dramatically during this transformation. Judges in the social-welfare state were increasingly asked to apply open-ended standards like fairness, good faith, reasonableness, and unconscionability. Judges were often asked to engage in purposive reasoning in order to achieve legislatively established policy goals. This change in the role of the judiciary was seen by some observers as contrary to formal rule-of-law principles. Rather than simply applying the law as it was written, many judges went outside the domain of legal rules and legal reasoning to consult external sources of knowledge to discern the lay sense of justice. Many decisions began to be based on political or economic arguments, rather than the legal arguments that advocates of the rule of law wished to see. Observers warned that the rule of law was being threatened by having unelected judges make decisions no different in kind from those made by legislatures.

In his book, Cass writes at length about what role a judge should play in today's modern understanding of the rule of law. As one would expect, opinions differ greatly on what that role should be. Cass divides the opinions into two camps. The first is what Cass calls the partnership model of judging. This model describes judges as substantially unconstrained, motivated by a complex set of instincts, interest, and incentives. As Cass points out, judges are seen as partners with other branches of government, rightly granting substantial room to choose among several legitimate, alternative decisional paths.

The opposing camp is the agency model of judging, which finds judges' decisions primarily governed by external legal authority. The judges' background, politics, and personal preferences do not disappear entirely, but rather are treated as incidental, not dominant factors. Judges perform their duties removed from politics, constrained instead by forces that can

be characterized as belonging to a relatively autonomous domain of law. Under this system, a judge is not allowed to do what he or she thinks is best or what is the most appropriate according to some principle divorced from positive law, but instead the judge is directed to find the proper meaning for a particular law. The agency model emphasizes that the judge's role is fixed irrespective of his or her own individual preferences.

Cass analyzes the evidence that supports both models, but he concludes that most judges do not conform fully to either polar model. There are institutional incentives that encourage judges to follow whichever model they choose to follow. Most notably absent, however, are binding constraints that would prevent judges from injecting personal beliefs into decisions. The influences that a judge uses in the decision-making process depends wholly on the particular judge. While a judge might face strong criticism for the use of particular influences (such as international law), in most cases such criticism is the maximum extent of negative repercussions that a judge would face. This is especially true in the federal judiciary, where judges have lifetime appointment and the threat of impeachment is almost nonexistent.

In conclusion, both books are unable to point to a specific definition of the rule of law, nor is either able to say precisely what role a judge plays within that definition. Perhaps that is the point, however, as the prevailing theme of both books is that the definition for the rule of law depends wholly on the perspective of the definer. The same can be said for the role of a judge, as it is a judge's prerogative to decide exactly what role to play within the judicial system. Tamanaha's and Cass's works are excellent tools in grasping the array of approaches to applying the rule of law in today's judicial system.

William F. Hurst IV is a student editor for Court Review. He is a third-year law student at the University of Kansas School of Law.

Lessons from an Unusual Retention Election

Shira J. Goodman and Lynn A. Marks

On November 8, 2005, something happened in Pennsylvania that has never happened before: an appellate judge, a supreme court justice no less, lost an uncontested retention election. Not only was the loss unprecedented, but with the exception of one retention election in 1993, appellate justices and judges in Pennsylvania routinely have won retention by margins of 70% to 30%. This year, one justice lost his retention election and another barely won with just 54% of the vote.

Retention elections have been a feature of judicial elections in Pennsylvania since the state constitution was amended in 1969. Following election to an initial 10-year term, judges may file to stand for retention in an uncontested, nonpartisan election, for successive 10-year terms until reaching the age of mandatory retirement. Retention elections, by their very nature (uncontested, nonpartisan, seemingly with foregone conclusions) traditionally have attracted little attention from the public and the media. Appellate justices and judges have not been targeted in retention elections for decisions they had rendered on the bench, and with one exception, were not identified as judges who should be “voted out.”

Two thousand five was the year this changed. Typically, judicial elections, and retention elections in particular, are low turnout elections. This year was no exception in that regard: only 18.26% of registered Pennsylvania voters voted in Justice Sandra Schultz Newman’s retention election, and only 17.87% voted in Justice Russell Nigro’s retention election.¹ What was different was that voters paid attention to the retention elections and were motivated to vote “no” in a way they never had before.

What accounts for this unprecedented event? It is difficult to make broad generalizations from such a low-turnout election, but it seems that the retention elections turned into a referendum on the role of the courts in our system of governance and the meaning of public service, especially as that relates to compensation and the use of public funds. In addition, this election took on special importance as a target of grass-roots activists eager to send a message that populist action can lead to tangible results. The court and the individual justices standing for retention likely would not have drawn such attention were it not for the debate roiling around recent legislative action regarding compensation for legislators, judges, and executive officials, and the lack of any other statewide races on the ballot.

Given this special set of circumstances, some may be ready to dismiss this election as an aberration. It is premature, however, to do so. History shows that judicial elections have tended to become more partisan, more expensive, and more like contests for other elected offices, not less. This first retention election of note may mark a point of departure for retention elections in Pennsylvania and may have important consequences for judicial selection in Pennsylvania going forward. Just as important, the 2005 supreme court retention elections hold significant import for the ongoing relationship between the public and the courts and point out that work needs to be done to improve that relationship.

HISTORY OF RETENTION ELECTIONS IN PENNSYLVANIA

Pennsylvania began using retention elections as the method for determining whether a previously elected justice or judge would continue to serve on the bench following a constitutional change in 1969. To be retained, a judge must receive at least a 50% “yes” vote.² From the first appellate retention election following the constitutional amendment until 2005, no appellate justice or judge failed to win enough votes to be retained in office. In fact, in only one race did an appellate justice not receive an overwhelming majority vote in favor of retention; in 1993, Supreme Court Justice Nicholas P. Papadakos retained his seat, but only 55% of the voters voted in favor of retention.³

With the exception of 1993, retention elections in Pennsylvania have not attracted widespread interest or attention. There were no major campaigns in favor of or against statewide justices or judges standing for retention, and the jurists did not raise funds to cover campaign costs. Essentially, retention elections were non-events. Even when retention races started heating up in other states, we in Pennsylvania considered ourselves somewhat insulated from the activities that were being observed elsewhere.

WHAT’S BEEN HAPPENING IN RETENTION ELECTIONS ACROSS THE NATION

Throughout the nation, retention elections have become more contentious as various groups have targeted judges who

Footnotes

1. Pennsylvania Department of State, *available at* <http://www.dos.state.pa.us/bcel/site/default.asp>.
2. PA. CONST. art. V, § 15(b).
3. In 1993, Justice Papadakos was the only justice standing for retention. It was a time when the state supreme court was dogged by controversy that ultimately led to the impeachment of Justice Rolf

Larsen. Justice Papadakos was personally criticized for standing for retention when he would only be able to serve one year before reaching the mandatory age of retirement, for hiring his son as a law clerk, and for having voted to increase judges’ pensions. Katherine Seelye, *Papadakos Victory Sets New Low in Margin of Approval by Voters*, PHILADELPHIA INQUIRER, Nov. 5, 1993.

have authored opinions or rendered decisions with which the groups have disagreed. Typically, such elections have focused on specific criminal sentencing decisions, abortion issues, and gay marriage.

In its 2003 report *Justice in Jeopardy*, the ABA Commission on the 21st Century Judiciary highlighted the threats it observed to state judges standing for retention or reelection: “[I]t is incumbents who are put at future risk of losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants. In such cases, it is incumbents who are thus presented with the impossible choice of sacrificing either their careers, or their independence and the rule of law.”⁴ The ABA Commission bolstered this finding with evidence from retention elections throughout the nation:

- In 1992, Florida Justice Rosemary Barkett’s retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was “soft on crime.”
- In 1995, a sitting South Carolina justice was challenged for the first time in over a century, on the grounds that she was “soft on crime.”
- In 1996, the Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she joined overturning a death sentence. In the next election cycle, Justice Adolpho Birch, Jr. resisted a challenge to his retention based upon his decision in the same case.
- In the 1998 California Supreme Court elections, Chief Justice Ronald George and Justice Ming Chin withstood challenges to their retention based on their rulings in abortion cases.
- In Florida, Justice Leander Shaw’s retention was opposed on the basis of his ruling in an abortion case.
- In Ohio in 1998, opposition to Justice Paul Pfeifer focused on his decision in a school-funding case decided under the Ohio Constitution (and was an ancillary issue in the reelection battle of Resnick in 2000).⁵

The 2002 retention elections in Illinois and Missouri also were heated affairs. In Illinois, three circuit judges, fearing possible opposition, raised money for a planned television campaign to support their retention efforts.⁶ In 2004, retention elections were major focal points in four states: Missouri, Arizona, Iowa, and Kansas. In Iowa, Judge Jeffrey Neary was targeted “because he granted a ‘divorce’ to a lesbian couple

who had split up after having a civil-union ceremony in Vermont. The group [targeting the judge] sees that ruling as a nod in the direction of same-sex marriages in Iowa.”⁷ Neary did win retention, garnering just 50% of the vote.⁸ Similarly, in Missouri, Judge Richard Teitleman was targeted because of his allegedly “liberal activism,” but he too won retention.⁹

In Kansas, District Court Judge Paula Martin was retained, despite a campaign against her based on her sentencing decisions.¹⁰ “The campaign [against Martin] was the first time in county history a judge faced formal opposition heading into a retention election.”¹¹ In Arizona, Maricopa County Superior Court Judges Ken Fields and William Sargeant were the targets of “vote no” campaigns based on their decisions in some abortion cases.¹² The leader of the anti-retention effort admitted that “he couldn’t say either judge has a pattern of bad decisions. The campaign is based largely on the two abortion-related decisions.”¹³ Despite the campaign, both Fields and Sargeant were retained.

Pennsylvanians had felt fortunate that our retention elections had not become so polarizing or politicized. Indeed, in drafting merit-selection proposals for the statewide appellate courts and even the local courts in Philadelphia, legislative sponsors and Pennsylvanians for Modern Courts (“PMC”) had always provided for a retention election following an initial term in office. PMC had hoped that retention elections in Pennsylvania would remain an opportunity for voters to weigh in on the judge’s performance on the bench, his or her fairness, his or her treatment of litigants and witnesses, and the quality of his or her work.

As will be seen below, the nature of retention elections in Pennsylvania has now changed somewhat, but not in the way many had predicted or expected. PMC, however, still believes that retention elections are an important part of the judicial selection process, whether that process remains electoral or is transformed into a merit-selection system.

WHAT HAPPENED IN 2005 IN PENNSYLVANIA?

In light of recent retention battles in other states, we expected that any interest in retention elections in Pennsylvania would be generated by controversial decisions rendered by

[I]nterest in the retention election and the targeting of [the justices] were not directly related to any decisions they authored or took part in

4. ABA Comm. on the 21st Century Judiciary, *Justice in Jeopardy*, at 24-25 (2003).

5. *Id.* at 25-28.

6. Trisha L. Howard, “Three Illinois Circuit Judges Raise \$155,000 for Retention Campaigns; Amount Dwarfs Figures for Madison County in 2000,” *ST. LOUIS POST-DISPATCH*, Oct. 22, 2002.

7. Rekha Basu, “Basu: Justice Is for Judges, Too,” *DES MOINES REGISTER*, Oct. 12, 2004.

8. Margaret Ebrahim, “The Bible Bench: The Message from Fundamentalists to State Jurists Is Clear: Judge Conservatively, Lest

Ye Not Be a Judge,” *MOTHER JONES*, May 2006 at 54.

9. *Id.* See also Donna Walter, “Supporters Rally to Defense of Missouri Supreme Court Judge Richard B. Teitelman,” *DLY. REC.* (Kansas City, Mo.), Nov. 1, 2004.

10. Eric Weslander, “Embattled District Judge Stays on Bench,” *LAWRENCE (KAN.) JOURNAL-WORLD*, Nov. 3, 2004.

11. *Id.*

12. Richard Ruelas, “Judge an Unexpected Target,” *ARIZ. REPUBLIC*, Nov. 1, 2004.

13. *Id.*

Chief Justice Cappy's request for a judicial pay raise and proposal of a new way to set judicial compensation was behavior typical of the leader of the judicial branch.

judges during their tenure. Indeed, it appears that Justice Russell Nigro, one of the two supreme court justices up for retention in 2005, shared these concerns. In the months preceding his retention election, his campaign committee raised funds in anticipation of having to run a campaign to address negative comments about some of

his rulings.¹⁴ As will be seen, however, the interest in the retention elections and the targeting of Justice Nigro (and Justice Newman) were not directly related to any decisions they authored or took part in while serving on the high court.

Justice Nigro's fundraising was unprecedented and controversial. Justice Nigro promised that he would only use the funds in the event he needed to respond to "an attack," and promised to return any unused funds. "If no attack occurs, he said, all of the money raised for a defensive ad campaign would be returned 'dollar for dollar' to donors."¹⁵

At the time Justice Nigro's fundraising became public, it was still widely assumed that any threat to the justices' retention bids would result from special-interest groups unhappy with particular decisions. One of the coordinators of Justice Nigro's fundraising campaign explained, "He wants to have enough in the bank so that if he has to conduct a six-to-eight-week concentrated media campaign to answer some off-the-wall out-of-state group, he will have enough money to do that."¹⁶ Similarly, the Chancellor of the Philadelphia Bar Association at the time stated, "I hope that we don't have what has occurred in other states—a single issue or agenda-driven campaign."¹⁷

Instead, the retention elections became a focal point of public interest because they were the only elections for statewide office this election cycle. Public discontent surrounding late-term legislation raising the pay of state legislators, judges, and executive-branch officials was reaching a critical level. Ironically, as will be discussed, a plan initially intended to divorce judicial compensation from the political process resulted in broad legislation affecting all three branches of government, allegations of a judiciary too closely tied to the legislature, and the use of the political process to punish judges.

Ultimately, the campaign committees of both Justice Nigro and Justice Newman raised substantial funds to support their retention campaigns,¹⁸ although Justice Newman did not do so until just before the election.

THE UNEXPECTED ISSUE IN THE RETENTION ELECTIONS — THE PAY RAISE OF 2005

In fall 2004, Pennsylvania Chief Justice Ralph Cappy began the process of seeking a pay raise for Pennsylvania's justices and judges. Excluding annual cost-of-living increases, the judiciary had not received a pay raise in 10 years. As part of this process, Chief Justice Cappy also proposed that judicial pay in Pennsylvania be pegged to compensation for members of the federal bench. As he explained:

Properly structured, such coupling would recognize the similarity in responsibilities between state judges and their federal counterparts and would make state judges' remuneration commensurate with our federal brethren. On the "front" side of the equation, this linkage would go far in attracting superior candidates to the judiciary just as it would help retain judges who had begun to consider alternative career options. Perhaps most importantly, such a plan would take politics out of the pay raise issue forever.¹⁹

Under his proposal, the judiciary would no longer be forced to come to the legislature seeking raises. Instead, when federal salaries for judges increased, state salaries would increase as well. Chief Justice Cappy's plan did not propose that appellate and trial-level state court judges receive the same salary as their counterparts on the federal district and appellate courts. Instead, state supreme court justices would receive the same salary as federal circuit court judges; intermediate appellate court judges in Pennsylvania would receive the same salary as federal district judges; and common pleas court judges would receive the same salary as federal magistrate judges.²⁰

This plan had much to recommend it. The Pennsylvania judiciary had not regularly received pay raises; each time such a raise was sought it became tangled up with legislative pay raises. This new plan would enable the judiciary to maintain some independence from the legislative branch by eliminating the need for the judges to go "hat in hand" to the legislators. Instead, the compensation of state judges would increase on a par with that of federal judges.

14. L. Stuart Ditzen, *Judge Is Preparing for a Tough Election*, PHILADELPHIA INQUIRER, July 24, 2005.

15. *Id.* Justice Newman, the other justice standing for retention, decided not to raise any campaign funds but in the last weeks preceding the election, she changed that strategy and her campaign did raise and spend significant sums of money.

16. *Id.*

17. *Id.*

18. A complaint was filed challenging the propriety of some of the contributions as well as the Nigro campaign's compliance with reporting requirements. PA CleanSweep filed a complaint with the Department of State contending that several contributions to Justice Nigro's retention campaign violated the state's campaign-finance law.

Charles Thompson, *Group Files Complaints Over Judge's Campaign*, THE PATRIOT-NEWS, Oct. 21, 2005. (At the time of this writing, the State Department was investigating the complaint and the propriety of the challenged contributions under the applicable campaign-finance regulations).

19. Chief Justice Ralph Cappy, *A Collaborative Effort of All Three Branches of State Government Led to a Newly Enacted Compensation System that Is Right for Pennsylvania*, July 20, 2005, available at <http://www.courts.state.pa.us/index/Aopc/PressReleases/opedrjc.720.asp>.

20. *Id.*; see also Act of July 7, 2005, P.L. 201, No 44 (repealed Nov. 16, 2005, §§ 1802-1808 ("Act 44")).

Chief Justice Cappy's request for a judicial pay raise and proposal of a new way to set judicial compensation was behavior typical of the leader of the judicial branch. Just as the chief justices of the U.S. and of other state courts must act as advocates for the judges and the courts, Chief Justice Cappy asked for a raise for his colleagues and proposed a plan for avoiding such awkward requests in the future.

It is difficult to explain exactly what happened next, because it did not happen during public hearings or open sessions of the legislature. Somehow, however, at the last moment, late at night, just before the legislature adjourned for the summer, broad legislation affecting compensation for members of all three branches of government, including the judiciary, was enacted: "The Legislature just gave itself, top state officials and judges pay raises up to 34 percent. Gov. Ed [Rendell] approved them. This was done without public review or a word of debate just after 2 a.m. on July 7."²¹ The secretive, nonpublic nature of the passage of the pay-raise legislation generated considerable criticism among the public and the media. State Representative Greg Vitali, a vocal critic of the pay-raise legislation who later would participate as a plaintiff in a lawsuit challenging the legislation's constitutionality, characterized the passage of the legislation this way:

The pay raise bill should have been read and discussed in public on three different days in the House and again in the Senate before the vote July 7. . . . That didn't happen, as legislative leaders kept the details secret before the 2 a.m. vote was finally held. "If the Legislature had been forced to discuss the raise in public before the vote, the raise never would have happened."²²

As noted above, the discussions and negotiations leading up to the drafting and amending of the bill were not public, and the extent of Chief Justice Cappy's participation in them is not clear. However, several sources have identified Chief Justice Cappy as being very involved in designing the concept of the pay raise. For example, in an op-ed piece defending his decision to sign the pay-raise legislation into law, Governor Edward G. Rendell wrote:

This legislation, particularly the concept of linking state salaries to a percentage of those paid equivalent federal officials, emanated from an idea put forth by our fine Supreme Court Chief Justice Ralph Cappy.²³

Chief Justice Cappy's lawyer, in a letter to the Judicial Conduct Board made public by the Administrative Office of Pennsylvania Courts following the dismissal of a complaint

filed against Chief Justice Cappy, wrote:

As Chief Justice Cappy discussed his proposal with representatives of the sister branches of government, it became clear to him that its best chance of success would be as part of a broader reform of compensation for all three branches. He therefore developed and began to discuss scenarios that would tie pay in those branches to counterparts in the federal system.²⁴

The reaction to the pay-raise legislation, and the manner in which it was enacted, was sharp and immediate.

The ultimate result of all this activity, Act 44, raised the compensation for all state judges, legislators, and many executive-branch officials. Chief Justice Cappy's plan of tying the compensation of the state judiciary to federal levels was accepted and adapted to apply to legislators as well. Members of the Pennsylvania House and Senate would receive an annual salary equal to 50% of the annual salary paid to members of the United States House of Representatives.²⁵ Legislative officers and leaders would receive a greater percentage of the federal salary, and all members would be eligible for cost-of-living adjustments.²⁶

In addition, one portion of Act 44 raised particular attention from the media, the public, and several government watchdog groups after the fact: Although the state constitution prohibits legislators from raising their own compensation during their term,²⁷ the legislators inserted into Act 44 a provision enabling them to begin receiving the increased salary immediately in the form of "unvouchered expenses."

1107. Additional Expenses

(a) Senate

(1) Beginning on the effective date of this subsection and ending November 30, 2008, a member of the Senate shall receive monthly, in addition to any allocation for clerical assistance and other actual expenses, an unvouchered expense allocation in the amount of 1/12 of the difference between:

(i) the amount specified for a member in:

(A) section 1102(a) (relating to members of the General Assembly) plus section 1104 (relating to cost of living) as appropriate;

21. John M. Baer, *Scales of Justice Are Over His Eyes*, PHILADELPHIA DAILY NEWS, July 21, 2005.

22. Tom Barnes, *Anger Over Pay Spelled Defeat for Justice Nigro*, PITTSBURGH POST-GAZETTE, Nov. 10, 2005.

23. Edward G. Rendell, *Why I Approved These Pay Raises; The Bill Creates a System for Just Pay Across Government*, PITTSBURGH POST-GAZETTE, July 9, 2005.

24. Letter of W. Thomas McGough, Jr., Esq., on behalf of Chief Justice Ralph J. Cappy, to Joseph A. Massa, Esq., Chief Counsel of the Judicial Conduct Board of Pa., Nov. 11, 2005, *available at*

<http://www.courts.state.pa.us/Index/Aopc/PressReleases/prrel06213.asp>.

25. Act 44, § 1102 (a) & (b).

26. *Id.* at §§ 1102 -1104. Act 44 also tied the salaries of executive-branch officials, including the governor, to the compensation of members of the federal executive branch.

27. "No member of either House shall during the term for which he may have been elected, receive any increase in salary, or mileage, under any law passed during such term." PA CONST. art. 11, § 8.

New citizen groups sprang up, motivated to . . . demonstrate that business as usual could not go on any longer in Harrisburg.

or (B) section 1103(a) (relating to legislative officers and leaders) plus section 1104 as appropriate; and

(ii) the amount calculated for that member as of the effective date of this subparagraph pursuant to the act of September 30, 1983 (P.L. 160, No. 39), known as the Public Official Compensation Law.²⁸

Similar language granted the same payments to members of the House of Representatives.²⁹

Years earlier, in 1986, the legislature had also used unvouchered expenses as part of their increase in compensation. This measure had been challenged, and ultimately upheld by the Pennsylvania Supreme Court in *Consumer Party of Pennsylvania v Commonwealth*.³⁰ The court drew a distinction between salary and expenses, concluding that the use of unvouchered expenses did not constitute an increase in salary.³¹

The reaction to the pay-raise legislation, and the manner in which it was enacted, was sharp and immediate. Many in the media were angry, and the public was roused to action. Lawsuits were filed in federal and state court challenging the pay-raise legislation.³²

Like Governor Rendell, Chief Justice Cappy made public statements supporting the legislation. In a press release issued by the Administrative Office of Pennsylvania Courts, Chief Justice Cappy stated:

“Raising public officials’ salaries is never popular and there is never the ‘right time’ to do so. . . . Doing so now was an act of courage by legislators, legislative leaders and Gov. Rendell and I must acknowledge their leadership on a difficult issue.”³³

Chief Justice Cappy was also widely quoted as calling public reaction to the pay raise “knee-jerk.”³⁴ A complaint was filed with the Judicial Conduct Board alleging that Justice Cappy’s role in designing and defending the legislation was improper.³⁵ The Judicial Conduct Board ultimately found the charges to be without merit and dismissed the claim.³⁶

Following these events, there was a pervasive sentiment that the courts would not look favorably on challenges to the pay-raise legislation, given previous decisions, including *Consumer Party*, in which the Pennsylvania Supreme Court had upheld previous legislation facing similar challenges to its mode of passage and the use of unvouchered expenses.³⁷

New citizen groups sprang up, motivated to do something to demonstrate that business as usual could not go on any longer in Harrisburg. Some called for a repeal of the legislation. One group, PACleanSweep, was founded in July 2005 with the goal of replacing every Pennsylvania legislator standing for reelection in 2006.³⁸ Others shared and still share that sentiment and goal, but in 2005, no legislators were up for reelection. Indeed, only two officials who are voted on by the entire state were on the ballot—Justices Nigro and Newman, who were standing for retention.

ELECTION SEASON

As the summer continued and anger over the pay raises did not dissipate, but rather intensified, those calling for ouster of the politicians soon found a new target—Justices Nigro and Newman:

Anger unleashed by the legislative pay raise has given rise to a familiar refrain: Remember in November. The problem, for citizen activist groups, is that lawmakers are not up for reelection till next year.

But some activists are now saying that voters can still make their voices heard in November by removing two members of the Pennsylvania Supreme Court.

They argue that the high court, whose members will benefit from the pay raise, has allowed the General Assembly to routinely pass bills that violate the state constitution.³⁹

Tim Potts, founder of Democracy Rising PA,⁴⁰ began the campaign against the justices, arguing “The governor and the legislature do what they do because the Supreme Court says it’s OK. . . . Over and over, they have given their blessing to stealth legislation.”⁴¹ Potts pledged to begin an internet-based campaign to defeat the retention campaigns of Justices Nigro and Newman.⁴² Other anti-pay-raise groups, including PACleanSweep, pledged to support Potts’ efforts.⁴³

28. Act 44, § 1107(a).

29. *Id.* at § 1107(b).

30. 510 Pa. 158 (1986).

31. *Id.* at 184-85.

32. For a discussion of these suits, see *infra* at nn. 54-58.

33. Administrative Office of Pennsylvania Courts, *Legislation Enhances Ability to Attract and Retain Quality Judges: Chief Justice Applauds Legislature and Governor for Enacting New Salary Structure*, July 8, 2005, available at <http://www.courts.state.pa.us/Index/Aopc/IndexAOPC.asp>.

34. Mark Scolloro, *Justice Calls Voter Outrage Over Raises “Knee-Jerk,”* ASSOCIATED PRESS, July 20, 2005.

35. *Cappy Targeted for Role in Pay-Jacking*, VALLEY INDEPENDENT NEWS, Aug. 18, 2005. On February 13, 2006, the Judicial Conduct Board publicly announced: “In August 2005, the Judicial Conduct Board of Pennsylvania received allegations that Chief Justice Ralph J. Cappy

violated the Code of Judicial Conduct through his involvement with the legislative pay raise. The Board unanimously determined that the allegations were without merit and dismissed the claim.” Judicial Conduct Board, Press Release, Feb. 13, 2006.

36. *Id.*

37. Of course, as the court of last resort, the Pennsylvania Supreme Court, can reexamine the issue of unvouchered expenses and either distinguish or overrule *Consumer Party*.

38. See PACleanSweep.com, press release, Aug. 15, 2005.

39. Amy Worden, *New Target for Anger Over Raises: Judges*, THE PHILADELPHIA INQUIRER, Sept. 23, 2005.

40. See <http://www.democracyrisingpa.com>.

41. Worden, *supra* note 39.

42. *Id.*

43. *Id.*

At the time Potts announced his campaign, “[J]ustices Newman and Nigro said they knew of no campaign against them and had no plans to publicly defend their records.”⁴⁴ Justice Newman at that point still was not planning to raise any campaign funds or campaign for retention, and Justice Nigro had not spent any of the money he had raised and would “wait and see” before mounting a responsive campaign.⁴⁵

The allegations that the Pennsylvania Supreme Court was, at least partially, to blame for the legislature’s actions were not new. In the past, the court had upheld other legislation in the face of constitutional challenges to the manner in which the legislature had enacted it. (Of course, the court also had struck down much legislation in the past as well, a fact that was often forgotten during discussions about the pay-raise legislation.) The *Consumer Party* decision in 1986, decided before either Justice Nigro or Justice Newman was on the court, had upheld the use of unvouchered expenses by the legislature. This history, coupled with Chief Justice Cappy’s role in and defense of the pay-raise legislation, combined to create an impression of the court being too close to, or at least too accepting of, the legislature.⁴⁶

Adding to dissatisfaction with the courts was an examination, less than two months before the election, of the reimbursement forms submitted by Pennsylvania Supreme Court justices for expenses they incurred. The *Harrisburg Patriot-News* reported that the seven justices were reimbursed for more than \$164,000 in one year.⁴⁷ It pointed out that these expenses were in addition to the justices’ salaries and a generous benefits package that included up to \$600 per month for a car lease.⁴⁸

The *Patriot-News* and follow-up articles in papers throughout the state also highlighted certain expense reimbursements that seemed to many to be out of line or inappropriate. One expense that was frequently cited by the media was Justice Nigro’s request for reimbursement for at least 115 meals during which court-related business was conducted:

No one wants high-powered lawyers to be buying dinner for someone who serves the public on the supreme court, but did Justice Russell Nigro really conduct “court-related business” at 115 meals charged to the taxpayers? And those dinners that cost him \$100, \$200 and even more than \$400—are they the kind of meals at the

same posh restaurants he would have bought if he were putting it on his personal tab? Yeah, we didn’t think so. (And don’t get us started about the \$85 bottle of wine.)⁴⁹

Justice Newman’s expenses didn’t draw the same attention as Justice Nigro’s, although she was criticized for the generous tips and also the seemingly inexpensive food purchases for which she sought reimbursement.⁵⁰ Other justices’ expenses, such as Justice Thomas Saylor’s request for reimbursement for 34 car washes,⁵¹ drew attention and criticism, but it was Justice Nigro’s expenses that the media highlighted.

Thus, what started out as a seemingly routine retention election became a campaign in which Justices Nigro and Newman were fighting to retain their seats. Both resorted to media buys in the days leading up to the election, including public endorsements of Justice Newman by former Governor Ridge.⁵² All of this activity was unprecedented in the realm of appellate court retention elections in Pennsylvania.

By the time election day arrived, Justices Nigro and Newman had spent a combined total of more than \$800,000; the bulk of the expenditures were in the two weeks leading up to election day.⁵³ As noted above, Justice Newman was retained with 54% of the vote; Justice Nigro failed to win retention, receiving only 49% of the vote. Interestingly, the local judges up for retention were not targeted for “no votes,” and all were retained.

POSTSCRIPT: THE PAY-RAISE REPEAL AND THE OUTCOME OF THE LITIGATION

During the fall, in response to the unrelenting attention and pressure of the media and the public uproar about the pay-raise legislation, the legislature debated repealing it. Differences over

Adding to dissatisfaction . . . was an examination . . . of the reimbursement forms submitted by Pennsylvania Supreme Court justices for expenses they incurred.

44. *Id.*

45. *Id.*

46. See, e.g., *id.* (“The Governor and the legislature do what they do because the Supreme Court says it’s OK,” Potts said. “Over and over, they have given their blessing to stealth legislation.”); Tom Barnes, *In Furor Over Pay Raise, Sights Are Set on Judges*, PITTSBURGH POST-GAZETTE, Oct. 10, 2005 (“But leaders of grass-roots groups such as PACleanSweep, based in Lebanon County, and Democracy Rising Pa., based in Cumberland County . . . claim the Supreme Court has a tradition of upholding what critics consider to be questionable, if not unconstitutional, actions by the Legislature.”).

47. Jan Murphy, *State Justices Resort to Big Expenses*, THE PATRIOT-NEWS, Sept. 18, 2005.

48. *Id.*

49. *State of Greed/Pennsylvanians Pay for the Court’s High Life*, PITTSBURGH POST-GAZETTE, Sept. 21, 2005; see also Jan Murphy, *State Justices Resort to Big Expenses*, THE PATRIOT-NEWS, Sept. 18, 2005; Stu Bykofsky, *Supremes Suffer from “Robe-it is,”* PHILADELPHIA DAILY

NEWS, Nov. 3, 2005.

50. John Baer, *It’s a Feast Out There for Judges*, PHILADELPHIA DAILY NEWS, Oct. 1, 2005 (“Newman’s charges are more modest but annoying. She charges for her AOL and Comcast hookups, for her On Star service and for \$10 tips to hotel bellhops and doormen.”); see Bykofsky, *supra* note 49.

51. *Report: Taxpayers Footing Big Bills Racked Up by Pa. High Court Justices*, ASSOCIATED PRESS, Sept. 19, 2005.

52. Peter Jackson, *For First Time, Pa. Voters Oust a Supreme Court Justice*, ASSOCIATED PRESS, Nov. 9, 2005 (“Nigro raised more than \$400,000 for his campaign. He aired TV ads that sought to distance himself from lawmakers, stating that he had ‘voted to overturn the Legislature when they’ve been wrong.’ Newman, a Republican, took in more than \$240,000 last week alone, and sponsored ads featuring a voiceover by Tom Ridge, the former Pennsylvania governor and former national Homeland Security secretary.”).

53. Mark Scoloro, *Justices Spent Heavily in Lead-Up to Election*, ASSOCIATED PRESS, Dec. 13, 2005.

It is difficult to draw sweeping lessons from a low-turnout election in which there was not wide polling of voters.

whether to repeal the judges' raises as well as the legislators' raises held up passage, and no compromise was reached in advance of election day. However, the week after the election, the legislature finally resolved to repeal the pay-raise legislation. Act 72, repealing the pay-raise legislation, was passed on November 16⁵⁴ and signed by the Governor.

The movement toward repeal was not enough to quiet the "vote no" campaign, and it also failed to end the pay-raise controversy. Soon after the repeal became effective, several lawsuits were filed by judges across Pennsylvania challenging the constitutionality of the repeal as it related to judges.⁵⁵ In addition to seeking to have the pay raises for judges reinstated, the lawsuits highlighted the critical need to separate judicial compensation from the legislative process.⁵⁶ The suits were consolidated and were argued before the Pennsylvania Supreme Court in early April 2006, along with Gene Stilp's lawsuit challenging the original pay-raise legislation.

The judges' challenges to the repeal hinged on the provision of the Pennsylvania Constitution that prohibits reducing a judge's salary while he or she is in office: "Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth." The judges' claim was based on the fact that although the repeal affected all officials who had received a raise through Act 44, some officials had not received such a raise and thus did not have their salaries reduced by the repeal.

In September 2006, the Pennsylvania Supreme Court, accepting the judges' constitutional argument, held that the repeal of the pay raises was unconstitutional as to the judges.⁵⁷ The court also found, however, that the unvouchered-expense portion of the legislative raises was unconstitutional. While finding Act 44 unconstitutional in part, the Court refused to apply the nonseverability clause of the pay-raise legislation. As a result, the provisions of Act 44 relating to judicial compensation were held to remain in force.

During the litigation and following the court's decision, there had been criticism that the justices were deciding a case affecting their own compensation. In response, by defenders of the court and the court itself, it was explained that under the "doctrine of necessity," there was no alternative, and that despite their own interest, the justices were required to deter-

mine the case impartially. As Judge Anne Lazarus, chairwoman of the Ethics Committee of the State Conference of Trial Judges, explained in an interview: "[The rule of necessity] holds that whenever all judges in a particular court are touched by the same conflict 'it is necessary for a judge, even if conflicted, to handle the controversy.'"⁵⁸ While legally correct, this further agitated the public and those calling for ousting all elected officials, including judges.

WHAT DOES IT ALL MEAN?

It is difficult to draw sweeping lessons from a low-turnout election in which there was not wide polling of voters. But, judging from the tenor of the debate and the arguments being made, PMC has discerned a central theme defining the 2005 retention elections. Significantly, this theme is not new, and the sentiments it represents have not been resolved.

A FAILURE TO COMMUNICATE

PMC attributes the events of 2005 to a collision of incongruous perceptions about the court system and its role in our system of government: the public and the judges (and their defenders) have very different views about the courts and our governmental system of checks and balances. In fact, when one reads what the "two sides" have to say about the situation, they seem to be talking about entirely different things. And, certainly, they are not really talking to each other. This underscores a major problem—the isolation of courts and judges from the people they serve.

All the publicity about judicial elections, federal appointments, activist judges, and high-profile cases has obscured a basic truth—the public does not really know all that much about judges and courts. A corresponding problem is that once on the bench, judges often become isolated from the public and seemingly "out of touch" with the common experience. In combination, these factors produce a condition ripe for explosive results when issues of compensation, expenditures by public officials, and political maneuvering arise.

Even now, the two sides seem miles apart in their assessment of what happened last fall. Judges and their defenders (mostly lawyers and the organized bar) seem not to understand the public outrage connected with the pay raise and why any part of it was directed at the court.

For example, one lawyer, in an effort to exhort fellow lawyers to support the courts, defended the chief justice's role in designing the pay raise and attacked the results of the retention election:

For almost six months there has been a persistent, unrelenting diatribe from many in the print media across the Commonwealth attacking our chief justice, our

54. Act of Nov. 16, 2005, P.L. 385, No. 72 ("Act 72").

55. A third lawsuit was filed challenging the entire repeal, as applied to judges, legislators, and executive-branch officials. To date, that suit has not been consolidated with the others or addressed by the Pennsylvania Supreme Court. Common Cause of Pennsylvania also filed a lawsuit in federal district court challenging the constitutionality of the pay-raise legislation. That suit was dismissed this spring, *Common Cause of Pennsylvania v. Commonwealth*, 447 F. Supp. 2d 415

(M.D. Pa. 2006), but has been appealed.

56. *Herron v. Commonwealth of Pa.*, Supreme Court of Pa. Docket No. 48-EAP-2005 (Brief of Appellant, at 1).

57. *Stilp v. Commonwealth*, 905 A.2d 918 (2006), rehearing denied (Nov. 8, 2006). Chief Justice Cappy did not participate in the decision.

58. Thompson, *supra* n. 29.

Supreme Court and our judiciary in general. The diatribe is frequently misleading, occasionally tasteless, often threatening and evidences an alarming illiteracy as to the operable provisions of the Pennsylvania constitution.⁵⁹

This lawyer then criticized the vote against Justice Nigro's retention as "an irrational act, which again was the result of actions by those who would undermine confidence in our justice system."⁶⁰ This echoes Justice Nigro's own assessment of his electoral defeat: "What they did was an irrational thing. They sent a misguided missile."⁶¹

Furthermore, the judges and their defenders seem not to understand why their efforts to attack the pay-raise repeal and the court's ultimate decision in the case, regardless of the legal merits, were so distasteful to the public. This failure to understand, and the insistence on viewing the public's ire as misdirected and the court and judiciary as scapegoats can only lead to further alienation and confrontation.

On the other side, the public seems not to understand, or at least to have lost faith in, the courts' role in the system of checks and balances. The public seems unable to grasp that judges are deserving of a pay raise and that Chief Justice Cappy's request for such a raise was reasonable and part of his duties. The real problem, which has been lost in the controversy, is that judges are beholden to the other branches of government for their compensation. Rather than respect this bind and act responsibly to ensure that our judges are fairly compensated, the legislature traditionally has piggy-backed its own raises onto the bills related to judges' compensation. As a result, lost in the pay-raise, retention, and repeal controversies were Chief Justice Cappy's reasonable plan to end this cycle of long periods without pay raises followed by turmoil over any ultimate legislation increasing compensation.

Essentially, this is a classic failure to communicate. The courts are perceived as having lost touch with the people they serve, and the people found the retention election was the only way to effectively communicate their lack of faith in the system. Another way must be found. Targeting judges for "no" votes when they stand for retention because of frustration about the courts, or about government in general, in the long run deprives Pennsylvania of good judges with solid experience. It may be part of our tradition, but it should not remain part of our future.

THE FUTURE OF RETENTION ELECTIONS

Retention elections, however, should remain part of Pennsylvania's judicial selection system, whether electoral or merit selection. Retention elections guarantee a role for the public in the critically important judicial selection process. While retention elections certainly can provide the opportunity for misguided attacks, they also offer a voice to the people and a real way to pass on a judge's performance as a judge.

Retention elections should not be referenda on hot-button issues or a way to attack the only official up for election; but if the right information gets out, if voters can be educated, it could be a true assessment of how the judge is doing his or her job. Does she treat all fairly and with respect—litigants, witnesses, jurors, court personnel? Is the judge efficient in adjudicating cases? Is the judge respected by the lawyers who practice before her, even when she rules against them? How often is the judge overturned on appeal? How is the courtroom run—efficiently, with respect to the parties involved, or simply to serve the judge's schedule? Has the judge made efforts to be out in the community—to educate and help the public learn about courts and judges?

Perhaps the best way to look at retention elections is as an opportunity for judges and the public to educate each other. The public can educate the judge about its concerns for fair and impartial courts, for strong courts that will ensure that the constitutional system of checks and balances works, for efficient and effective courts. And the judge can educate the public about what he or she does on the bench, how she views her role, what she has learned during the preceding term. This type of education, and communication, is sorely needed. But not only during retention time. There should be an ongoing conversation between the public and the judiciary, not about specific cases and controversial issues, but about systemic issues and the role of the courts in our system of government.

If we have these conversations, perhaps retention elections can begin to fill the role they were always meant to play—neither a non-event rubberstamp for another 10 years in office, nor a targeted campaign based on specific decisions or more general discontent with government. Instead, retention elections can fill a void in our system—providing information so that the public and the judiciary no longer hold incongruous views of the courts and their role in our system of government.

CONCLUSION

Real issues must be addressed if Pennsylvania is to have strong courts that have the confidence of the public. Two items should be examined as part of this effort. First is the potential use of judicial evaluation committees. Second, in the wake of ambiguity in the court's decision about the permanence of the mechanism of tying state judicial salaries to federal levels as well as recent proclamations by state legislators that they will essentially "undo" the effect of the court's decision and find a way to bring judicial salaries back to pre-pay-raise levels, there is a need to discuss a new means of setting judicial compensation. PMC is eager to explore both of these concepts, which have been employed successfully in other jurisdictions.

The first, judicial evaluation committees, would be formal committees established by law and charged with evaluating judges' standing for retention. Evaluations would be based on the factors described above, including experience on the bench, efficiency, demeanor, and the opinions of fellow jurists and

59. Edward W. Madeira, Jr., *Chief Justice, Courts Deserve More Support from Legal Community*, THE LEGAL INTELLIGENCER, Jan. 30, 2006.

60. *Id.*

61. L. Stuart Ditzen, *Nigro Calls Vote to Oust Him "An Irrational Thing,"* PHILADELPHIA INQUIRER, Nov. 10, 2005.

practicing lawyers. The ratings and recommendations would be shared with the public, so that voters would be educated and informed when entering the voting booth during retention elections.

The second concept, finding a new way to set judicial compensation, would seek to divorce permanently the process of setting judicial compensation from the state legislature. This, in effect, would achieve what Chief Justice Cappy originally intended, eliminating for all time the need for the courts to go asking for raises from the legislature. Possible solutions include setting up an independent judicial compensation commission, tying judicial salaries to some outside index, or even implementing Chief Justice Cappy's proposal to tie judicial salaries to those paid to members of the federal judiciary. The point is that the judicial compensation process we have now is not working. There needs to be a change.

The public needs to have confidence in our courts. This is a big challenge, particularly in the wake of the Pennsylvania Supreme Court's decision in the pay-raise case. But the work of repairing the damaged relationship can and should begin now. We need and welcome willing partners in the judiciary and the public. We know that many within the judiciary and the court system are interested in having this dialogue, as are members of local and statewide bar associations. We hope we can broaden the conversation and work together to ensure that we have strong courts in Pennsylvania.



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Lynn A. Marks is the executive director of Pennsylvanians for Modern Courts, a position she has held since 1990. During that time, the group has spearheaded a very active effort to change to merit selection of judges in Pennsylvania. Marks has spent her career leading nonprofit organizations and is an active member of the American, Pennsylvania, and Philadelphia Bar Associations. She has cochaired the ABA's Litigation Section's Task Force on the Judiciary and serves on the ABA Commission on the American Jury Project and the ABA Standing Committee on Judicial Independence. She is a graduate of the University of Pennsylvania Law School. More information about Pennsylvanians for Modern Courts can be found at its website, <http://www.pmconline.org>.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

Newport, Rhode Island

2007 Midyear Meeting
April 19-21, 2007
Hotel Viking
\$169 single/double

Vancouver, British Columbia

2007 Annual Conference
September 25-30, 2007
Sheraton Vancouver Wall Centre
\$229 Canadian single/double

Amelia Island, Florida

2008 Midyear Meeting
May 1-3, 2008
Amelia Island Plantation
\$159 single/double standard room
\$169 single/double deluxe room

Maui, Hawaii

2008 Annual Conference
September 7-12, 2008
Westin Maui
\$190 single/double

Sanibel Island, Florida

2009 Midyear Meeting
May 14-16, 2009
Sundial Beach Resort
\$145 single/double

Judicial Elections: Changes and Challenges

Jan Witold Baran

Today, myriad approaches for selecting judges exist and few states—if any at all—use identical schemes. In many states, the selection methods vary depending on whether the judge is a trial or appellate judge, or an initial selection or an incumbent. As will be seen, the vast majority of state judges are elected. Recently, judicial campaigns have become increasingly controversial while traditional restraints have fallen to the wayside. This article will address the variety of election methods, the challenges that recent constitutional decisions have presented to the ABA Code of Judicial Conduct, and whether innovations, such as public financing, offer a solution.

MODERN STATE SCHEMES

Despite the wide variance among states and the fact that no two states go about judicial selection exactly the same, it's possible to classify the different methods by general category. The following summary, largely from the American Bar Association's Standing Committee on Judicial Independence (ABA), considers state high courts, intermediate appellate courts, and trial courts separately.

STATE HIGH COURTS

Called “supreme courts” in 48 states, these courts typically represent the highest level of judicial review that a state offers. According to the ABA, 38 states have some type of judicial election at this highest level. Six states¹ have partisan elections, 15 have nonpartisan elections,² and 17 have uncontested retention elections³ after an initial appointment. The remaining 12 states either grant life tenure to judges, or use some form of reappointment.⁴ States that appoint judges to an initial term without an election still undertake the process differ-

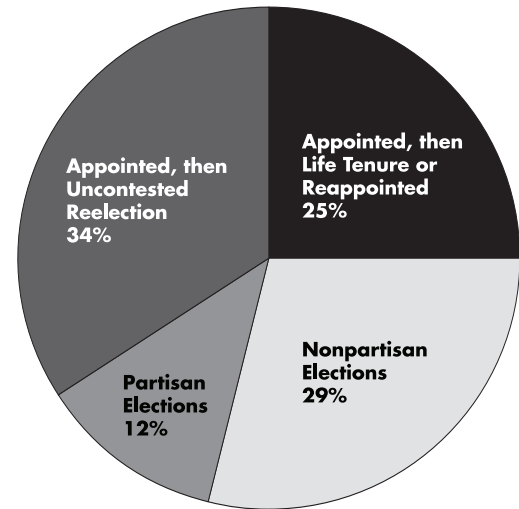


FIGURE 1:
SELECTION METHODS
FOR STATE HIGH COURT JUDGES

ently. In 23 states, the governor appoints judges to the highest court with the assistance of a commission.⁵ In contrast, while the governor appoints the judges in California, Maine, New Jersey and New Hampshire, he or she does so without the aid of any such commission.⁶ The legislature chooses judges in both South Carolina and Virginia.⁷

INTERMEDIATE APPELLATE COURTS

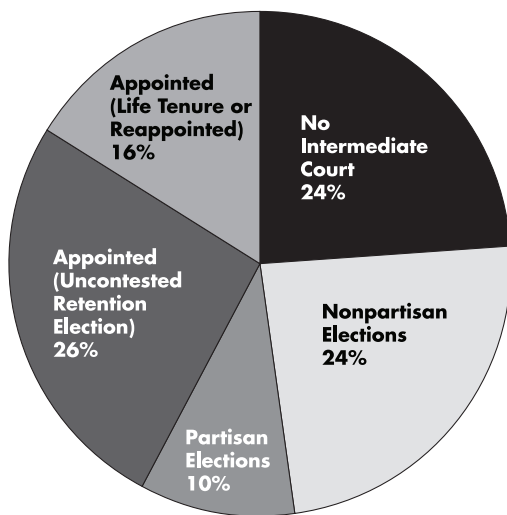
Thirty-nine states have intermediate appellate courts.⁸ Among those states, 5 choose intermediate appellate judges

Footnotes

1. Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. In Illinois and Pennsylvania, judges must first win their initial term through a contested partisan election. Thereafter, they run in uncontested retention elections for subsequent terms. A.B.A. Standing Committee on Judicial Independence, *Fact Sheet*, available at <http://www.abanet.org/judind/jeopardy/fact/html> (June 7, 2006) [hereinafter *Fact Sheet*].
2. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin. *Id.*
3. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, New England, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming all have uncontested retention elections after an initial appointment. *Id.* New Mexico modifies the method by initially appointing judges who then face a contested partisan election for a full term, and then run in uncontested retention elections for subsequent terms. *Id.*
4. Connecticut, Delaware, Hawaii, Massachusetts, Maine, New

Hampshire, New Jersey, New York, Rhode Island, Vermont, Virginia, and South Carolina.

5. See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC'Y (1999), available at http://www.ajs.org/js/berkson_2005.pdf, at 6 (last visited June 9, 2006). This method is also used by the District of Columbia, with the exception that in lieu of a governor, the President of the United States makes all appointments to the D.C. Court of Appeals (the highest court) and D.C. Superior Court (trial court). See *Judicial Selection in the States: District of Columbia*, available at http://www.ajs.org/js/DC_methods.htm (last visited June 9, 2006).
6. See Berkson, *supra* note 5, at 6-7.
7. *Id.* at 7.
8. See *Fact Sheet*, *supra* note 1. The states that do not have intermediate appellate courts are Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.



**FIGURE 2:
SELECTION METHODS FOR
STATE INTERMEDIATE APPELLATE JUDGES**

through partisan elections⁹ and 12 hold nonpartisan elections.¹⁰ Of the 22 states that initially appoint judges, 14 states require that incumbents run in uncontested retention elections,¹¹ while the remaining 8 states either grant life tenure or use a reappointment method.¹² As with state supreme court appointments, the legislature appoints judges in both South Carolina and Virginia, and the governor makes his or her appointments without the aid of a nominating commission in California and New Jersey.¹³

Such a commission assists the governors of the remaining eighteen states when they appoint intermediate appellate judges.¹⁴

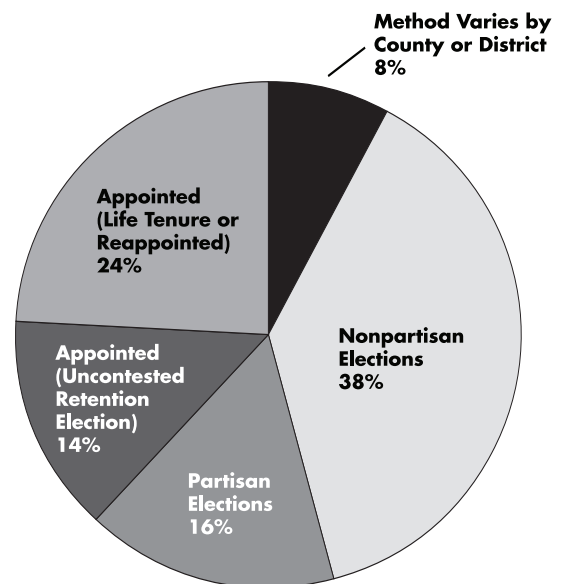
TRIAL COURTS OF GENERAL JURISDICTION

Thirty-nine states hold elections of some kind for trial courts.¹⁵ Eight states hold partisan elections for all trial court judges,¹⁶ while 20 states have nonpartisan elections.¹⁷ Seven states appoint trial judges,¹⁸ but hold uncontested retention elections. Four states¹⁹ use different selection systems for gen-

eral jurisdiction trial courts depending on the county or judicial district. For example, in Indiana, the governor appoints trial court judges in Lake and St. Joseph counties from lists of names submitted by local nominating commissions, but the voting public elects trial judges in other counties.²⁰ Those elections are partisan except for Allen County, where judges run without party designation.²¹ As with other judicial appointments, the legislature appoints trial judges in both South Carolina, and Virginia and the governor forgoes the aid of a nominating commission in Maine, New Hampshire, and New Jersey.²²

EVALUATING THE DIFFERENT METHODS

A preliminary question is whether judges should be elected or appointed, but additional questions arise depending on that answer. If judges are elected, should the election be partisan or nonpartisan? If appointed, what benefits does commission input provide? Finally, once the initial selection has been



**FIGURE 3:
SELECTION METHODS FOR
STATE GENERAL JURISDICTION TRIAL JUDGES**

9. Alabama, Illinois, Louisiana, Pennsylvania, and Texas.

10. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Washington, and Wisconsin.

11. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Utah.

12. Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, South Carolina, and Virginia.

13. See Berkson, *supra* note 5, at 7.

14. *Id.*

15. See Fact Sheet, *supra* note 1. Eleven states (Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia) either grant life tenure or use reappointment of some type for all general jurisdiction trial courts. *Id.*

16. Alabama, Illinois, Louisiana, New York, Pennsylvania, Tennessee, Texas, and West Virginia hold partisan elections. *Id.*

17. Arkansas, California, Florida, Georgia, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin all hold nonpartisan elections. *Id.*

18. Alaska, Colorado, Iowa, Nebraska, New Mexico, Utah, and Wyoming use uncontested retention elections. *Id.*

19. The types of election vary by county or district in Arizona, Indiana, Kansas, and Missouri. *Id.*

20. See Judicial Selection in the States: Indiana, available at http://www.ajs.org/js/IN_methods.htm (last visited June 9, 2006).

21. *Id.* In Kansas, the method of selection varies by judicial district (17 districts select district court judges using a nominating commission, while 14 use partisan elections). See Berkson, *supra* note 5, at 7. The public elects most Missouri trial court judges in partisan contests, but four counties appoint the judges based on a commission's recommendation. *Id.*

22. See Berkson, *supra* note 5, at 7.

made, should the judge be subject to an uncontested retention election or reappointment, or enjoy a life tenure?

ELECTION OR APPOINTMENT

During the colonial era, the king chose all judges. That pattern survived the Revolution as governors of the newly formed states continued to appoint state judges in the early years of the Union.²³ Popular election, however, is the essence of a democracy and in 1832, Mississippi became the first state to constitutionally decree the election of judges. Every state that entered the Union between 1846 and 1912 similarly provided for judicial elections. Supporters of popular election believe that accountability is of paramount importance and contend that as policymakers, judges resemble legislators: if judges make policy decisions, the absence of direct electoral accountability is contrary to democratic principles. Further, some believe that elections increase representation of women and minorities on the bench.²⁴ Despite these benefits, some critics perceive the election of judges as potentially problematic, charging that such selection compromises judicial independence.²⁵ Beyond the obvious problem that campaigning judges might take positions on issues they will later face on the bench,²⁶ concerns also exist regarding attorneys who contribute financially to campaigning judges and then subsequently appear before them in court. Such a relationship threatens the judge's required impartiality. Additionally, voters in some judicial elections—forced to choose from a seemingly indiscernible pool of candidates without the benefit of traditional campaign rhetoric—may not be sufficiently informed to make intelligent voting decisions and may simply decide to not vote.

Supporters of judicial appointment argue that the method mitigates the problems that come with elections and results in the selection of judges based on professional qualifications rather than political success. Advocates believe this approach de-politicizes the process, but critics contend that the process is still inherently political and that an appointment process, often undertaken by a nominating committee or commission, merely “substitutes committee politics for electoral politics.”²⁷ Interest groups will inevitably promote their interests to the best of their ability, regardless of the judicial selection mechanism, and so the appointment method succumbs to the same politicization as an election, but without the accompanying accountability.

PARTISAN OR NONPARTISAN ELECTIONS

On one hand, partisan elections embody the very sort of political divisiveness cited by critics of judicial elections. Critics of partisan elections, alleging that such selection affects the behavior of judges on the bench, cite to the fact that the average tort award varies dramatically between partisan and nonpartisan states. According to one study, this is particularly true for out-of-state defendants, against whom the average tort award is \$276,320 in nonpartisan states compared to an eyebrow-raising \$652,720 in partisan states.²⁸ On the other hand, partisan elections provide the voter a quick and generally accurate way of distinguishing candidates who may be otherwise fungible to the average, nonlawyer voter.

Returning to the theme of accountability to voters, supporters of partisan elections argue that “[a]ccountability requires institutional arrangements that strengthen voters’ ability to select officials who will . . . govern consistently with the majority’s policy preferences.”²⁹ While voters may not be able to readily evaluate different judges’ judicial philosophies and qualifications, they are able to choose between a Republican or Democrat and the corresponding policy stances.

THE BENEFIT OF COMMISSION INPUT

The vast majority of state governors who appoint judges do so with the assistance of a commission. Under this method, a commission actively locates, recruits, investigates, and evaluates potential judges. At the conclusion of this process, that commission advances a list of names to the governor, who makes a final selection. This process, favored by the American Bar Association, the American Judicature Society, and others, endeavors to choose applicants on the basis of their qualifications rather than political or social connections. Furthermore, this approach recognizes that a single governor, acting alone, often lacks the time, resources, or possibly even knowledge to parse out the best qualified potential judges from a crowded legal field.

UNCONTESTED RETENTION ELECTIONS, REAPPOINTMENT OR LIFE TENURE

States first implemented retention elections to provide for public participation in the selection process while still excluding partisan politics, believing that the elimination of party labels and campaigns would help voters focus on the record and professional qualifications of sitting judges.³⁰ Unless

23. See *id.* at 1.

24. Tanya L. Green, *The American Judiciary: Understanding Federal and State Courts*, available at <http://www.cwfa.org/articledisplay.asp?id=7296&department=LEGAL&categoryid=legalother> (last visited June 12, 2006).

25. See e.g., AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (last visited June 11, 2006).

26. See *Republican Party of Minnesota v. White*, 536 US 765 (2002) (finding that First Amendment speech provisions prohibit states limiting judicial candidates’ speech).

27. Michael DeBow, *Judicial Selection White Papers: The Case for*

Partisan Elections, Federalist Society for Law and Public Policy Studies, available at <http://www.fed-soc.org/Publications/White%20Papers/judicialection.htm> (last visited June 12, 2006) [hereinafter DeBow].

28. Alexander Tabarrok and Erik A. Helland, *Partisan Judicial Elections and Home Court Advantage*, CORPORATE LEGAL TIMES, available at <http://www.independent.org/newsroom/article.asp?id=225> (last visited June 12, 2006).

29. DeBow, *supra* note 27, at 7-8.

30. Kevin M. Esterline, *Judicial Accountability the Right Way*, 82 JUDICATURE 206 (1999); William K. Hall & Larry T. Aspin, *The Roll-off Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 418 (1987).

given a strong reason to do otherwise, voters generally have supported the judges in such elections: from 1964 to 1998—only 52 of 4,588 judges running in retention elections lost.³¹ In this regard, the system has proven effective as a means for the voting public to hold judges accountable. Implicit in this accountability, however, some critics have found the potential for abuse by interest groups. Any judge who strikes down a popular law, renders an arguably lenient sentence, or otherwise makes an unpopular decision may, in doing so, imperil his or her reelection. For example, after the Florida Supreme Court in 1990 struck down a state law requiring minor girls to obtain parental consent before obtaining abortions, the Florida Right to Life Committee unsuccessfully sought to defeat Chief Justice Leander Shaw.³² The result of such action is awareness on the part of judges that while they are ostensibly independent, an unpopular decision might prove fatal to their return to the bench. Such an awareness, some may argue, inevitably politicizes the judges' decision making. While reappointments and life tenures may cure this problem of politicized decision making, such approaches also deprive the public of accountability on the part of the judiciary.

ABA MODEL CODE OF JUDICIAL CONDUCT

Since 1924 the American Bar Association has produced ethics guidelines for judges. Originally called "Canons," subsequent revisions in 1972 and 1990 have renamed the document the Model Code of Judicial Conduct ("Model Code").³³ Each state judiciary and the federal judiciary (except the Supreme Court of the United States) uses the Model Code as a starting point for its own ethics rules. Since 2003, a joint commission of the ABA has reviewed the current Model Code in an effort to update and improve the guidance to judges.³⁴ While the joint commission intended to conclude its work by the summer of 2006, it was unable to do so. Among the key reasons for its inability to finish in the allotted time was the increasing difficulty in applying the current Canon 5 of the current Model Code, which pertains to conduct by judges and candidates in the course of election campaigns and judicial selection processes.

Canon 5 seeks to regulate the behavior of judicial candidates. This is both a practical and constitutional challenge. In light of the variety of election/selection processes noted above,

it is difficult to draft the Model Code to adapt to all such variations. It is therefore not surprising that Canon 5 is the canon most revised by state jurisdictions when they form their own ethics code. Canon 5 in general mandates that "[a] judge or judicial candidate shall refrain from inappropriate political activity."³⁵ The tricky part is determining what constitutes "inappropriate activity." In general, for example, judges and candidates are warned not to act as leaders or officeholders in political organizations, publicly endorse or oppose candidates for public office, attend political gatherings, or solicit campaign contributions.

Regardless of whether a state adopts any of the specific proscriptions, there is increasing uncertainty about the constitutionality of some of the provisions. The uncertainty began with the 2002 decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White*.³⁶ The *White* decision struck down a provision of Minnesota's then version of Canon 5. The clause prohibited judicial candidates from announcing their views "on disputed legal or political issues." This "announce clause" appeared in the 1972 version of the Model Code but had been removed from the current 1990 version. The Supreme Court held that the announce clause violated the First Amendment rights of candidates, and remanded the case to the court of appeals for further consideration of other Minnesota provisions. Subsequently, the United States Court of Appeals for the Eighth Circuit held that other Canon 5 clauses, like the announce clause, also were unconstitutional.³⁷ Specifically, the Eighth Circuit struck down provisions that prohibited candidates from identifying themselves as members of a political organization, attending political gatherings, using endorsements from political organizations, and personally soliciting contributions. The Supreme Court, notwithstanding an amicus brief from the ABA begging for review,³⁸ denied a petition for certiorari.³⁹

In addition to the Minnesota decisions, federal courts also have been asked to enjoin another provision of Canon 5, specifically the so-called commit clause. This provision provides that judges and candidates shall not "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."⁴⁰ District courts in Kentucky,⁴¹ North

31. Larry T. Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (1999).

32. G. Alan Tarr, *State Judicial Selection and Independence*, in JUSTICE IN JEOPARDY, *supra* note 25, at appendix D-8.

33. MODEL CODE OF JUDICIAL CONDUCT Preface (2004), available at <http://www.abanet.org/cpr/mcj/toc.html> [hereinafter MODEL CODE].

34. See ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judiciaethics/home.html> (last visited June 21, 2006).

35. MODEL CODE Canon 5 (2004).

36. *Republican Party of Minnesota v. White*, 536 US 765 (2002). See also Jan Witold Baran, *Judicial Candidate Speech After Republican*

Party of Minnesota v. White, COURT REVIEW, Spring 2002, at 12; Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8.

37. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

38. See Brief for American Bar Association, as Amici Curiae, *Dimick v. Republican Party*, No. 05-566, available at <http://www.abanet.org/amicus/briefs/holton06.pdf>

39. *Dimick v. Republican Party*, 126 S. Ct. 1165 (2006).

40. MODEL CODE Canon 5(A)(3)(d)(i)(2004).

41. *Ackerson v. Ky. Judicial Ret. and Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991) (as applied to administrative matters, "pledge" and "commit" clauses fail strict scrutiny).

Dakota,⁴² and Kansas⁴³ have enjoined this clause in the respective state judicial codes on the grounds that it is too vague and impinges on First Amendment rights. Moreover, lawsuits have been filed in various states, including Alabama,⁴⁴ Kentucky,⁴⁵ and Pennsylvania,⁴⁶ challenging provisions that bar judicial candidates from answering questionnaires from organizations.

Finally, recent controversies have arisen regarding the interpretation of the clause⁴⁷ that prohibits judges from endorsing candidates. In Texas the judicial disciplinary committee has proposed to sanction a state supreme court justice who made public statements in support of his former colleague, Harriet Miers, who in the fall of 2005 was nominated by President George Bush for the United States Supreme Court.⁴⁸ The statements were interpreted as improper “endorsements” under Canon 5. The Texas justice has vowed to challenge the sanction as a violation of his First Amendment speech rights. In addition, several judges on the United States Court of Appeals for the Third Circuit appeared as witnesses before the Senate Judiciary Committee in support of the nomination of their then-colleague, Judge Samuel Alito, who also was then a nominee to the Supreme Court of the United States.⁴⁹ While to date there is no indication of disciplinary proceedings against the judges, public reports quoted ethics experts on the issue of whether the judges’ statements were improper endorsements under the Code of Conduct for United States Judges, which warns judges not to “publicly endorse or oppose a candidate for public office.”⁵⁰

In short, multiple provisions of Canon 5 are under both practical and legal challenges. This makes campaigning for judicial office more complicated and makes the job of the ABA in rewriting the Model Code a daunting task.

PUBLIC FINANCING OF JUDICIAL CAMPAIGNS

Amid all the challenges and uncertainties surrounding judicial campaigns, there is a faint glimmer of positive change. North Carolina, subsequent to a proposal by the ABA and its

Commission on Public Financing of Judicial Campaigns,⁵¹ adopted a public funding system for appellate candidates.⁵² One of the most nettlesome ethics issues in judicial campaigns is the manner in which they are funded. Like all other political campaigns, those of judges are increasingly expensive. Unlike other major statewide campaigns, campaigns for offices like a state supreme court do not have a large or diverse potential private fundraising base. Contributions to judicial candidates unsurprisingly most often come from members of the bar or private parties with interests before the courts. Not only is this source of funding a potential special interest, it usually is not large enough to provide sufficient resources for expensive campaigns. For these reasons, the ABA has encouraged states to consider providing public funding to provide financial resources and dilute the dependence on private funding.

Public funding of judicial campaigns had been adopted in Wisconsin in the 1970s. However, it has never been sufficiently funded. North Carolina, in contrast, adopted and funded a public financing system. The program provides for threshold eligibility requirements and potential maximum public funding of slightly over \$200,000. Additional public funds are available under certain conditions.

In 2004, 12 out of 16 eligible candidates qualified for public funding. Out of five seats up for election, two of which were for the state supreme court, four seats were won by candidates who participated in the public financing program. Almost \$1.5 million was distributed to the 12 participating candidates, and the public subsidy accounted for 64% of all money received by Supreme Court candidates.⁵³

These are encouraging statistics. They reflect widespread candidate participation. Apparently the combination of public and private funding was sufficient to undertake statewide campaigns. Most important, private funding was a minority source of funding for the Supreme Court candidates. The challenge for North Carolina will be to continue providing sufficient public funds and to maintain a system that provides enough

42. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005) (“pledge” and “commit” clauses fail strict scrutiny).

43. Kansas Judicial Watch v. Stout, ___ F. Supp. 2d ___, 2006 WL 2038045, 2006 U.S. Dist. Lexis 50765 (D. Kan. July 19, 2006) (granting preliminary injunction against enforcement of “pledge” and “commit” clauses as well as prohibition on solicitation of support).

44. Pittman v. Cole, 117 F. Supp. 2d 1285 (S.D. Ala. 2000) (enjoining ban on answering voter guide), *vacated and remanded*, 267 F.3d 1269 (11th Cir. 2001) (reversing for want of ripeness).

45. Family Trust Foundation of Ky. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (“pledge” and “commit” clauses are overbroad because they cover more than promises to rule in a particular way on an issue likely to come before court), *stay denied sub nom.* Family Trust Foundation of Ky. v. Ky. Judicial Conduct Comm’n, 388 F.3d 224 (6th Cir. 2004).

46. Pa. Family Inst. v. Black, 2005 U.S. Dist. Lexis 29735 (M.D. Pa. 2005) (dismissing for lack of ripeness).

47. MODEL CODE Canon 5(B).

48. See Pete Slover, *Panel Rebukes Justice*, DALLAS MORNING NEWS, May 24, 2006, available at <http://www.dallasnews.com/haredcontent/>

dws/news/texasouthwest/stories/052406dntexhecht.15a0c2da.html (last visited June 21, 2006).

49. See U.S. Senate Committee on the Judiciary, “Supreme Court Witness List for Thursday, January 12, 2006 at 9:30 a.m.,” available at <http://judiciary.senate.gov/hearing.cfm?id=1725> (noting the scheduled appearances of Judges Becker, Scirica, Barry, Aldisert, and Garth).

50. JUDICIARY POLICIES AND PROCEDURES: CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 7(A)(2).

51. ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 30-57 (2002), available at http://www.soros.org/initiatives/justice/articles_publications/publications/judcampaigns_20020201/commissionreport.pdf (last visited June 22, 2006).

52. See NORTH CAROLINA JUDICIAL CAMPAIGN REFORM ACT, S.B. 1054 (2002), available at http://www.ncjudges.org/citizens/education/about_jcra/full_text.php (last visited June 22, 2006).

53. JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 38-39 (2004), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (last visited June 22, 2006).

Seizing the Accountability Moment:

Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent

Bert Brandenburg

Did the 2005 uproar over Terri Schiavo's end-of-life case mark a peak in the recent surge of attacks on the independence of America's courts? When the case generated threats to impeach and even murder the presiding judge, and Congress passed a bill seeking to manipulate the case, broad public disapproval helped end the political crisis.¹ The President backpedaled—"I believe in an independent judiciary. I believe in checks and balances"²—and dispatched the Vice President and Attorney General to add their reassurances. Just a few months later, Supreme Court nomination hearings offered little hint of the rising tide of fury that courts and judges have been facing during the past decade.

Although American history shows that hostility to the courts sometimes rises and falls in cycles, it's unlikely that the current round will subside anytime soon. A generation of opportunistic politicians and special interest groups have nurtured a litany of grievances against the judiciary, aggressively stereotyping judges as enemies of mainstream values.³ 2005 marked the national coming of age for an outrage industry that stokes anger over controversial decisions and paints judges as "tyrants in black robes" in order to raise money, turn out voters, intimidate and even impeach judges, and roll back the power of the courts to protect people's rights. The Schiavo fight was just one battle in a war that fits perfectly into the polarized politics and 24-hour media circus that is early 21st-century America. Court-bashing won't be fading away any time soon.

How can supporters reclaim the debate and shore up public

support for the independence of the courts in the face of this onslaught? This article reviews the results of a major public opinion research project exploring the attitudes of Americans toward the growing tide of attacks on the courts. It suggests that Americans of all backgrounds are ready to reject the sloganeering and stand up for strong courts—if their defenders embrace both independence *and* accountability, and link the work of the courts to the values Americans care about most. It outlines a simple and powerful communications framework for defending courts from political interference, putting court-bashers on the defensive, and exposing radical attacks for what they are.

Above all, the research suggests that for America's courts, the road to independence goes through accountability. Accountability is not the only principle of an effective communications framework. But court-bashers have been abusing the definition of accountability for years, exploiting the reticence of judges and bar leaders who worry that judicial accountability is too complicated, weak, or unique a concept to defend in a public debate. If courts and those who care about them can learn to make accountability their friend and define judicial accountability properly before the other side corrupts it, they'll go a long way toward turning back the onslaught of attacks on the independence and impartiality of our courts.

The Justice at Stake Campaign⁴ commissioned the opinion research firm of Belden, Russonello & Stewart to design and conduct a two-phase research project, including focus groups

This article is based in part on findings available in a Justice at Stake monograph, *Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts*, available at <http://www.justiceat-stake.org/files/SpeaktoAmericasValues2.pdf>.

Footnotes

1. By a margin of 70%-27%, Americans called it "not appropriate for Congress to get involved" by passing a law requiring the federal courts to review the Schiavo case. *Federal Intervention in Schiavo Case Prompts Broad Public Disapproval*, Mar. 21, 2005 available at <http://abcnews.go.com/images/Politics/978a1Schiavo.pdf>.
2. David D. Kirkpatrick, *After DeLay Remarks, Bush Says He Supports "Independent Judiciary,"* N.Y. Times, Apr. 9, 2005 available at <http://www.nytimes.com/2005/04/09/politics/09judges.html?ex=1270699200&en=ae896f7768d67eee&ei=5088&partner=rssnyt>.

3. At the state level, a Justice at Stake search using Nexis revealed 27 news stories in 1998-2001 about calls for impeachment of state judges. In a comparable period, 2002-05, that number spiked to 45. At the federal level, in 1997 Congressman Tom DeLay said that he had a list of judges who violated their oaths of office and should be impeached. He said that judges "need to be intimidated" into upholding the Constitution. In 2003, he launched the House Working Group on Judicial Accountability, stating, "We in the House are putting America's judges on alert. We are watching you." In 2005, the chief of staff to Oklahoma Senator Tom Coburn, told a conference that, "I don't want to impeach judges. I want to impale them!"
4. Justice at Stake is a nonpartisan national partnership working to keep courts fair, impartial, and independent. The views expressed here do not necessarily reflect the opinions of Justice at Stake partner organizations.

and a national survey.⁵ Survey respondents were queried about their confidence in major institutions (including the courts), their knowledge of how courts work, and the values they want their courts to uphold. After an initial test of their willingness to support stronger congressional checks on federal courts, they were asked to consider a variety of mechanisms to implement such checks, including jurisdiction-stripping legislation and impeachment. They were asked to consider whether the power of the courts should be curbed with respect to high-profile issues like gay marriage and the public display of the Ten Commandments in the courtroom. They were asked to react to common arguments made for and against curbing the power of the courts. At the end of the survey, after hearing the arguments on both sides, they were asked once again if they generally supported more congressional checks. (Previous opinion research suggests that the findings are equally valid for controversies involving state courts, and that indeed Americans do not often distinguish between the two).

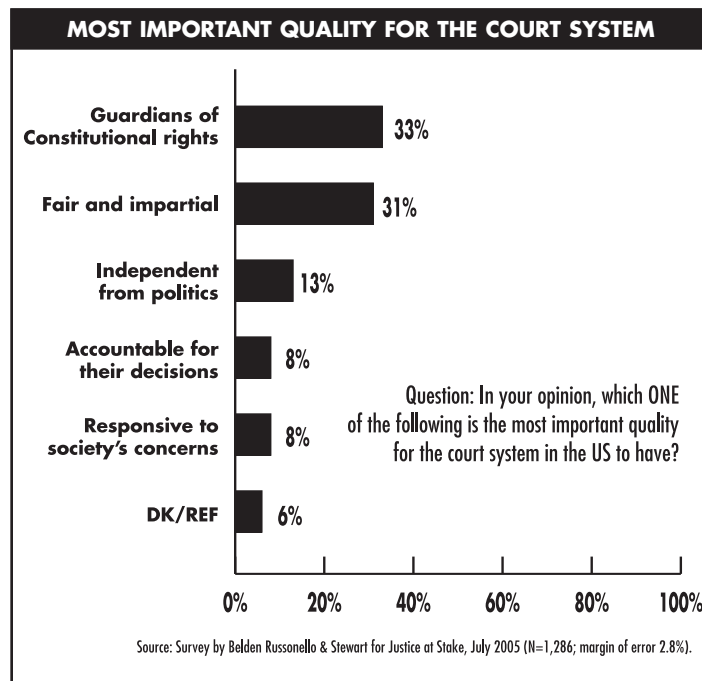
The survey found that the American public continues to hold favorable but soft opinions about the courts and that the public's knowledge of the courts remains rudimentary. As an institution, the courts enjoy more of the public's confidence than does Congress. The Supreme Court receives the strongest vote of confidence (30% "great deal"; 46% "some" confidence) followed by federal courts (23%; 51%) and state courts (20%; 51%). Even individual judges (20%; 55%) garner more public confidence than Congress (12%; 52%).

THE IMPORTANCE OF KNOWLEDGE AND EDUCATION

The survey revealed how critical it is to educate more Americans on how courts work. Less than half know that federal judges serve life terms, and bare majorities know that federal judges are appointed or can identify the three branches of the government. But the news is not all bleak: most Americans generally understand the Constitutional role of the courts and the opportunity for appealing court rulings, and that judges are bound by precedent in their decisions.

Most significantly, the research confirmed a direct correlation between knowledge about the courts and willingness to support them in the face of attacks. Those Americans with the most knowledge of how courts function tend to be among the most likely to reject attempts to reduce their powers. Having an understanding of the role of precedent, appeals, constitutional review, and other aspects of the courts appears to reinforce an appreciation for the courts and their role as constitutional guardian. Educating Americans about the courts isn't just good civics—it's smart politics as well.

General education levels are also important. A regression analysis of the results shows that the strongest predictor of opposition to or support for congressional checks is education level. As the opinion research firm observed:



One story line is that the two most reliable predictors of a person's views on most social issues—political party affiliation and political ideology identification—give way to education when it comes to the courts. A highly educated person, whether that person is a Democrat or Republican, liberal or conservative, is more likely to be a core supporter of the courts, while a person with very little education is likely to be a court critic, regardless of other characteristics.

This finding has important implications for targeting. Court defenders should make it a priority to reach well-educated audiences and mobilize them to resist radical attacks on the courts.

Conversely, the greatest challenge will be to inform and engage Americans who have less education. This poll, and others conducted in recent years, suggest an additional complication: when lesser-educated Americans happen to be racial and ethnic minorities, their disaffection with the courts may well be based on factors that have little to do with ideological attacks on the courts. In a 2001-02 poll commissioned by Justice at Stake, 62% of voters, including nearly 90 percent of African-American voters, feel that "there are two systems of justice in the U.S. – one for the rich and powerful and one for everyone else."⁶ This is consistent with other polling, which shows that people of color are generally less satisfied and more

5. In phase one, six focus groups were held in Spring 2005—in Raleigh, NC, Chicago, IL, and Columbus, OH—with voters who had at least some college education and who demonstrated some level of community or political involvement. A national telephone survey of 1,286 adults living in the U.S. was conducted from July 20 to July 30, 2005. The data have been weighted by

race and age to bring them into proper proportions with the U.S. adult population. The margin of sampling error is 2.8 percentage points for the entire survey.

6. See *Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts*, available at <http://www.justiceatstake.org/files/PollingsummaryFINAL.pdf>.

cynical about the performance of the judicial system. While minority attitudes toward the courts are beyond the scope of this article, more work needs to be done to make judicial independence issues relevant to communities of color.

A BATTLE OVER VALUES

The research also uncovered evidence of a real battle over values, a contest far more sophisticated than talk-show shouting matches over slogans like “judicial activism.” Indeed, one of the most encouraging pieces of news coming out of the research is that the core values that Americans want from their courts—fairness, responsibility, and protection of rights—require that the judiciary be independent from special-interest pressure. More specifically, in focus groups and on the survey, Americans consistently articulated these values in four ways:⁷

- A strong belief in the courts’ role in protecting individual rights by upholding the Constitution;
- The priority of guaranteeing access to justice for all Americans;
- Desire for the courts to be fair and impartial, which means free from political influence or pressure once on the bench; and
- The need for accountability to ensure judges follow the law and Constitution and not their own personal beliefs.

Conversely, those who would like to weaken the role of the courts make headway when they are able to assert—unanswered—that judges are violating these values, either by ruling according to their own personal views or because they are not free from political influence. The challenge for court advocates is to show how courts honor the values Americans expect from them, and to show how their opponents would undermine those core beliefs. By focusing on these core values—and not becoming mired in debates over individual rulings, controversial issues of the day or slogans such as “judicial activism”—defenders of strong checks and balances can present a stronger case than those who would undermine them.

Indeed, supporters of independent courts may be heartened to know that the research shows that charges of “judicial activism,” as ubiquitous as they may seem, have little effect on the attitudes of most Americans. It’s a mistake to be obsessed about such charges or to be drawn into debates over the definition of activism. The charge of “judicial activism” does have a galvanizing effect on people who are already antagonistic to the judiciary but it doesn’t tend to win new converts to the cause of weakening the courts. Similarly, defenders of strong courts should avoid being pulled into debates over the merits of controversial decisions or the hot-button issues that underlie them, like abortion, public display of the Ten Commandments, and marriage. When discussions focus on cases and controversies, it’s easier to lose sight of the role that Americans want courts to play in a constitutional system.

WHO SUPPORTS THE COURT, WHO DOESN’T, AND WHO’S READY TO LISTEN?

The research found that many respondents fell into one of three categories:⁸

Core supporters: People who were most likely to support maintaining the power of the courts without hearing any information. A majority within each of the groups listed below opposed increased congressional checks when initially asked, and almost three in ten strongly disagree with increased checks:

- People with college education or more
- People earning \$75,000 per year or more
- People who rarely or never attend religious services
- People who are knowledgeable about the courts

Most persuadable: People who are more likely to support the courts after being exposed to the arguments on both sides. By the end of the survey, a majority in each of these groups opposes increased congressional checks:

- Men over 40 years old
- Older baby boomers (between 50 and 59 years old)
- Liberals
- Independents
- Northeasterners
- Suburbanites

Court skeptics: Those least likely to support the courts after being exposed to arguments on their behalf:

- Black Americans
- Hispanics
- Less educated
- Lower income
- Less knowledgeable about the courts

It’s telling that this last list does not include self-identified conservative frequent church attendees. While most people in this group initially express strong support for weakening the courts, many soften their position after hearing messages for and against congressional checks. After hearing both sides of the argument, the percentage saying they strongly agree with increased congressional checks drops 11 points (39% to 28%). The pro-courts messages that resonate with this segment remind them of the important role the courts serve as guardians of the Constitution and individual rights, and in providing access to justice for all.

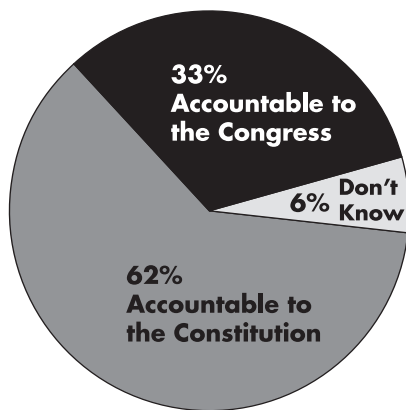
TESTING CHECKS ON THE COURTS

Since congressional attempts to limit the power of the courts have been in the news in recent years, the survey provided a useful opportunity to test Americans’ reactions to such efforts. As a general matter, they value accountability very strongly: 81% want more accountability from the courts. “I feel anyone who is held accountable will probably do a better job,” said one focus-group participant. So it’s not surprising

7. *Id.*

8. *Id.*

SHOULD COURTS BE ACCOUNTABLE TO POLITICIANS OR THE CONSTITUTION?



Question: With whom do you agree more, those who say:

- a) It is the job of Congress to hold the courts accountable and reduce abuses by judges, or
b) judges should be accountable to the law and the Constitution and not to Congress?

Source: Survey by Belden Russonello & Stewart for Justice at Stake, July 2005 (N=1,286; margin of error 2.8%).

that when respondents were asked at the outset of the poll, before hearing any arguments on either side, whether more checks on the power of the courts and judges were needed, they agreed by a margin of 54%-40%.⁹

Those who would limit the courts felt more strongly about their position than those who opposed them (31% strongly favored limits, 20% strongly opposed them). Initial support for increased congressional power was strongest among less educated people (37% strongly agreed), frequent churchgoers (36%), conservative frequent churchgoers (39%) and Southerners (38%). Partisan affiliation had little effect: Democrats (30% strongly agreed) and Republicans (32%) both initially leaned in favor of increased checks, as did moderates (28%), and independents (31%). Liberals were split on the issue (28% strongly agree, 26% strongly disagree). As might be expected, regression analysis shows that the strongest predictor of opposition to or support for congressional checks is education level.

In isolation, these findings could spell more trouble for the courts. But when Americans weigh the other values they want from the courts, and the specific remedies being proposed to make courts more accountable, they grow wary of attempts to curb their powers. For example, when asked to consider a variety of competing values, only 16% of respondents thought that the most important quality they wanted from courts was to be either “accountable for their decisions” or “responsive to society’s concerns”—compared to 77% who chose “fair and impartial,” “independent from politics,” or “guardians of Constitutional rights.”

These findings were reinforced by an additional question series that tested how Americans react to common messages advanced on both sides of the debate over whether Congress should impose more checks on the courts. When asked

whether any of the following were excellent reasons to support such checks, respondents picked:

“Too many activist judges are reinterpreting the Constitution to fit their personal views.” (29% called it an “excellent” reason to support more checks)

“When judges start changing the definition of marriage by allowing gay couples to marry, it is time for Congress to step in and check the courts.” (29%)

“Too many judges are making decisions that are out of ‘mainstream America’ like banning displays of the Ten Commandments, and it is time for Congress to step in and check the courts.” (28%)

“Too many judges are legislating from the bench and making laws instead of interpreting the laws.” (28%)

“Judges who are unaccountable to voters should not be allowed to make decisions that run counter to Americans’ beliefs.” (22%)

On the other hand, when asked whether any of the following were excellent reasons to oppose such checks, respondents picked:

“We need strong courts to protect our rights under the Constitution and the Bill of Rights.” (61% called it an “excellent” reason to oppose such checks)

“We need strong courts to ensure access to justice/a day in court for all Americans.” (56%)

“We need strong courts to protect us from abusive actions by government/law enforcement.” (46%)

“Strong courts are necessary to balance the power of the Congress and President and it would be a mistake to upset this balance.” (43%)

“The courts are part of our democracy that has worked well for hundreds of years and we should not weaken it now.” (41%)

“Strong courts are a necessary check on extreme politicians.” (39%)

“We need strong courts as a check on the will of the majority, because the majority at any given time may want to pass laws that threaten the rights of individuals.” (35%)

The comparison is striking—every single message in opposition to more checks on the courts, even the weakest, bested every single message in support of more checks on the courts, even the strongest. Indeed, after hearing messages from both sides of the debate, public support drops for the general idea of increased congressional checks on the courts. Overall support for the idea decreases five points from 54% to 49% and opposition to Congress as enforcers of judicial accountability rises five points from 40% to 45%.

Certain groups were more likely than others to curb their enthusiasm for congressional checks after hearing both sides,

9. *Id.*

including women, westerners, Democrats and moderates. Indeed, by the end of the survey, a majority of the following groups opposed increased congressional checks:

- Men over age 40 (57% disagree)
- People between 50 and 59 years old (54%)
- Liberals (55%)
- Independents (51%)
- Suburbanites (56%)
- Northeasterners (53%).

Conservative frequent church attenders softened their position after hearing messages for and against congressional checks. Their overall support for congressional checks dropped two points, but the percent saying they strongly agree with increased congressional checks drops 11 points (39% to 28%). Like other Americans, they are moved by messages that remind them of the important roles the courts serve as guardians of the Constitution and individual rights and in providing access to justice for all.

Americans were also asked to evaluate four ways that Congress could reduce the power of the courts. In every instance, they expressed less support for specific checks than they had for the general concept of increased checks. They clearly opposed stripping jurisdiction from the courts to hear certain kinds of cases (53% to 39%) and threatening judges with impeachment over an unpopular decision (63% to 32%). Indeed, a majority (53%) believes that if Congress “threatens judges with impeachment” based on their rulings “it will result in political intimidation” and “prevent the courts from being fair and impartial.” However, they leaned in favor of summoning a judge to hearings before Congress to answer questions (51% to 40%) or even threatening impeachment over a series of decisions that many people disagree with (51% to 42%). In each instance, higher support for checks was expressed by racial minorities, people with less knowledge of how courts work, those with less education, and people earning less money.

THE IMPORTANCE OF ACCOUNTABILITY

One of the most important lessons of this research project involves the concept of judicial accountability, which is popular among all segments of the population. Supporters of strong courts can’t afford to ignore it. Indeed, court-bashers have made accountability a staple of their message, seeking to portray judicial independence and its defenders as the enemies of America’s mainstream values and populist heritage.

Of course, since courts must protect rights and offer impartial justice, judicial accountability is different than for executives and legislators. That’s one of the reasons that judges, bar leaders, and other defenders of the courts ignore the topic, or grow almost apologetic when it is brought up. Courts are different, they say. That’s true, but such responses come across as dismissive of accountability and plays into the court-bashers’ trap. Americans feel strongly that courts have to be accountable, and they will reject any message to the contrary. This strong public belief in accountability—and the fact that Americans simultaneously demand a sophisticated blend of values from their courts—has powerful implications for the current national debate.

The crux of the question is this: *to whom should courts be accountable?* When this question was posed, Americans were decisive in rejecting accountability that smacked of political interference in their courts of law. More specifically, large majorities of Americans believe the courts should be accountable to the Constitution and law (62%) rather than Congress (33%). A plurality (42%) believes it strongly. Few demographic characteristics divide the population on this matter, and even among those groups giving congressional checks the strongest support, the percentage on the side of the law and Constitution is near 60 percent. Defenders of strong courts would do well to embrace accountability—to the Constitution and the Bill of Rights, not to politicians and special interests. They should remind Americans that court decisions must be published, and that they can be appealed to higher courts.

This finding is consistent with other parts of the research. As one focus group participant, a self-described moderate, put it: “Representatives are only in office for a short period of time, and the Constitution has been around for hundreds of years. So let’s go with something that has been there for a while instead of someone who just got into office.” In the survey, by a margin of 94% to 5%, respondents agreed that, “We need strong courts that are free from political influence.” This finding is reinforced by Americans’ revulsion at congressional meddling in the Terri Schiavo case.

CONCLUSION AND RECOMMENDATIONS

Americans are ready to reject political interference with our courts—if defenders of the courts use the right language to make their case. The research findings can be boiled down to five recommendations:

Stick to the core message: In order to protect access to justice for all and our rights under the Constitution, we must defend fair and impartial courts from political interference.

Speak to American values: Connect with a bipartisan majority of Americans by talking about the role of the courts in protecting individual rights and ensuring everyone a day in court.

Describe the threat: Americans grow concerned when they hear about political interference with the courts, but they need to be educated about those threats.

Embrace accountability: People want courts to be accountable—but to the Constitution and the law, not to politicians and special-interest groups.

Don’t be distracted: Don’t get trapped debating controversial decisions or slogans like “judicial activism.”

If more bench, bar, and civic leaders are willing to speak to American values, and invoke time-tested principles, they can help check the “outrage industry” that hopes to wage a permanent campaign against the courts.

But the findings also suggest implications that go well beyond communications frameworks and today’s debates. It’s fair to say that the long-term health of the courts is dependent on Americans’ civic education generally and knowledge of the courts in particular. Here, too, there are encouraging signs; in the wake of growing concern about the state of civics educa-

tion in the schools, a growing number of states are reexamining their educational standards and considering strategies for improvement. Last year, the American Bar Association created a Commission on Civic Education and the Separation of Powers, co-chaired by former Supreme Court Justice Sandra Day O'Connor and former U.S. Senator Bill Bradley, to boost education on the separation of powers, with a particular emphasis on the role of an independent judiciary. One of the commission's tasks is to review current curricula on separation of powers in U.S. civics, government, and history classrooms in order to recommend improvements and model programs.

Increased education outside the classroom will also be critical: in the mass media, in small gatherings, and everywhere in between. Many courts and bar associations work hard to educate the public. They would do well to increase these efforts wherever possible, and to view them as part of a permanent campaign, not a short-term fad. The fact is, those who would tear down the courts have been fighting for a generation. They are committed to a long-term plan to make courts less fair, impartial, and independent. Defenders of the courts need to look beyond the Schiavo battle, and commit to

long-term investments in education designed to protect our system of checks and balances.



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AMERICAN JUDGES ASSOCIATION

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- Board of Governors Meeting
- Luncheon
- Justice-at-Stake Workshop

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Photo by Orrie van der Wal www.vandervall.com

Judges, Law, Politics & Strategy

Frank B. Cross

In law, we commonly presume that judges reach decisions based on legal materials, such as precedents. In political science, researchers typically presume that judges *do not* reach decisions based on such legal materials. They maintain that the apparent reliance on precedent to reach decisions is simply a hoax designed to provide cover for a particular outcome. These researchers traditionally argued that judges reach their personally preferred outcome in the case and then rationalize it after the fact with references to precedent, conveniently supplied them by the attorneys for their preferred side.

Much of the empirical research on judicial decision making has involved the United States Supreme Court. Indeed, there is considerable evidence that Supreme Court justices decide cases differently, for ideological reasons, and do not reliably defer to prior precedents of the Court. For structural reasons, though, the Supreme Court is not a representative sample to study the operation of the law. The Court selects its own cases, and very few of them. These are often the cases where the law does not provide a clear answer, so one cannot look for legal control. Moreover, in its position at the top of the judicial hierarchy, the Supreme Court has no vertically superior precedents it is legally bound to obey.

The lower courts are where the law is found in this nation. They issue vastly more decisions and the appellate courts are often the final arbiters of legal disputes, on the frequent occasions when the Supreme Court does not review their rulings. Political scientists and economists have considered the role of precedent in lower courts. Although loath to accept claims that judges follow precedent because they are supposed to do so, these researchers have argued that lower-court judges do indeed follow precedent, for strategic reasons.

STRATEGY THEORY OF PRECEDENT FOLLOWING

The basic premise of the strategic theory of following precedents is that lower-court judges do not reach their preferred outcomes in cases because of a fear of reversal by a higher court. They compromise their ideological preferences to avoid a reversal, which would of course undo those preferences. In addition, researchers hypothesize that there is some stigma associated with reversal such that judges will shun results that subject them to higher-court reversal.

At the federal-circuit-court level, this hypothesis has facial plausibility problems. The federal circuit courts decide tens of thousands of cases annually, while the Supreme Court now reviews fewer than one hundred cases. If judges are so devoted to their ideological preferences, it makes little sense for them to sacrifice those preferences across the board, when the probability of reversal is so extremely low.

The experience of the Ninth Circuit Court of Appeals illustrates this effect. In 1997, the Supreme Court took 29 cases from the Ninth Circuit and reversed 96% of them, which probably represents a record for the disciplining of a particular circuit

court. Yet the Ninth Circuit decided around eight thousand cases a year, and the Supreme Court let stand 99.7% of the circuit's 1997 decisions. Thus, the circuit had little incentive to modify its decisions to avoid reversal and in fact it did not do so. The Ninth Circuit continued to have a high reversal rate at the Court, typically rendering relatively liberal decisions, a few of which were reversed but most of which stood unreviewed.

Researchers have come up with some clever theories of random auditing that enable the Supreme Court to have influence beyond the few cases it takes. But none of these theories enable a Court deciding so few cases to exercise control over the vast body of circuit court decision making. Moreover, these strategic theories do not truly explain adherence to precedent – they try to explain adherence to contemporaneous Supreme Court preferences. Under the theories, there is little reason for a circuit court to follow a Warren Court precedent, when such an outcome may not be favored by the present makeup of the Supreme Court.

This adherence to current Supreme Court preferences is sometimes called “anticipatory overruling.” This occurs when a lower court believes that the Supreme Court wishes to disregard a past precedent of the Court, and the lower court therefore disregards that precedent in expectation of affirmance. An oft-cited instance of this action is the Fifth Circuit's decision in *Hopwood v. Texas*, which essentially concluded that the *Bakke* decision on affirmative action was no longer the Supreme Court's preference. While one can identify instances of apparent anticipatory overruling, they do not seem frequent. And anticipatory overruling is not adherence to precedent.

ALTERNATIVE THEORY OF PRECEDENT FOLLOWING

The conventional legal theory of precedent following is one of traditional Langdellian formalism. Judges decide cases according to the best application of precedents (and other legal sources such as the Constitution and statutes) to the facts at hand. This traditional theory turns judges into ciphers, acting as “law calculators” to decide cases without individuality personality or preferences. Few scholars in the law or other disciplines believe that judges act in this manner. Indeed, few judges claim to act in this manner. There is ample empirical evidence showing that different judges will reach different decisions in the same case and that this difference can be explained by their apparent ideological preferences. However, the empirical evidence falls far short of demonstrating that individual judicial ideology explains all or even most decisions. The following theory attempts to salvage a kernel of the conventional formalistic theory of judicial decision making, and combine it with judicial ideology.

I begin by suggesting that judges have a preference for following the law. In the language of an economist, judges get utility from adhering to precedent, perhaps because it is considered part of their judicial responsibility. This is not to suggest that judges are either saints or machines who slavishly follow their duty at the expense of all personal predilections. Rather, I sug-

gest only that judges take law adherence seriously enough that it forms part of their decision-making consideration. Richard Posner has suggested an interesting analogy of judging to playing a game. Legal decision making is a rule. Just as a chess player would get little utility from winning a match by cheating on the rules, Posner suggests that a judge would get little utility from reaching a desired outcome by cheating on the law. For my purposes, it is unimportant to identify the reason that judges prefer law or precedent adherence, simply that they do have this preference.

At this point, it is necessary to turn to what it means to follow precedent, which requires a digression into linguistic theory. Those who believe that the law is all political, such as critical legal theorists, argue simply that language is too ambiguous to constrain judges. In the hands of a skilled interpreter, words can be colorably twisted to mean anything. The “Crits” argued that language was radically indeterminate, so that any word could be manipulated to mean anything. This theory of radical indeterminacy has been generally rejected as implausible, but that does not deny the presence of some indeterminacy in language.

Philosophers have devoted much time to exploring the study of language, commonly called hermeneutics. Gadamer is perhaps the leading philosopher in the field and he emphasized the inevitable indeterminacy of language. He stressed that the interpretation of a given text is influenced by the interpreter and his or her own history and context. However, he also noted that there were interpretive communities of individuals with roughly similar histories and contexts who would interpret the same language with great commonality. This latter position suggests that the judiciary might be expected to reach similar interpretations of the same precedent.

There remains the problem of some linguistic indeterminacy, however. A common American interpretive community would not look at the color red and declare it to be blue. Words about colors are not so radically indeterminate. However, consider when that community is presented with a color such as aquamarine or some other intermediate shade. Some interpreters might call this color blue, while others would disagree. The word for the color blue thus has some determinacy and rules out various shades but is not perfectly determinate, defining all the same shades into the set for every individual. Language has an unavoidable fuzziness.

Precedents share this fuzziness of meaning. The words of the precedent have their own uncertain meaning, especially when composed of very broad terms such as “due process.” Moreover, the precedential case was resolved in a particular dispute with particular underlying facts. While it may discuss the importance of various facts to its ruling, the precedent cannot possibly discuss the relevance of every conceivable fact that might subsequently arise. In a later case, with different facts, a judge might reasonably find that the earlier precedent should be distinguished, given the factual differences.

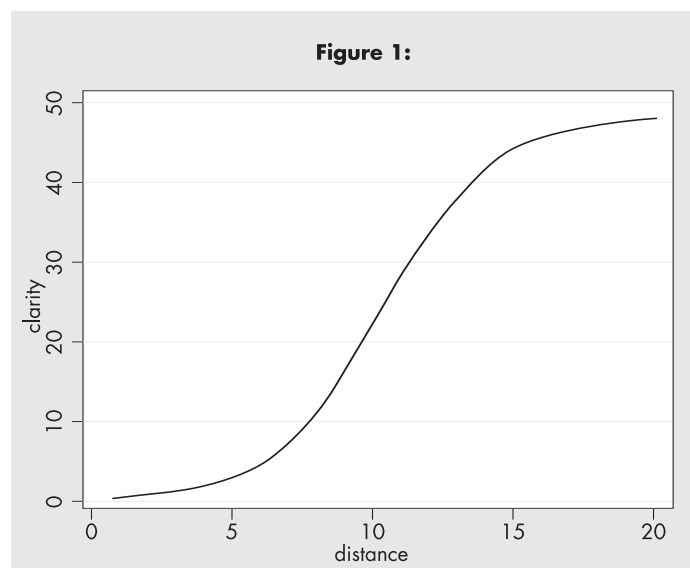
To better understand this fuzziness, one can turn to the science of categorical perception. Much of this science has examined the perception of sounds. For example, the sounds for the letters “b” and “p” are distinct but have an intermediary continuum. A sound can depart from the “ideal b” sound and still be perceived as a “b.” At some point, though, the departure

becomes too great, and the sound is no longer perceived as a “b” but perhaps instead as a “p.” This produces an association that studies of categorical speech perception have characterized as “S-shaped.” This association is depicted below in Figure 1. The analogy to precedent is straightforward. The precedent sets an ideal point for future decisions, but a court may depart somewhat from that ideal point and still be perceived as consistent with precedent. However, once the departure from the ideal point becomes too great, it is no longer perceived as consistent with adherence to precedent. The implications of this association are depicted in the following three figures.

To begin my depiction of the theory of precedent-following, the relevant considerations must be reduced to some quantitative scale, which seems somewhat artificial. However, it is not important that the precise quantification be accurate, so long as the relationships are roughly accurate. Figure 1 is meant to depict the nature of language interpretation as an S-shaped curve. Suppose the best understanding or intended meaning of a precedent is at the far right end of the figure, at the point labeled 20. The horizontal axis is a measure of the distance of a decision from this point 20 and the vertical axis is a measure of how linguistically clear it is that the decision is in fact distant from point 20.

S-CURVE OF LANGUAGE AND PRECEDENT

In this figure, a decision at point 20 is perfectly compliant with precedent, but its linguistic fuzziness means that a decision at point 15 appears to be quite compliant with precedent. However, once one gets much further removed from point 20, the noncompliance with precedent becomes quite clear. At points 5 or 10, it is relatively obvious to the decider that he or she is departing from precedent. If a judge perceives that the intended point of precedent is at 20, he or she would render an opinion based on this perception, and this would represent a



classic legal formalism. However, given the fuzziness of language, a judge might misperceive the precise location of precedent and believe that it was set at point 15.

Next I consider the problem that arises when a judge does not like the outcome dictated by precedent – the issue of interest to researchers of judicial decision making. If a judge ideo-

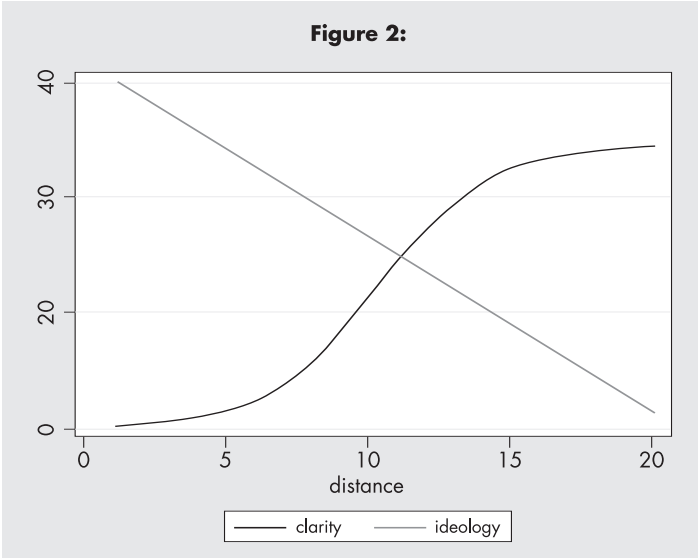
logically agrees with the precedent, one would expect the judge to happily follow it, but this does not display any power of precedent, because the judge would have reached that decision absent precedent. For adherence to precedent to have meaning, it must influence decisions away from those the judge would otherwise prefer to reach.

Figure 2 displays the conflict. Again, we have a precedent set at point 20 but now the deciding judge's ideology lies at point 0, some distance from the precedent. I assume that the more ideologically distant the decision is from the judge's ideology, the less preferred it is. This is depicted by the straight line in Figure 2, which steadily declines as it gets further from 0. This is superimposed on the S-shaped curve of precedent following in Figure 1.

IDEOLOGY IN CONFLICT WITH PRECEDENT

Note that for purposes of this figure, I have assumed that ideology is more important to the judge than is legal-precedent following. The ideological line peaks at point 60, while precedent following gets no higher than point 50. Thus, if given the choice, the judge would prefer to decide ideologically at point 0 than legally at point 20, because 60 > 50.

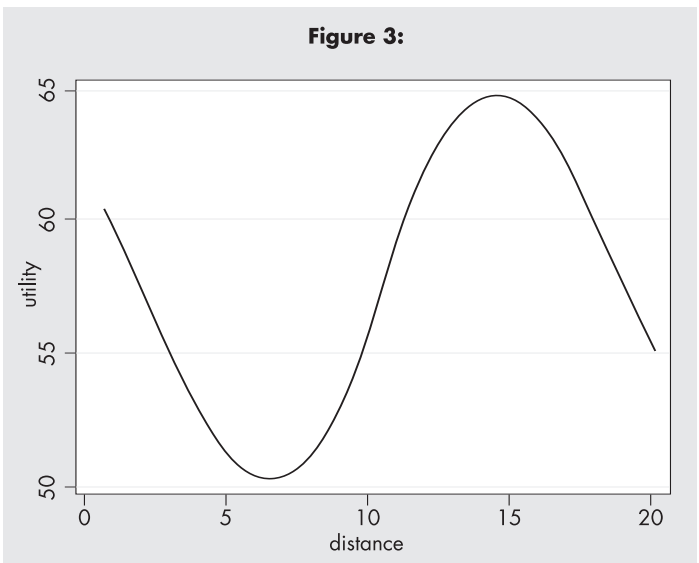
However, this outcome does not follow if one assumes that a judge gets utility from both ideology and law adherence. Thus,



at each point on our distance scale, the judge gets the vertical ideology measure for consistency with ideology and the vertical legal measure for consistency with the law and precedent. Figure 3 displays the results from adding the two measures together from Figure 2. The horizontal axis is again a measure of distance (from precedent and preferred ideology), and the vertical axis is a measure of judicial utility from adding up the legal and ideological measures.

CUMULATIVE IDEOLOGICAL/LEGAL UTILITY

Based on my assumptions, the lower-court judge gains the greatest cumulative ideological/legal utility by deciding the case at around point 15. This provides “pretty good” adherence to precedent (at point 20), allowing some influence from the judge’s personal ideological preferences. This pretty good adherence to precedent occurs even though the individual judge in my hypo-



thetical model places greater relative importance on ideology than adherence to precedent.

In this theory, the closeness of future adherence to precedent may depend on the specificity of that precedent. My S-shaped curve may have different dimensions, with a larger or smaller upper plateau, depending on the clarity of the precedential command. Some precedents, which provide more detailed specificity, may have a smaller upper plateau of linguistic indeterminacy, and they should therefore command a greater degree of adherence from lower courts. However, the effort to produce too much precision could result in inflexible rules that will be disregarded or too easily distinguished away in future decisions.

The judicial ideological influence need not be a conscious one. Psychologists have consistently identified a feature of human nature called motivated reasoning. In this process, individuals analyze available information conditioned on their beliefs. They are more likely to believe information that would support their desired conclusion and disbelieve information inconsistent with that result. Although a judge may be dedicated to producing an opinion that would convince even a dispassionate observer, the factual and legal sources of a decision are filtered through the judge’s preexisting preferences, which influence the outcome.

EMPIRICAL STUDY OF CIRCUIT-COURT DECISIONS

I believe my hypothesis, that judges gain utility from both ideologically consistent decisions and from law adherence is a plausible one, and it is supported by various surveys of circuit-court judges that have been conducted over the years. Like any hypothesis, though, it must be tested for predictive accuracy. Such empirical testing of judicial decision making is imprecise. In contrast to traditional economics, with readily available quantitative measures for GDP and other variables, there are no obvious quantifications for ideology or adherence to precedent.

Most empirical research on judicial decision making has been conducted by political scientists and focused on the role of ideology in decisions, so I use their basic frame and available data. As noted above, the Supreme Court has been extensively studied and justices have been given quantifiable scores for ideology, and research has shown that their decisions conform reasonably well

to those ideological scores. Thus, we have reasonably reliable measures of Court ideological preferences. To provide ideological measures for circuit court judges, I assume that their preferences conform to those of their appointing President (as measured by their ADA ratings). These provide us with measures of ideological preference for the judges.

Providing ideological measures for decisions is even more difficult. There are no grounds for saying that a particular opinion is located at a particular ideological point on our scale (0-20 in the figures). Researchers typically classify these decisions on a binary scale, as either liberal or conservative and have developed rules for this classification. For example, if a decision strikes down an anti-abortion law as unconstitutional, it would be coded as liberal while if it upholds that law it would be coded as conservative. Obviously, the available measures for judicial ideology and decision ideology are only very rough ones. This imprecise specification, though, generally has the statistical effect of obscuring a true association. If an association appears, despite the limitations of the measures, that provides especially strong evidence of its reliability.

To conduct the study, I use the already accepted measures of ideology for the Supreme Court and for circuit court judges. I study decisions using a vast database of thousands of federal circuit court decisions over the years, compiled thanks to a National Science Foundation grant. This database codes the decisions on numerous dimensions, including whether they reach a liberal or conservative outcome.

My study considers the likelihood that a given judge will issue a liberal (or conservative) decision. I have three essential variables to test. The first variable is judicial ideology, measured by the presidential appointment ADA rating discussed above. If this variable is statistically significant, it would show that judicial ideology matters. The second variable is the contemporaneous ideological position of the median Supreme Court justice. This is the “swing voter” on the Court, whose preferences are likely to dictate the outcome of close cases. If this variable is statistically significant, it would provide some evidence of anticipatory overruling, that circuit judges are strategically adapting their decision to the contemporaneous preferences of the Court. However, the contemporaneous preferences of the Court may also reflect the past preferences of the Courts, and hence the content of their decisions and precedents issues. If so, the association might truly reveal adherence to precedent. To control for this effect, I add a third variable for the Supreme Court’s median voter for the prior five years, to reflect the ideological content of recent precedents. If this variable is significant, after controlling for the preferences of the contemporaneous Court, it would suggest that precedent is indeed driving the outcome of circuit court decisions.

I used a procedure known as logistic regression to test the effect of these variables on decisions. There are 20,744 separate votes by circuit court judges in the database, for which all the necessary variable measurements are available. Because some of these cases have relatively little ideological content, I also ran the regression for two subsets of cases. One subset is criminal cases, where a vote for the defendant is considered liberal, for which there were 7,206 judicial votes to be studied. The second subset is civil-rights cases, where a vote for the party representing a minority is considered liberal, for which there were 2,419 judi-

cial votes to be considered. Table 1 reports the results of the regression for each set of cases.

All results were highly statistically significant at the .01 level, for each group of cases. The significant finding was that *Ideology* and *Past Supreme Court Median* were positive, but the current *Supreme Court Median* was actually negative. This is strong evidence against the anticipatory overruling theory but supports the

TABLE 1: LOGIT REGRESSION ON OUTCOME OF CIRCUIT COURT DECISIONS			
	ALL CASES	CRIMINAL CASES	CIVIL-RIGHTS CASES
IDEOLOGY	.05	.05	.07
SUPREME COURT MEDIAN	-.50	-.46	-2.0
PAST SUPREME COURT MEDIAN	.61	.55	1.0

theses that both judicial ideology and precedent are important determinants of the votes of circuit court judges. In a logit regression the size of the number (the coefficient) cannot be directly compared among variables, which also have different scales. Thus, the statistical significance of the findings does not demonstrate the substantive significance of the effect of each of these variables.

The substantive significance of our variables can be measured in a different approach. For this, I considered the effect of moving from the 25th percentile on each scale to the 75th percentile. For example, with *Ideology*, I considered the effect on decisions of moving from the 25th percentile (a relatively conservative judge) to the 75th percentile (a relatively liberal judge). Table 2 displays the effect of this change on the overall votes in the model.

These results mean that a shift from a relatively conservative judge to a relatively liberal judge means that the judge’s vote will be 6.9% more likely to be a liberal one. Both ideology and precedent show an effect. This also enables some comparison of

TABLE 2: SUBSTANTIVE EFFECT SIZES	
	25% → 75%
IDEOLOGY	6.9%
SUPREME COURT MEDIAN	-5.7%
PAST SUPREME COURT MEDIAN	7.4%

effects and indicate that precedent is slightly more significant. The effect sizes are not that great, but this is to be expected, because the case facts are important and cannot be incorporated in the model. In addition, the sizes may be moderated by the inability to provide precise specifications for the variables of ideology and precedent. I suspect that this problem causes a par-

ticular understatement of the precedent variable (because it considers only recent Supreme Court decisions and does not consider other precedents, such as those of the circuit court itself). Moreover, it does not consider other legal factors, such as statutes.

CONCLUSION

Judging, like any human decision making, is a complex process. The efforts of researchers to reduce this process to models is necessarily simplifying and fails to capture the full scope of the decision-making process. However, those models can illuminate key aspects of the process. There is neither sound theoretical reason nor empirical evidence to support contentions that judges engage in much strategic anticipatory overruling. Instead, it appears that judges generally adhere to precedent, albeit with some differences depending upon their personal ideological preferences. The results are consistent with

my hypothesis about the S-shaped curve of adherence to precedent in judicial decision making. The law and precedent do not rigidly bind subsequent judicial decisions, but they do tether them. Judicial discretion, an inevitable consequence of some linguistic indeterminacy, enables small departures from governing precedent, but dramatic disregard of precedent appears to be rare.



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A Profile of Settlement

John Barkai, Elizabeth Kent, and Pamela Martin

Ninety-eight percent of civil cases settle,¹ right? Well, not exactly. Although claims of settlement rates of 90% and above are cited frequently,² settlement rates really are not that high. Many commentators start with an accurate picture of low, single-digit trial rates (typically 2%-3%),³ but then they inappropriately assume the inverse—namely, that all the remaining cases are settled. Commentators ignore the fact that a significant proportion of cases are terminated for reasons other than trial or settlement, and their mistake goes undetected because most state judicial systems do not collect any information about settlements.⁴

On the other hand, other people, speaking more cautiously, say that “most cases”⁵ settle. Is this opinion closer to the mark or does this opinion vastly underestimate the rate of settlement? Knowing which statement about the percentage of settlements is true and knowing the statistics supporting the most accurate statement about settlements should be important information for judges, lawyers, clients, and policy makers. Unfortunately, accurate empirical data about settlement rates does not exist.

Although information about settlement is mainly anecdotal, the information about case filings is available, empirical, and accurate. Over 100 million lawsuits were filed in state and federal courts in the United States in 2003.⁶ However, that figure includes nearly 55 million traffic-court cases. Focusing only on civil cases, there were nonetheless over 17 million civil cases filed in state and federal courts in the United States in 2003, with nearly 8 million⁷ of those cases filed in state courts of general jurisdiction.⁸ Generally, less than 3% of civil cases reach a trial verdict, and less than 1% of all civil dispositions are jury trials,⁹ although rates of non-jury trials can vary significantly across states.¹⁰ Therefore, perhaps up to 97% of cases are resolved by means other than by trial.

The pattern of dispositions and trials in Hawaii courts seems to be very much the same as the national pattern. There were 3,661 civil cases filed in Hawaii circuit courts in 2004-2005. Of the 4,127 cases terminated during that same time period, less than 2% (only 79 cases or 1.91%) reached a trial verdict. Jury trials were extremely rare in Hawaii during this time period. There were only 16 completed¹¹ civil jury trials in

Footnotes

1. See Association of Trial Lawyers of America, *Discovery: Overcoming Obstacles in Getting to the Truth*, 2 ANN. 2004 ATLA-CLE 1425 (2004); David Rosenberg, *Adding a Second Opt-out To Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19; Scot Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 551 (2002); Robert E. Margulies, *How to Win in Mediation*, 218-DEC N.J. LAW. 66 (2002).
2. A Westlaw search found 3 articles that state “97% of cases settle,” 2 articles that state “96% of cases settle,” 20 articles that state “95% of cases settle,” and 53 articles that state “90% of cases settle.” One article even said “99 & 44/100 percent of cases settle.”
3. BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1996: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT, at 11, National Center for State Courts (1997).
4. Recently, the National Center for State Courts suggested that settlement data be collected routinely in all state courts. The National Center for State Courts’ new STATE COURT GUIDE TO STATISTICAL REPORTING (2003), suggests data-collection methods that would result in some limited settlement statistics. The purpose of the new reporting guide is to “provide trial, appellate, and state court administrators with a more accurate picture of court caseloads and workloads,” National Center for State Courts, CASELOAD HIGHLIGHTS, Nov. 2003. This guide suggests that courts use eight categories of non-trial dispositions. The categories include five categories of non-settlement: dismissed Want of Prosecution, Default Judgment, Summary Judgment, Other Dismissal, Transfer to Another Court; as well as three categories of settlement: Without Judicial Action, With Judicial Action, and Alternative Dispute Resolution. *Id.* at 4. Understanding and collecting settlement data, however, will still be complex because the GUIDE suggests counting settlements during jury trials and settlements during non-jury trials as separate categories in the Trial Disposition section of the data under the label of “Disposed After

- Start.” *Id.* at 5. In other words, apparently such settlements made during the course of trial will be counted as “trials.”
5. A Westlaw search found 505 cites stating that “most cases settle.”
6. The civil and criminal caseloads for state courts vastly exceed the caseloads for federal courts. Statistics for 2003 are the most recent statistics available. Over 100 million cases were filed in state courts and over 2 million cases were filed in the federal courts. The state court statistics are from RICHARD Y. SCHAUFFLER, ROBERT C. LAFOUNTAIN, NEAL B. KAUDER & SHAUNA M. STRICKLAND, EXAMINING THE WORK OF STATE COURTS, 2004: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT, National Center for State Courts (2005) [hereinafter EXAMINING THE WORK 2004]. There were approximately 17.1 million civil cases, 20.6 million criminal cases, 5.6 million domestic cases, 2.1 million juvenile cases, and 54.7 million traffic cases filed in the 15,588 state trial courts during 2003. *Id.* The federal court data is available at <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf> (last visited June 3, 2006). There were over 250,000 civil cases, 69,000 criminal cases, 1,780,000 bankruptcy actions, and 940,000 judicial duties before magistrates filed in the federal courts in the 2004 fiscal year. *Id.*
7. *Id.*
8. A general jurisdiction court is the highest trial court in the state and the court where the most serious criminal cases and high-stakes civil cases are handled. National Center for State Courts, CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF THE STATE COURTS, Aug. 1995. In Hawaii, the circuit courts are courts of general jurisdiction.
9. EXAMINING THE WORK 2004, *supra* note 6.
10. EXAMINING THE WORK 2004 reports that 7% of cases were disposed of by non-jury trials in 21 United and General Jurisdiction Trial Courts, including Hawaii. *Supra* note 6, at 22. However, non-jury trial rates vary significantly, from Tennessee with a 17% non-jury trial rate (7 states have non-jury trial rates of 10% or above), to Florida with a 0.5% non-jury trial rate. Hawaii was one of 7 states with a 1% non-jury trial rate. *Id.*

Hawaii Circuit Courts in 2004-2005, which is a jury trial rate of less than 0.4%.¹²

Despite many generalizations about the prevalence of settlement and the growing focus on and use of alternative dispute resolution, empirical research on settlement continues to be very limited.¹³ Therefore, the Center for Alternative Dispute Resolution, a program within the State of Hawaii Judiciary, and the University of Hawaii Law School collaborated to study settlements in civil cases in Hawaii Circuit Courts. We hoped to learn as much as we could about civil litigation in general, civil settlements in particular, and other information that might be helpful in facilitating settlements and making civil case processing more effective.

What happens in the vast majority of civil lawsuits that are not resolved by trial was the subject of our study. The study posed some basic questions about settlement: How many cases settle? What kinds of cases settle? When do cases settle? Why do cases settle? We also wanted to learn more about the length of time cases remained open as well as the type and amount of pretrial discovery. Because excessive cost and delay have long been considered the two primary evils of the civil justice system, any information we could learn about these topics would be helpful. Finally, we also wanted to compile some baseline statistics about litigation in Hawaii that might be helpful in the future for policy makers, both locally and nationally.

METHODOLOGY

Two different data sets were collected to answer our research questions. The first data set was a printout of computerized court docket sheets ("the docket sheet data") of over 3,000 cases terminated during a six-month period in 1996, and the second data set was over 400 surveys of lawyers who represented parties in some of those terminated cases ("the lawyer surveys").¹⁴ We also used the Hawaii Judiciary's own statistical reports in our research.¹⁵

Although a full report of the study is available from the authors and will soon be published in the *Hawaii Bar Journal*, here is a summary of major findings:

The Docket

The Circuit Court civil docket was composed of 36% tort, 31% foreclosure, 16% contract, and 16% "other" cases.

Types of Cases

Tort cases were most likely to settle by a "stipulation for dismissal," had the longest time to disposition, and had the greatest incidence of discovery.

Foreclosure cases were most often terminated by court adjudication with "dismissal by motion" having the shortest median disposition time (160 days), and recorded almost no discovery.

Contract and "other" cases showed more variation in disposition methods, had disposition times much closer to tort cases than to foreclosure cases, and had some discovery.

Filings

Civil filings have decreased substantially over the past few years. In 1982-1983 there were 8,921 civil cases filed; in 2004-2005 there were 3,661 civil cases filed.

Trials

Only 2% of cases ended in a trial verdict during the Hawaii study period. The trial rate is now less than 2%. Jury trials were just slightly more than one-third of 1% for all civil cases terminated in 2004-2005, and the jury trial rate has been less than 1% since 1987. Nationally, there are reports of the "Vanishing Trial Phenomenon" and research shows that over the past 40 years not only that the trial rate has fallen, but also that the absolute number of trials has decreased in federal court even though filings have increased five-fold.

The trial rate in Hawaii is lower than the national average.

Settlement

The pattern of dispositions and actions taken on individual cases varies significantly across the variety of types of civil cases that comprise the civil docket.

Although "most cases settle," the percentage of cases that settle varies dramatically by the type of case. About 84% of tort, 45% of contract, 20% of foreclosure, and 51% of "other" cases settle. Contrary to the popular saying, nowhere near 90% or more of cases settle (although torts come close).

While the data confirm that "most cases settle," they also identify a substantial group of cases that neither go to trial nor settle. By subtracting trials and settlement from total terminations, we conclude that 14% of tort, 53% of contract, 78% of foreclosure, and 47% of "other" cases terminate under conditions other than settlement or trial.

11. Some additional jury trials are started but not completed. For example, in 2003-2004 there were 8 civil jury trials started but not completed. We assume that most of these cases ended in settlements, but we did not research that question.

12. 2005 ANNUAL REPORT, STATISTICAL SUPPLEMENT, THE JUDICIARY, STATE OF HAWAII, Table 7 at <http://www.courts.state.hi.us/attachment/4D44FE74F4DF1267F34A9452DD/2005arstatsupp.pdf> (last visited June 3, 2006). A number of trials are started but never completed. We believe that most of those are settled during trial. The court statistics report both completed and non-completed trials. When we refer to trials, we mean completed trials.

13. Two studies that have researched settlement are Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70

JUDICATURE 161, 163 (1986) and Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253 (1997).

14. For a complete copy of the study, please e-mail Professor Barkai at barkai@hawaii.edu.

15. The most current report is available online at <http://www.courts.state.hi.us/attachment/4D44FE74F4DF1267F34A9452DD/2005arstatsupp.pdf> (last visited June 3, 2006).

The term "judicial assistance" was not defined in the survey and therefore the interpretation of judicial assistance by lawyers may vary across responses (for example, assistance by the judicial system as opposed to assistance by the judge).

Stipulation for Dismissal was the most common method of termination (44% of the cases), a method of termination the authors believe indicates a settlement. Termination by Motion was the most common non-settlement method of termination (17% of the cases).

Satisfaction with Settlements

The vast majority of lawyers were satisfied with both their settlement terms (92%) and the settlement process (91%).

Types of Negotiation

Five types of negotiations were identified: face-to-face negotiation between attorneys, face-to-face negotiation with attorneys and parties, telephone negotiation between attorneys, letter/fax negotiation between attorneys, and communication with insurance agents.

79% of the cases used 2 or more types of negotiations.

Telephone negotiations were the single most common type of negotiation, occurring in 80% of the cases surveyed.

Telephone, letter/fax, and face-to-face negotiations took place in almost 50% or more of the cases: telephone (80%), letter/fax (57%), and face-to-face (49%).

The lawyers rated telephone negotiations as the event with the most impact on settlement. Therefore, telephone negotiations not only occurred most frequently, but also were viewed as the most effective event in the settlement of cases.

ADR

42% of the cases used some form of ADR process (defined as settlement conference, court-annexed arbitration program (CAAP), binding arbitration, and mediation).

Three ADR events—binding arbitration, court-annexed arbitration, and settlement conferences—had the greatest impact in the cases where they occurred.

Events Impacting Settlement

Certain events occurred in many cases contributing greatly to settlement in various types of cases. For example, CAAP was used almost exclusively in tort cases and was the event having the second largest contribution to settlement after telephone negotiations. Communication with insurance agents was a major factor in the settlement of tort cases, but not in contract cases. Motions for summary judgment had a greater impact on the settlement of contract cases than on tort cases.

Based upon the data collected, one could not predict whether a case will settle or not based upon the events that took place in the case. In other words, settlements and non-settlements looked alike.

Judicial Assistance

Less than one-quarter of the cases are settled with judicial assistance.

Three-quarters of lawyers indicated that they did not need more judicial assistance in settlement.

Lawyers believed that having more efficient and earlier judicial involvement would have made their case settle earlier.

All types of cases had shorter median times to disposition when settlements were reached with judicial assistance.

Judicial assistance with settlement negotiations resulted in

shorter times to disposition of a case only when cases were open more than one year.

When judicial assistance occurred, it was ranked highly and frequently as the event having the greatest impact on settlement.

Disposition Time

The average disposition time from filing until final disposition in the circuit court was 433 days (the median was 308—but that included 36% foreclosure cases).

Tort cases had an average disposition time of 540 days (the median was 445 days).

Contract cases had an average disposition time of 504 days (the median was 360 days).

Tort cases that had a CAAP award and then later settled after the case returned to the trial track had a median disposition time of 707 days, compared to 405 days for cases where the award was accepted and 445 days for all cases. In the cases where the CAAP awards were not accepted, ADR might have contributed to the delay in disposition (contrary to ADR's generally positive benefits).

The vast majority of cases (80%) do not “settle on the courthouse steps;” they terminate more than 30 days before trial.

Pretrial Discovery

Two-thirds of all civil cases had no recorded discovery requests, and 65% of tort cases did have recorded discovery requests.

Not surprisingly, there was more discovery in cases that ended in trials than in other cases.

Lawyers estimated that if their case had gone to trial, they would have needed to take 2 to 3 times the number of depositions they took in cases that settled.

Demographics

The average lawyer on the surveyed cases had been practicing law for 15 years.

75% of the lawyers had served as a CAAP arbitrator.

35% of the lawyers had not taken a negotiation or ADR class.

Readers of this publication might be particularly interested in more detailed information from our survey about judicial settlement conferences and forms of settlement.

SETTLEMENT CONFERENCES

Because judicial settlement conferences are thought to be very helpful in aiding settlement, we designed a survey to learn about the use and effectiveness of settlement conferences. Lawyers were asked if the negotiated settlement was reached with or without judicial assistance. As Table 1 indicates, slightly less than one-quarter (23%) of respondents indicated that their case was settled with some judicial assistance, and three-quarters (75%) of respondents who settled reached a negotiated settlement without judicial assistance. Our data did not show how many cases had judicial assistance but did not settle. More contract cases (32%) settled with judicial assistance than non-motor-vehicle torts cases (24%) or motor-vehicle torts cases (18%).

We hypothesized that appearing before a judge would assist

with the settlement process. Therefore, the survey inquired about the total number of appearances before a judge, including motions, pretrial conferences, and settlement conferences. Predictably, cases that settled with judicial assistance had more

TABLE 1 SETTLED WITH OR WITHOUT JUDICIAL ASSISTANCE				
SETTLED	ALL CASES (N=341)	CONTRACT (N=99)	NON-MOTOR VEHICLE TORTS (N=81)	MOTOR VEHICLE TORTS (N=161)
WITH JUDICIAL ASSISTANCE	23%	32%	24%	18%
WITHOUT JUDICIAL ASSISTANCE	75%	67%	74%	80%
NO INDICATION	2%	1%	2%	2%

appearances before a judge than those cases that settled without judicial assistance.

Settlements that lawyers did not attribute to judicial assistance did not report as many appearances in court. As seen in Table 2, cases that settled with judicial assistance averaged 3.5 appearances for contract cases, slightly over two appearances (2.2) for motor-vehicle torts, and just over four appearances (4.1) for non-motor-vehicle torts. Those cases that settled without judicial assistance averaged just over one (1.1) appearance for contract cases, not even one appearance (0.4) for motor-vehicle torts, and not even one appearance (0.6) for non-motor-vehicle torts. Table 2 also indicates that cases that settled with judicial assistance had more than three times as many appearances before a judge than did those cases that settled without judicial assistance.

TABLE 2 AVERAGE NUMBER OF APPEARANCES IN FRONT OF A JUDGE BY RESPONDENTS REPORTING NEGOTIATED SETTLEMENTS			
	CONTRACT	MOTOR VEHICLE TORTS	NON-MOTOR VEHICLE TORTS
WITH JUDICIAL ASSISTANCE (N=80)	3.5	2.2	4.1
WITHOUT JUDICIAL ASSISTANCE (N=225)	1.1	0.4	0.6

The lack of appearances before a judge did not appear to bother lawyers. When lawyers were asked about their preferences for judicial involvement, more than three-fourths (77%) of responses indicated that the settlement process was appropriate and that no change was preferred. Additionally, in response to an open-ended question asking what could have been done to settle the case earlier, 59% of lawyers offered no response.

On the other hand, of those lawyers who provided a response to the question, “Is there anything that would have made this case settle earlier?” the most common suggestions were focused on having more efficient and earlier judicial involvement. It is almost as if the lawyers wanted it both ways.

They indicated that they did not need any change in judicial involvement, yet many lawyers would have preferred earlier and more efficient judicial involvement.

FACTORS IN SETTLEMENT

Because we sought to learn as much as possible about the factors affecting settlement, the longest question in the survey asked the lawyers to report on and rank the impact of methods of negotiation, meetings with and hearings before judges, and the use of ADR processes. This question provided a wealth of information to analyze. We provided a list of eleven specific events and offered one additional choice listed as “other.” The lawyers were asked to check all of the listed events that occurred and then to indicate which of the various events had the most impact on settlement by indicating the top three events as 1, 2, and 3.

The 11 events we examined can be arranged into three major groupings:

- 1) methods of negotiation (face-to-face negotiation between attorneys, face-to-face negotiation with attorneys and parties, telephone negotiation between attorneys, letter/fax negotiation between attorneys, and communication with insurance agents),
- 2) meetings with and hearings before judges (motion for summary judgment, pretrial conference, and judicial settlement conference), and
- 3) various ADR processes (judicial settlement conference,¹⁶ court-annexed arbitration (CAAP) decision, binding arbitration, and mediation).

We analyzed the data in many different ways. Table 3 shows some of the most important data. It should be no surprise that the most frequently occurring events affecting settlement were various types of negotiation (face-to-face negotiation between attorneys, face-to-face negotiation with attorneys and parties, telephone negotiation between attorneys, letter/fax negotiation between attorneys, and communication with insurance agents). As Table 3 indicates, four types of negotiation were the most frequently occurring events. Telephone negotiations between the lawyers representing the opposing parties occurred in 80% of the cases, and were thus by far the most frequently occurring of all the events. Letter or fax negotiations took place in 57% of the cases, and face-to-face negotiations between lawyers took place in 49% of the cases. Each of these “big three” types of negotiation took place in almost 50% or more of the cases. The second tier of settlement affecting events took place in about 25% of the cases (communication with insurance agents 27%, court-annexed arbitration 24%, and judicial settlement conferences 22%). This second tier included two ADR events (CAAP and settlement conferences). The remaining five events took place in anywhere from 17% to just 1% of all cases. At the bottom of this third tier were the two traditional ADR processes, mediation and binding arbitration.

16. Although judicial settlement conferences only appeared one time in the survey, judicial settlement conferences can fit in two categories: meetings with judges and ADR processes.

TABLE 3
EVENTS THAT OCCURRED, EVENTS THAT WERE RANKED 1-3, AND EVENTS THAT RANKED #1

	OCCURRED N=380	% OCCURRED	RANKED 1-3 N=230	% RANK 1-3	RANKED #1 N=230	% RANK #1
TELEPHONE NEGOTIATION BETWEEN LAWYERS	304	80%	175	76%	74	32%
LETTER/FAX NEGOTIATION BETWEEN LAWYERS	215	57%	118	51%	16	7%
FACE-TO-FACE NEGOTIATION WITH LAWYERS	187	49%	93	40%	32%	14%
COMMUNICATION WITH INSURANCE AGENTS	101	27%	55	24%	28	12%
COURT-ANNEXED ARBITRATION (CAAP)	92	24%	49	21%	34	15%
JUDICIAL SETTLEMENT CONFERENCE	84	22%	45	20%	27	12%
FACE-TO-FACE NEGOTIATION WITH LAWYERS AND PARTIES	65	17%	38	17%	19	8%
MOTION FOR SUMMARY JUDGEMENT	53	14%	22	10%	12	5%
PRETRIAL CONFERENCE	37	10%	15	7%	2	1%
MEDIATION	15	4%	6	3%	4	2%
BINDING ARBITRATION	2	1%	2	1%	2	1%

Table 3 also shows that when the lawyers ranked the three events having the greatest impact on settlement in their cases, the order of the events were exactly the same as the order of the events when the lawyers just indicated the occurrence of the events. Telephone negotiations remained the top-ranked event, and the ADR processes of mediation and binding arbitration were again at the bottom of the list. Naturally, the percentages for being ranked 1-3 were slightly lower than the percentages when we just analyzed occurrences because some of the events were not ranked as one of the top three events in some cases.

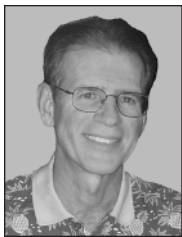
Table 3 shows that a slightly different pattern emerged when we analyzed which events were ranked as the number one event in the settlement of the cases, a measurement which we called “impact.” Telephone negotiations between lawyers remains the event with the greatest impact on settlement. With 32% of the cases indicating telephone negotiations was the event with the greatest impact, it has 2 to nearly 3 times more impact than its closest competitors (court-annexed arbitration 15%, face-to-face negotiations between lawyers 14%, settlement conferences 12%, and communication with insurance agents 12%). Court-annexed arbitration, the event with the second highest impact (15%), really has an even greater impact because this non-binding form of arbitration is only available in tort cases. CAAP would be ranked number one in 20% of the 172 tort cases we surveyed if we excluded the contract cases. The greatest change between the rankings as we move the analysis from occurrences, to ranking events 1-3, to number one rankings, is that letter/fax negotiation goes from the event occurring second most frequently (57%) and being ranked 1-3 second most frequently (51%), to being the number one event in settlement only 7% of the time. Mediation, arbitration, and pretrial conferences are at the very bottom of the list of events,

ranked number 1 at only 1-2%.

Yet another way to look at the events is not to just see what events are ranked as number one, but to analyze how often an event is ranked number one compared to the number of times that event was ranked at all. We called this the “Impact Percentage.” Using this approach, the ADR events dramatically rise to the top. Arbitration has a 100% Impact Percentage (admittedly it is a very small sample size of only 2), and court-annexed arbitration, mediation, and settlement conferences all have an Impact Percentages of 60% or over (they were ranked number one in 60 or more percent of the cases in which they were ranked).

The data also show that different events had widely varying impacts with different types of cases. For example, court-annexed arbitration was the number one event contributing to settlement in 18% of all tort cases but in only 1% of contract cases. Communication with insurance agents was the number one event contributing to settlement in 14% of all tort cases but in only 3% of contract cases. Motions for summary judgment were the number one event contributing to settlement in 14% of contract cases but in only 2% of all tort cases. The other events were roughly comparable across both contract and all tort cases, and the events were ranked quite similarly across motor-vehicle and non-motor-vehicle cases.

This study was designed to learn more about settlements in general and the civil docket in particular. It confirmed many common beliefs about civil litigation and settlement, and it also revealed many surprises. Because settlement is such an extensive part of civil litigation, and because of the increasing use of ADR, settlement needs greater study and quantitative analysis. Even in the twenty-first century, the study of settlements is in its infancy.



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Elizabeth Kent has been the Director of the Hawaii State Judiciary's Center for Alternative Dispute Resolution since 1996 (she took an 18-month leave of absence to work as the Deputy Director of the Department of Human Services). Kent graduated from the William S. Richardson School of Law in 1985, and then worked as a law clerk at the United States Court of Appeals for the Second Circuit, as a staff attorney at the United States Court of Appeals for the Ninth Circuit, and as an associate at

Paul, Johnson, Park & Niles. She taught business law at the University of Hawaii at the graduate and undergraduate levels for six years. Kent is one of Hawaii's commissioners to the National Conference of Commissioners on Uniform State Laws, on the drafting committee for the Uniform Mediation Act, a mediator for the Mediation Center of the Pacific, Inc. (a community mediation center), an arbitrator in the Court Annexed Arbitration Program, and a panel member on the Medical Claims Conciliation Panel.



Pamela Martin has previously worked as a research analyst with the State of Hawaii Judiciary's Center for Alternative Dispute Resolution and administered the Appellate Conference Program, a mediation program for cases on appeal. She is currently Administrator of the Wage Standards Division in the Hawaii Department of Labor and Industrial Relations. She is a graduate of the William S. Richardson School of Law and has taught at the Hawaii Pacific University's Master of Business Administration Program and the University of Hawaii's Master of Public Administration. She has been an active mediator for the Mediation Center of the Pacific for more than 15 years.

E-Courts:

The Times They Are A-Changin’

James E. McMillan

The title obviously comes from Bob Dylan’s classic song from 1964. That song captured the spirit of the times and again, in a small way, captures ours as well. This year’s upcoming E-Courts Conference (www.e-courts.org) in December will highlight both the changes that computers have brought to court operations and where things are going in the future.

Court operations have been impacted over the past decade with the implementation of electronic court document filing (aka E-filing). This year the U.S. federal courts will have electronic filing available in nearly all district and bankruptcy courts. We have seen that not as many court staff are needed to perform filing and case-processing procedures, and the staff working with the information have greater capabilities since they are working with the information rather than shuffling paper.

Security of court information has also been impacted by E-filing since it can be accessed literally worldwide as well as copied to multiple distant computer servers so that if a courthouse is physically destroyed, the information is safe. The 9-11 attack in New York City proved the security of electronic court information because many law firms housed in the World Trade Center asked the federal bankruptcy and district courts in New York City to use their electronic archives to help to rebuild their files. The federal courts store their E-filing information in multiple computer servers throughout the country, making it virtually impossible to destroy.

But the E-Courts Conference and concept is about much more than current technology. It is about taking advantage of the “digital opportunity” that continually presents itself. I believe that there is a radical change about to occur in how court automation systems will work, and how these systems will connect with one another. Technology advances have provided a new foundation that is significantly different than what we had to work with in the past. This article will list a few of these technology advances and why they will affect the way that court and legal automation systems will be built.

NEW DATABASES AND SMART DOCUMENTS

What could be more boring than a discussion of computer database technology? Apologies, but first, what is a computer database you might ask? It is simply the software that stores and controls data. Yet, there is big news here for legal processes now that databases can contain and search both data stored in fields and documents. You know what field data are from the process of selecting a date when making an airline or hotel reservation via the Internet. The field data pops up to display a list of possible

dates for that month. But document data are different. Traditionally one had to apply Google-like text searches to find data in documents. Lawyers who live with Lexis and Westlaw know how this works. But the advent of XML (eXtensible Markup Language), including the “Office Open XML” document format being standardized for word-processing documents with the support of Microsoft, will make it possible to create document templates that “mark” or identify data within the pleading, form, or notice. And so when a search is performed by the database, it can query both the data and document information. Since we live and breathe documents in the legal system, this is a significant sea change.

But what this change really means is that the ability to extend data capture is no longer the sole province of the computer programmer. It will now be possible for lawyers, judges, and court staff to extend the database by tagging information in documents. Thus, when some legislature thinks that it is a good idea to track some obscure piece of information, a form can be created by the court staff to do that function without waiting months for the database to be changed. As a result, the court case management database can focus on helping the courts process data, and the new smart documents can focus on helping judges and attorneys to present and make decisions.

SECURE AND VERIFIABLE DOCUMENTS

Last year I wrote a paper titled the “Verification, Validation, and Authentication of Electronic Documents in Courts: How Digital Rights Management Technology Will Change the Way We Work.”¹ The paper explored the concept that Digital Rights Management (DRM) software could be very useful to the legal system in that it both protects and verifies digital content such as documents. This is in diametric opposition to the popular view that DRM technology is inherently bad.² The current legal system is based on the anachronism of physical possession of documents and the concept of a paper “original,” verified with a signature and file stamps. When I visit the courts in Europe, I particularly enjoy viewing the file-stamp images that populate legal documents “verifying” that this person or that department has done something with a particular piece of paper. Today’s reality is that any piece of paper can be copied, manipulated, reprinted, and passed off as an original with current scanning, imaging software, and high-quality color printers. Therefore, I believe that any document produced by the legal system must use an “out of band” verification system, such as the ability to view a copy of the document online or, better yet, be verified with a digital sig-

Footnotes

1. The complete paper can be downloaded from: http://www.ncsconline.org/d_tech/courttechbulletin/Uploads/drm-whitepaper-v3.5.pdf

2. See Steve Gilmore’s interview in *InfoWorld* magazine of John Perry Barlow on one viewpoint of this issue at: http://www.infoworld.com/article/03/01/24/030124hnbbarlow_1.html

nature using DRM technology. The digital signature controls whether the document is from a trusted source like the court and whether they are allowed to view and/or print the document. This enhances privacy of an individual's information and makes its controllable in the worldwide electronic world. The E-Courts Conference will contain several sessions that will focus on this issue.

STANDARDIZED COMMUNICATING SYSTEMS

Similar to the telephone and electrical systems of a century ago and railroads even earlier, current court and legal computer systems are extremely difficult to connect with one another. This is because, despite more than 40 years of work, there have been no standards on how to accomplish this. Hopefully, there is considerable work being led by the U.S. Department of Justice Bureau of Justice Assistance through their Global Justice XML Data Model (GJXDM) Projects. GJXDM, as you can see, applies XML and what is known as web-services technology to connect justice systems with one another. The National Center for State Courts has been involved in the creation of the E-Filing 3.0 standard, the creation of a number of GJXDM message standards for warrants, protection orders, and sentencing information. In addition, a current project is to create a test registry/repository system that in the future courts may connect to via the Internet; it would serve as both an electronic library for standards and a continual resource for software using the standards. A number of sessions at the conference will describe how this technology will be used by courts and the legal system to set standards so that connections can be made.

THE BOTTOM LINE

Technology in the courts and the legal and justice systems is not being designed and implemented for the sake of technology. Rather it is being used to solve real problems of improving information for the decision makers so that services to the citizen can be improved and justice done for all. The upcoming E-Courts 2006 conference is another in a long series of stops the community takes in our journey to the electronic court of the future. The discussion will continue next year at CTC10 (www.ctc10.org), set for October 2-4, 2007 in Tampa, Florida.



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Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.



The Resource Page



WEBSITES

Justice at Stake Campaign

www.justiceatstake.org

The Justice at Stake Campaign is a national, nonpartisan campaign to keep courts fair and impartial. It is supported by a number of partner groups, including the American Judges Association, the American Bar Association, the National Center for State Courts, the American Judicature Society, and about 40 other organizations. The website is regularly updated and currently includes commentaries and reactions to the 2006 election results related to the judiciary. If you're looking for talking points for a presentation to a civic group, this would be a good place to check.

National Ad Hoc Advisory Committee on Judicial Campaign Conduct

www.judicialcampaignconduct.org

Established by the National Center for State Courts, this site includes a 50-page handbook on setting up an effective judicial campaign conduct committee. Such committees, composed of lawyers and lay members, educate judges and candidates about ethical campaign conduct, encourage appropriate campaign conduct, and publicly criticize inappropriate conduct when it cannot otherwise be resolved. Included on the site are references to key court decisions on proper campaign conduct and a list of campaign conduct committees currently in existence.

ABA Standing Committee on Judicial Independence

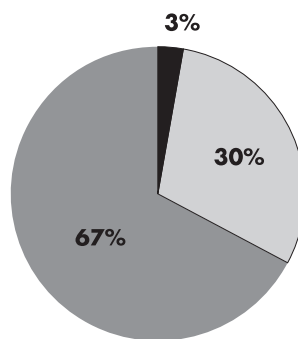
www.abanet.org/judind/home.html

The American Bar Association's Standing Committee on Judicial Independence includes an online "Resource Kit" with a variety of materials that could be used in crafting a civic club or school presentation.

A SNAPSHOT OF PUBLIC OPINION: 2006

SHOULD ELECTED OFFICIALS HAVE MORE CONTROL OVER JUDGES?

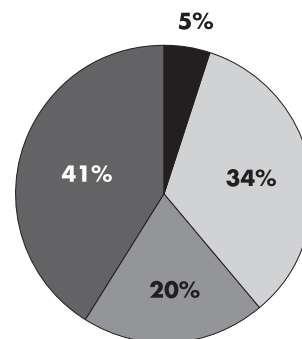
More control No more control
No opinion



Do you think elected officials should have more control over federal judges and the decisions they make in court cases, or don't you think so?

ARE FEDERAL JUDGES TOO CONSERVATIVE OR TOO LIBERAL?

Too Liberal Too Conservative
About right No opinion



In general, do you think federal court judges are too liberal, too conservative or just about right?

Source: Survey by Opinion Research Corp. for CNN, Oct. 2006. (N=1,013; margin of error 3%.)

CONFIDENCE IN AMERICAN INSTITUTIONS

	A Great Deal	Quite a Lot	Some	Very Little	None (vol.)	Unsure
	%	%	%	%	%	%
The military	41	32	19	5	1	1
The police	25	33	29	10	2	1
The church or organized religion	28	24	26	19	2	1
Banks	18	31	39	10	—	1
The U.S. Supreme Court	14	26	41	15	1	3
The medical system	14	24	36	22	2	1
Public schools	15	22	36	23	2	2
The presidency	15	18	25	36	4	1
Television news	12	19	40	25	3	1
Newspapers	12	18	40	25	2	2
The criminal justice system	9	16	43	28	3	1
Organized labor	9	15	43	26	2	6
Congress	5	14	44	32	3	2
Big business	6	12	40	36	4	2
Health maintenance organizations, HMOs	6	9	40	33	5	6

Question: I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one: a great deal, quite a lot, some, or very little.

Source: Gallup Poll, June 2006, reported in Polling Report.com. (N=1,002; margin of error 3%.)