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EDITOR’S NOTE

The National Forum on Judicial Independence, convened by the American Judges Association in October 2004 in San Francisco, forms the basis for this special issue of Court Review. The Forum, conceived by AJA’s then-president Mike McAdam, sought to provide both a review of current threats to judicial independence and of actions judges can take to preserve it. In addition, while judicial independence is often discussed in an abstract way, the Forum emphasized its importance at the trial-court level.

I hope you will take some time to review the Forum sessions, reprinted in this issue. Speakers included one of the nation’s top experts on judicial elections, Roy Schotland, a public-opinion expert who advises groups like the ACLE, John Russonello, both the chief justice and the administrative director of the California courts, Ronald M. George and Bill Vickrey, and judges from throughout the United States. At day’s end, one of the attending judges said (see page 52), “I’m fired up and I’m excited from today’s forum.” I think you’ll find the discussions inspiring and interesting as well.

There are a great number of people and organizations to whom we express the thanks of the American Judges Association for their help with the Forum:

- The Joyce Foundation, which provided generous financial support. We thank Larry Hansen for his support and confidence in this project.
- All of those involved with the one-hour PBS program, Inside the Law, filmed at the conference: Associated Broadcast Consultants, Inc., and its producer, Gary Nenner, associate producer and editor, Melissa B. Butler, and host, Jack Ford.
- The California state courts, which, in addition to the presence of the chief justice and administrative director of the court system, provided invaluable logistic and other support through Bill Vickrey and his staff.
- The American Judges Foundation, which also provided financial support for the Forum.

For our Canadian readers, I recognize that this issue is predominantly about legal issues in the United States. I can tell you that the Canadian AJA members in attendance at the Forum did find the discussions there of interest. To the extent that there are materials you’d like to see in Court Review that would be of specific interest to you, though, please let me know.

In addition to the Forum proceedings, we have two other items of interest in this issue. First, we have our standard Resource Page on the last page of the issue, with some brief items of interest to judges. Second, we reprint excerpts from a recent decision of the United States Court of Appeals for the Eight Circuit (see page 68) that may have a great impact on the way judicial election campaigns are conducted in the United States.—SL
President's Column

Gayle A. Nachtigal

Over their lifetime, most citizens will never see the inside of a jail or be a participant in a criminal trial. They may come to the courthouse for traffic violations and for domestic relations cases, to pay property taxes, deal with landlord-tenant matters, or obtain documents for other events in their lives. As a result, their understanding and appreciation for the judicial system must be gathered from other sources. We must provide accurate information.

Citizens receive information about the judicial system from the media, particularly television. Television cases are resolved in approximately 22 minutes; on at least one show, that includes the commission and investigation of the crime, as well as the trial itself. Important legal rulings are made in the hallways, elevators, getting into or out of vehicles or in chambers. There is no record made of the proceedings and usually only the judge and the attorneys are present. I don't know about you, but I have yet to make an important legal ruling off the record and while I was getting into my car in the county parking lot. Television trials have only two or three witnesses a side and they are asked only a few extremely well-crafted questions. Closing arguments are beyond succinct—beautifully and flawlessly delivered by each attorney. When something goes “wrong” in a case, it is usually the fault of dishonest police officer, a bad lawyer, or incompetent judge. Certainly these are not average trials in Washington County, Oregon, yet this is the nightly view of trials, lawyers, judges, and courts.

Over time these powerful images develop into opinions about the judicial system, the third coequal branch of our government. Polls indicate that the legal profession is not held in the highest regard. There is a growing lack of faith in the judicial system, which I believe to be a new trend. If the judicial system really operated as it is portrayed, I would not have much faith in it either. I believe the growing public opinion is incorrect and must be changed.

Civics lessons on the importance of the judicial system in preserving the rule of law must be re-taught. And who better to begin the lesson than judges. If we do not correct the picture, who will? As “The Voice of the Judiciary,” the AJA has begun the process by its participation in the National Forum on Judicial Independence that makes up the pages of this special issue of Court Review and the taping of an edition of the PBS program Inside the Law. The program has aired on PBS stations throughout the United States since 2005.

As judges, we are neutral and approach each case without a preconceived position for either side of the legal question being presented. We are bound by precedent and must apply laws that are constitutional, even if we personally did not vote for them or believe they are the best way to resolve an issue. This does not mean that we cannot speak out about the role and the importance of the judicial system. Basic civics is not off limits. What is the role of a judge? Just what is the job of the judicial system in our society and why is it important in preserving the rule of law? These are all topics I believe we as judges must discuss with our local service groups, civic associations, and schools. The people we serve must understand why they should care and what might occur if they don’t.

Writing is not my strongest asset. I was a trial lawyer. I am a trial judge. In Oregon, we have a unified trial bench, causing me to handle traffic cases one day, followed by a civil or domestic relations matter, followed by a capital murder case. On the average day I have contact with many people. Like you, the vast majority of my in-court time is spent with a very small percentage of the overall population of my county. The vast majority of my time—and that of my fellow judges—is spent on the criminal-justice side of the judicial ledger.

I encourage each one of you to take an opportunity to talk to a school group, civic organization, or local service group. Law Day is an easy day to start, but why wait? Speak at your local civic groups about the rule of law and its importance in their lives. Take the time to have a school group visit the courthouse and sit in on part of a trial or hearing. Yes, you have to be careful of the trial subject matter and sometimes they wiggle just a little and make a little more noise than we typically allow, but the chance to teach something of value should not be missed. Take the time to answer some of their questions. I have received some of the best questions from third-grade students eager to learn something new. Be “The Voice of the Judiciary” in your community or others will be it for us.

I have been a member of the AJA since 1992. I attended my first annual meeting in Maui and I have not missed an annual or midyear meeting since. Every year has been a great experience in education, networking, and social events. During each education session, I learned something new and useful. After every meeting I brought back information to my county to better serve the people of my judicial district. Without a doubt, however, the 2004 annual meeting in San Francisco was the best educational experience of them all. The programs on judicial independence (excerpted in this issue), the Médgar Evers case, First Amendment and media issues for judges, bias in the courtroom, elder abuse, judicial leadership, problem-solving courts, interstate compacts, and Professor Whitebread’s annual review of the opinions of the Supreme Court all were excellent and very well attended. Programs such as these prepare us to become “The Voice of the Judiciary.”
Working on the Components of Judicial Independence

Ronald M. George

Editor's Note: California Supreme Court Chief Justice Ronald M. George presented the keynote address at the October 2004 National Forum on Judicial Independence. We reprint his remarks here.

Courts have often been cited as the weakest of the three branches of government. I do not necessarily agree with that assessment, but increasingly courts are realizing that that does not, in any event, mean they can or should remain silent or passive and allow our sister branches to determine our fate. Court governance and leadership, eliminating bias, improving access, and judicial independence are critical areas upon which we all must focus. They are necessary factors not only in preserving the strength of the judicial branch in our state and federal governmental structures, but also in ensuring that our nation continues at every level to be governed by the rule of law.

The significance of the traditional notion of judicial independence has been highlighted by a number of recent trends. Lately, many of us have come to realize with more and more force that judicial independence, deeply ingrained though it is in our national and local cultures, cannot ever be taken for granted.

There is continuing uncertainty surrounding permissible judicial speech following the U.S. Supreme Court's decision in Republican Party of Minnesota v. White. The increasing politicization of judicial selections—whether by election or appointment—at the national and state levels has profound implications for the administration of justice and the counter-majoritarian role of the courts. Legislative decisions on court funding made in response to unpopular decisions, partisan interpretations of decisions based purely on results, and threats of recall and opposition are heard with dismaying regularity. Some of you probably saw an article in the New York Times yesterday that served as a timely reminder of the increasingly political nature of judicial elections.

We in California have no magic bullet to solve the difficult question of preserving judicial independence, but we have taken a wide variety of approaches in this endeavor. You may find them of interest in your home jurisdictions, so I will dwell on some of these by way of sharing our experience with you. Moreover, as the immediate past president of the Conference of Chief Justices, I can assure you that the chief justices in your states, by and large, also are deeply committed to taking steps to preserve judicial independence.

We in California have focused on two components we consider essential to judicial independence. The first is the very essence of the judicial function: independence and fairness in decision making. Courts, in order to fulfill their constitutional obligations, of course must be free to decide cases based upon their merits. The goal of the judicial branch is to uphold and enhance the rule of law while—unlike the representative branches of government—remaining unswayed by personal preferences or the latest opinion polls.

Courts, of course, must rely on the trust and confidence of the public we serve. As Chief Justice of California, I chair the Judicial Council, the constitutionally created entity charged with setting statewide policy for California’s judicial system. Among our major goals have been ensuring access and fairness and strengthening and preserving the independence of the judicial branch. To that end, we have undertaken a wide variety of educational and informational programs aimed at both those who work in the courts and those who are served by the courts. Eliminating bias is a subject integrated into the core curriculum of the California Center for Judicial Education, our premier provider of judicial and staff education. In addition to substantive material, courses provide extensive information on ethics, administrative and managerial responsibilities, and community involvement.

Courts in turn are reaching out to their communities through programs coordinated with community groups, school projects, and educational public forums. For example, even our California Supreme Court the last few years has been holding one session each year in a location apart from our standard

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three venues, which are San Francisco, Los Angeles, and Sacramento. In each instance, the Court of Appeal for that district, in coordination with the local courts, educational establishments, and bar associations, has created extensive materials pertaining to the cases scheduled for oral argument. These are made available for use by thousands of students, some in attendance in the courtroom and others by television, and all with informed teachers, judges, and lawyers available in each classroom to lead discussions and answer questions. A statewide public-service cable network also has broadcast each of these court hearings to large portions of the state. We truly have electronically expanded our local courts to either all sections of the state.

Our local courts engage in regular planning and involve their communities in discussions about how better to serve the public’s needs. Judges are available as speakers for community groups and public forums, and actively participate in activities aimed at improving the administration of justice to a degree consistent with ethical constraints.

Now these are only some of the steps courts are taking, but they are emblematic of how seriously we take our obligation to inform and involve the public in decisions placed on the judicial branch have greatly expanded as the diversity and complexity of our state have grown. In the early 1990s, the situation had become critical. The existing combination of individual county support for local courts and limited state support resulted in major variations in the administration of justice and the quality of justice from courthouse to courthouse.

It became impossible to ignore the gross inadequacies of the fiscal structure as some courts came perilously close to bankruptcy, and others cut back vital services to the public in order to maintain core programs. The range of services for the public, the time to get to trial, the hours of clerk’s office access, all differed from county to county.

Consistency in the actual administration of justice was elusive at best, and in some areas the ability of courts to serve public needs was at great risk.

After many years of discussion and advocacy among the courts, the counties, and our sister branches of government, legislation was enacted in 1997 shifting from the counties to the state the responsibility for funding the trial courts. This was a major curative step toward equalizing adequate services statewide, and the need for it became apparent my first year as chief justice. I embarked upon a project that nobody had undertaken before, accompanied by Bill Vickrey, the Administrative Director of the California courts.

The two of us visited the courts in every one of California’s 58 counties. That first year we had to obtain emergency funding just to keep some courts from closing, and this problem became progressive throughout the system. So once we obtained state funding the following year, that was a major step toward creating a true judicial branch and not one just in name, as opposed to a fragmented series of judicial entities across the state.

During those visits it became apparent to me that there was a substantial degree of duplication in the services provided by our municipal courts and the superior courts in terms of filing windows, different clerks’ offices, different interpreters’ services, jury pools, jury commissioners, and overlapping purchasing of supplies, and that efficiencies could be achieved both in terms of savings to the taxpayers and expansion of court services to the public if we were to merge our two levels of trial court into a single level.

So in 1998 we persuaded the legislature to place on the ballot a constitutional amendment permitting a merger of the courts on a county-by-county basis. We could not have gotten it through if we had tried to do it in one fell swoop. The electorate approved this measure by a two-thirds vote, and our trial courts began another fundamental revision pursuant to this constitutional amendment. County by county, the municipal and superior courts decided to merge into one level of trial court. About 50 of them did this within the first six months. The last eight had some problems, but through a combination of carrots and sticks we got them all done and went from having 220 trial courts in our state to 58 courts, one in each of our 58 counties.

These structural changes not only guaranteed more stable and dependable funding across California, but also helped solidify the court system as not merely a loosely affiliated group of individual venues, but as a more fully realized coequal, independent branch of government with a statewide perspective and presence.

The benefits of this approach have been reflected in the growth of California’s judicial branch budget during the past four years. Despite a very shaky start to the budget process at the beginning of the current year, given the economic problems facing California and its government and the generally gloomy figure for our state’s fiscal outlook, after meetings and negotiations I and members of our staff had with Governor Schwarzenegger and his staff, he agreed to
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The original budget proposed for January 2004 would have been disastrous and would have resulted in court closures and employee layoffs, but as I noted, we ended up receiving a substantial increase to that figure. Now we shall have a difficult year, like everyone else, but will get through it all right. I should note here, with reference to the size of our budget, that we have more than 1,600 judges in California, plus approximately 400 court commissioners and referees. Our system is the largest in the United States, far surpassing the size of the federal court system nationwide, and perhaps the largest in the Western world.

The bottom line in dollars and cents for our system’s current fiscal year is a budget that still does not meet all of the needs of our branch, but that allows courts to maintain services for the public at a reasonable level. Some courts have reduced hours of service and have cut back certain programs, but by and large courts have been able to cope.

The improvement in the judicial branch’s situation this year resulted in large part from hearings that were held up and down the state on court needs and on the impact of court programs, including one hearing conducted before our Judicial Council, and I believe you will be interested in one particular presentation that was quite striking.

The speaker was a CASA worker, a Court Appointed Special Advocate, who told the story of meeting with a 16-year-old girl in juvenile hall who was trying to provide her younger siblings with the stability their parents could not, but who had succumbed to the drug and alcohol abuse that she herself had learned from those very same parents. This young woman had made remarkable progress, overcoming her addiction, finishing high school, going on for more education, and returning as a counselor to the drug rehab center that had helped her.

The former client then began to read a prepared statement on what the CASA volunteer had done for her. She soon lost her composure, as did many others in the room, as she explained in direct words how the volunteer’s support and belief in her had changed her life.

This was one of several presentations that brought home the positive effect court services can have on individual lives. It is not about courts, not about judges. It is about access, about the services that we provide to the public. The public has to understand that they are the real stakeholders in this. The hearing conducted before the Judicial Council was televised on the California Channel, and not long afterwards I received a letter from the president of the United Domestic Workers of America stating that his organization, based on what its members had seen on the broadcast, wished to make a donation to the CASA program.

The recent budget cycle involved more than successful advocacy to restore judicial branch resources to a manageable level. A budget trailer bill strongly supported by legislative leadership of both parties—we worked hard to get this, I can assure you—and also supported by the governor and the state and local bar associations, included important revisions to the process by which our judicial branch budget is considered by the other branches, revisions that I believe will be of interest to you and that will certainly enhance our ability as a coequal, strong, and effective branch.

Under the new approach, an automatic adjustment to the base funding for trial-court-operating costs will be included each budget year. The figure is determined through a formula that includes changes in per capita personal income and changes in population. The assumption will be that the new budget will include these adjustments from the past year, rather than potentially starting again from zero with a need to rejustify the base budget each and every year.

In addition, under the new budget process, our proposed budget for the trial courts will be submitted concurrently to both the legislature and the governor. Under the preexisting procedure, the budget had been submitted initially to the governor, and only those items approved by him and the Department of Finance were included in the budget proposal presented by the governor to the legislature and hopefully advocated by his staff on our behalf. Now, instead of having the executive branch trim our budget proposal and then hopefully advocate on our behalf, we are able to present exactly what we think we need directly to the legislature.

This may sound highly technical and, undoubtedly, the details will be arcane to those not steeped in state budget terminology, but the fundamental message is far from technical. We have accomplished a sea change in our branch’s relationship with its sister branches. The judiciary’s budget no longer will be treated as that of just another state agency, but instead will be accorded the deference and consideration due an equal branch of government.

This does not mean that California’s courts will have free reign to demand increases. Far from it. The process contemplated is a collaborative one in which the judicial branch has the responsibility to be accountable and to carefully and completely justify its budget requests, but changes in judicial branch governance during the past several years have made this a far easier task.

These modifications ultimately benefit the judicial branch, the state, and the public at large by establishing responsible and responsive growth. As a result of the revised budget structure, we anticipate a new era of predictable and stable funding, equal funding across the state, and funding adequate to permit court operations to meet the public’s needs.

The third prong of our structural reform lies in the physical surroundings of the courts. Our judicial branch has actively sought the authority and the resources to acquire courthouse facilities from the counties that now own them. Once funding for the trial courts shifted from a local responsibility to a state obligation, it was no longer sensible—and the counties realized this—for the counties to own and maintain existing and future court facilities. Some of these courthouses are structurally unsafe and need to be replaced, and the degree of maintenance has varied quite a bit now that the counties basically feel they are out of the courthouse business.

The Trial Court Facilities Act, which was enacted at our urging in the year 2002, provides the authority to begin the transfer of all of the 451 court facilities in California from the counties to the judicial branch. This involves more than
2,000 courtrooms, about 10 million usable square feet, and about $4 billion worth of real estate. It is one of the largest transfers of real estate anywhere. This year's budget grants more than $23 million in expenditure authority to support the staff required to oversee the transfer of facilities and to plan the construction of new facilities.

The facilities transfer measure is predicated on self-funding. You may wonder how we are able to accomplish this in difficult economic times. Well, there are three sources. First of all, there is a redirection of court-generated revenue, which is flowing into a state courthouse construction fund instead of going to the counties. There is a special filing fee that is deposited into the court construction fund as well, and this funding will be supplemented by a future bond measure, which is expected to be on the ballot in 2006 or 2008, so this project has no impact on the state's general fund.

The basic concept of courts controlling their own physical environment, and specifically the judicial branch rather than a bureaucratic agency of California state government exercising this control, is truly a novel one that we anticipate will have tremendous benefits to our system. We no longer will have to compete at the local level with schools and police and fire services and emergency rooms. Instead, there will be a more reliable income stream, which we will manage in providing and maintaining necessary facilities for the courts.

I have spoken about the important structural changes that we have made, mainly these three mammoth reforms: the switch to state trial court funding, unification of our trial courts into a single level of trial court, and the process underway to acquire all the courthouse facilities in the state. These measures collectively have given us a more stable base from which to concentrate on our goal of improving our relationship with the public in order to effectively administer justice for all and to ensure a strong and independent judicial system.

It has been repeatedly demonstrated that the courts achieve their greatest successes in enhancing their services to the public when the judicial system collaborates with other interested and affected segments of the community, including of course the bar.

The word “court” traditionally conjures up a vision of two lawyers standing before a black-robed judge seated on an elevated bench arguing a matter that the judge will resolve by rendering a decision. That decision then will be carried out by the parties, usually outside the presence of the court, and, of course, the gulf between that vision and the reality of our courts today perhaps has never been greater.

In many proceedings in California, especially in family law, neither party to a dispute has a lawyer or can afford one. Many of California's courts report that 80 percent of those persons seeking a divorce or child custody or child support are not represented by counsel, and that same is true of 90 percent of those seeking domestic violence restraining orders and 90 percent of the tenants in landlord/tenant cases.

Reflecting California's increasingly multicultural society, a growing number of our state's litigants do not speak English but instead—and this always amazes me to recite it—speak one of the approximately 100 languages that are translated each year in California's courts, running literally the gamut from "A" to "Z"—Albanian to Zapotec. The changes in the population of those who come before the courts challenge our preconceptions about the courts and demand of us that we respond creatively.

Ensuring effective access based on community needs is critical to the ability of the courts to meet the changing expectations and needs of the public. Access to justice signifies far more than providing an open courthouse door. It includes allowing meaningful access so that individuals can vindicate their rights.

The resolution of a legal issue can profoundly affect an individual's future. Will a family be able to stay together? Can a disabled child obtain the care and assistance to which she is entitled? Can an elderly homeowner keep her only asset, her home? Will the veteran whose life has been derailed by substance abuse find his way back to a productive life?

Often the small cases that set no precedent nonetheless will have a life-changing impact on an individual or a family. When we speak of policies to improve access and of making services available to a broader segment of the community, it is easy to think merely in abstract terms. In California, we have tried hard never to lose sight of the fact that real people with real problems are involved, and that with what is often a remarkably small investment of time, individual lives can be turned around. In the final analysis, it is our ability to provide justice for all that creates our strength. How well we succeed in this endeavor says much about us as a society.

When I became Chief Justice of California in 1996, I began my visits to courts around the state in response to a commitment I made in the first of the State of the Judiciary Addresses that I have given every year to a joint session of the legislature. What Bill Vickrey and I learned in those visits—we were able to communicate with judges, court employ-
ees, lawyers, and community leaders—helped lead to the successful implementation of many of the changes that I have described. The purpose of those changes was not to make things easier for judges and court staff but rather to improve public access to and trust in our legal system.

I now want to highlight just a few of our initiatives that I hope will give you a sense of how broadly our courts have interpreted their mission to improve access and fairness in our justice system:

• Courthouse family-law facilitators now are at work in every county, helping persons navigate their way through the crucial proceedings of family law—divorce, child custody and support, domestic violence, and so on. Many local courts have developed self-help centers that focus on serving individuals who are not fluent in the English language. Some courts now offer regional services in rural areas, even providing vans that travel to remote parts of the county that otherwise are underserved.

• At the urging of the Judicial Council and the state bar, the legislature began to provide a $10 million annual appropriation for an Equal Access Fund to aid unrepresented litigants in civil cases, through various legal aid services and organizations. This has enabled us to establish self-help centers at courthouses with the assistance of legal-services providers.

• Community participation in court planning is now commonplace. Juvenile peer courts, community evenings when judges answer questions from members of the public, educational programs in local schools that teach our children about our judicial system and why it is important to them, all of these are part of the process of increasing community access and finding new tools for courts to better interact with their own communities.

• Collaborative justice courts, focusing on cases involving drug use, domestic violence, or mental health problems, have had remarkable success, and I know that has been the case in many of your states. These courts work closely with prosecution and defense counsel, local probation departments, education providers, therapists, and various social services and other community agencies to create programs that are fashioned to affect the underlying problems that often are the cause of the criminal behavior that lands an individual before the court.

Court involvement does not end with adjudicating guilt or innocence and imposing sentence. Instead, it encompasses trying to change the underlying conduct and conditions that led to the offense. One court commissioner testified before our Judicial Council that the drug treatment courts in her county had reversed the statistic on success rates for defendants. Where previously 80 percent were projected to reoffend within two years after release from custody, after drug court 80 percent were still successfully free of drugs after two years. Such individuals are required to seek and maintain employment, and often the result is a reunited family. Truly, lives get turned around.

All this, of course, also makes economic sense when one considers the cost of keeping an individual in custody, the benefits to society in creating a productive and tax-paying citizen, and the financial as well as the emotional cost of placing children in foster care when they have to be removed from the home because of their parents’ substance abuse.

Our court system has significantly expanded its use of technology in the last few years. We have installed interactive self-help kiosks in many courthouses, equipping them with user-friendly forms. We are in the process of simplifying our court rules. Perhaps the most impressive technological achievement is our self-help website, which provides a broad array of services online. Its more than 900 pages of information already have been translated into Spanish, and large portions are being made available in other languages commonly spoken in California.

More than 3 million visitors use the site each month. It contains all 580 Judicial Council forms for use in court proceedings, forms that now can be completed online. It offers background information on the court system and on individual courts, as well as practical information on how to proceed, including directions to the local courthouse. The website offers links and directions to where one can obtain additional assistance, legal and otherwise—for example, the location of the nearest domestic violence shelter—and it has links to a host of other law-related websites of many sorts. It already has won awards, but most importantly, it has demonstrated that online access to information about the courts is a remarkably useful resource for the public.

We also have made jury service less burdensome and more inclusive of a broader spectrum of the population through the one-day-or-one-trial mode of jury selection. Under this system, one’s jury duty is satisfied by showing up at the jury assembly room for one day unless one is actually sent out to a courtroom.

Where 80 percent were projected to reoffend within two years after release from custody, after drug court 80 percent were still successfully free of drugs after two years. Such individuals are required to seek and maintain employment, and often the result is a reunited family. Truly, lives get turned around.
where jury selection is underway. Having shown up for jury service myself in response to summonses I received the last few years, both under the old system and the new, I can assure you that we have made substantial progress in improving the system. How we treat or mistreat our jurors comes back to us in terms of community support and legislative support for the courts.

We have increased the compensation of jurors, and jurors in civil cases also are now getting the benefit of our new plain-language jury instructions that are rendered by the trial judge to guide them in their deliberations. We hope to have the set of instructions for criminal cases available next year. We went through them all and rewrote them in plain English instead of arcane Victorian prose. One of the ones I like to cite as an example deals with the credibility of witnesses. We used to say, “Innocent misrecollection is not uncommon.” Now we say, “People sometimes forget things.” Why not make it simple?

California’s court system has experienced enormous innovation during the past several years, but there is no guarantee that the road ahead will be easy, and we are far from meeting all the needs of the public we serve. Like many other states, California faces tremendous budget challenges, and our judicial system’s ability to continue to innovate and respond to reasonable community needs is not assured.

California’s judicial branch is fortunate to have been able to work closely with the other two branches of government. That is something I have worked very hard to achieve. Each year I have dozens of meetings with individual members of the legislature, one on one, with the governor and his administration, and also with other entities that are stakeholders and partners in the justice system, emphasizing the need for adequate court funding and the essential role that the courts play in our democracy. The message I and others strive to convey to those who wield the purse strings in Sacramento and Washington, D.C., is that the courts are not a mere luxury to be funded in times of prosperity and neglected in bad times, nor should the fortunes of the courts be dependent upon the popularity of their latest rulings, interpretations, and applications of the law.

We seek to convey the message that the judicial system is not simply another bureaucratic agency. It is one of the three separate, independent, and coequal branches of government. It differs from its sister branches in the influences that must guide its functioning. We, of course, as we all know, must be guided by the state and federal constitutions, statutes, and precedent that embody the rule of law in our nation and our individual states. Although courts are an integral part of our democracy, they are not and should not be considered simply another representative arm of government responsive to the newest polls and sensitive to the latest trends.

We are striving to make our court system even more worthy of the designation “judicial branch.” In California, our courts have taken on unprecedented responsibility for improving access, providing accurate fiscal information, and better communicating with lawyers, litigants, and the public. We have become active guardians of judicial independence and of the rule of law.

These days we sometimes hear the courts and the Bar criticized as impediments to the best interests of our nation or to the will of the people. I strongly disagree. In my view, judges and lawyers must be—and to a great degree are—committed guardians of the rule of law and of the rights of all Americans. Every day in California, and I know in your states as well, judges and lawyers can be found reaching out to all segments of the community, developing programs to assist self-represented and underserved litigants, contributing pro bono services, representing clients ethically and effectively, and impartially adjudicating civil disputes and criminal charges. I have no doubt that this is true in all your jurisdictions as well.

In my view, our legal and judicial system, and those who labor in its court-houses and law offices, deserve praise and gratitude from those who cherish our nation and the freedoms it extols. By working together to ensure independence, increase access, and provide the finest administration of justice possible, judges, court staffs, and attorneys contribute mightily to the strength and dignity of our nation and its principles.

In many respects these are challenging times for all of us, as private citizens, parents, members of the legal profession, and those privileged to serve on the bench, but these challenging times offer opportunities to better serve the public and strengthen our structure of government. We in California, like many of you, have been focusing on creative change and improvement. We look to you for ideas and innovation. Many of the improvements in California that I have mentioned have come from other states. We often have been the beneficiary of your efforts, and we have adapted your successes to our own needs. We look forward to working with you in the future to ensure and improve access to a fair and effective system of justice everywhere in our nation.

Ronald M. George has been the Chief Justice of the California Supreme Court since 1996. He joined the California Supreme Court in 1991 following service on the Los Angeles Municipal Court, Los Angeles Superior Court, and California Court of Appeal. In 2003-2004, he served as president of the Conference of Chief Justices and as chair of the Board of Directors of the National Center for State Courts. He received the William H. Rehnquist Award for Judicial Excellence in 2002. He is a graduate of Princeton University and Stanford Law School.

Is Judicial Independence a Casualty in State and Local Budget Battles?

The first panel discussion at the National Forum on Judicial Independence reviews the budget pressures encountered by the judiciary and their impact on judicial independence. The discussion was led by then-AJA vice president Michael A. Cicconetti, a municipal judge from Painesville, Ohio. Panelists were Michael L. Buenger, Missouri state court administrator, Lawrence G. Myers, court administrator for Joplin, Missouri, and Robert Wessels, court manager for the County Criminal Courts at Law in Houston, Texas. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JUDGE MICHAEL CICCONETTI: Michael Buenger, in his recent article in Court Review,1 makes us aware of the fiscal crisis, if we don’t know [already], that began in 2001 which has resulted in many court budgets being cut. Well, where does that leave judges? We have statutory criminal guidelines, requirements to dispose of criminal cases. We may have our state supreme court guidelines requiring us to dispose of civil cases in a certain period of time, yet we have mandates to cut our budgets 6%, 10%, whatever it may be, of which 80 or 85% is personnel.

Then the other constraints on judicial independence: We can’t say anything. You know we have limits on what we can say.

We also have the reality that many of us are in politics. We have to run for election, so do we speak out? Do we journalize our court budget and get into a battle with our local funding authority and then the next year have to face reelection? 

MR. MICHAEL BUENGER: . . . [T]oday . . . the stakes are very high. They’re not only high in terms of budgets, but they’re also high in terms of attacks on the judiciary, efforts to remove judges, efforts to impeach judges, so on and so forth, but the one thing I think is important to keep in mind is that the stakes have always been high. Today really isn’t all that different. It is just new for us.

I’ll give you the perfect example. Oddly enough, the “Father of Judicial Review,” John Marshall, wrote in 1804 a letter to Justice Chase, who was being subjected to impeachment in the Senate for his decisions—he suggested to Justice Chase that in lieu of actually going through impeachment over improper decisions, the legislature ought to form itself as an ultimate court of appeals. Now imagine that, the father of judicial review suggesting in an effort perhaps motivated more out of political reality than legal necessity, suggesting that the legislature be in a position to review the decisions of the U.S. Supreme Court to make sure that they comport with the public’s sentiment.

The stakes have always been high. They are simply higher today, I think, as a result of the change in the stature of the judiciary in the last 50 years. There was a time, I think, when you went into your local communities and you talked to your citizens and judges were viewed as independent actors. The connection between you and perhaps a judge in the county over was tenuous, perhaps based on friendship, but certainly not based on any sense of institutional connectedness.

I think what has happened in the last 50 years is the judiciary has emerged somewhat along the lines of what Chief Justice George was saying. The judiciary has emerged with a new sense of its institutional standing, and that’s not only a challenge in terms of funding and in terms of our relationship with our sister branches. It’s also a challenge in terms of our relationships with each other. What one court does in one part of the state of Missouri can have implications for all courts in the state of Missouri now.

The other comment I would make to you is that when it comes to issues of budget there is, I think, a distinction between what happens on the state level and what happens on the local level, and I recognize in making that statement that I may come across as perhaps disconnected from local concerns, and I’m not—I actually began my career as a legal counsel for an appellate district in Ohio that was funded by the counties—but with the evolution of state funding for the judiciary, there has changed the dynamic by which courts get their money, and that dynamic is basically one in which: Where do you go as the state supreme court or as the administrative office of the court when you have a confrontation with your state legislature over funding? Where do you go?

And the reality is there is no place to go, and so it is forcing, I think, state-funded systems to become much more engaged in the legislative process to tell the story of the judiciary not only at the local level, but also at the state level, because in the absence of public support, in the absence of public understand-

Footnotes
ing, in the absence of the public's willingness to in fact support the concept of judicial independence and an independent judiciary, it will be nearly impossible for us to withstand institutional attacks as we're seeing them today.

**MR. LAWRENCE MYERS:** As Mike said, I'm the municipal court administrator in Joplin. Prior to that I had about 25 years of experience in juvenile courts. I had the unique experience in Tulsa, Oklahoma, when I was the court administrator of the juvenile court, to receive a call from the county commissioner who funded the juvenile court, saying, “Larry, the county has 50,000 extra dollars. Could you use it?”

That was more than 20 years ago. I don’t know that Lou Harris would make the same call today.

My first three years as the court administrator of the Jackson County Juvenile Court in Kansas City, Missouri, each year the circuit court’s budget, of which the juvenile division was a part, was before the judicial finance committee, trying to resolve the differences between the executive branch of government and the judicial branch of government as to what our needs were.

I have a very good situation in Joplin, where the 473 municipal courts in the state of Missouri are funded by the local cities. Joplin is very kind to us. I get to prepare my budget with input from the judge. It’s presented to the city manager and we are treated fairly. That’s not true of other cities.

The topic for today is, “Is judicial independence a casualty in state and local budget battles?” In Missouri, in many of the municipal courts the answer would be no, not because they’re not a casualty, but because they couldn’t get a ticket to the fight. They weren’t invited by the judicial branch, and in fact at this time the judicial branch of the state is making some demands on the municipal courts for statewide reporting, which I support, but they are providing some budget problems because there are issues that require funding and we did not have input in the battle.

The battle with the legislature—perhaps the 473 municipal courts could have helped fight that because we weren’t invested in getting money from the state, but perhaps we had personal contacts with our state legislators that could have been advantageous in that battle.

We’re also not invited by the executive branch because each municipal court has been structured by their city based upon what the city wanted them to accomplish, and with little input from either the legislative or the judicial branch of government.

There’s an architectural saying that “form follows function,” and a lot of cities in Missouri have structured their municipal courts around the functions that they want them to perform. . . . [M]y article in the special issue of the Court Review . . . deals with institutional independence of the municipal courts.

Seventy-six percent of the judges are part-time. Eighty-eight percent of the prosecutors are part-time. Thirty-five percent of the court administrators are part-time, but that’s misleading because when you ask, “What other functions do you per-

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MR. ROBERT WESSELS: . . . It seems to me that whether you’re a casualty or just get wounded in the budget process, most of the issues we face need to be addressed long before we ever get in a room and a confrontation begins, whether you’re state funded or locally funded.

I happen to come from a state where, other than the appellate courts, the state pays the salaries of the general-jurisdiction judges and a part of the salary of limited-jurisdiction judges. All the other expenses for the operation of the court system in the administration of justice are borne by the counties.

From time to time I’ve been able to reflect a little on things. When it comes down to it, what do you have to develop in order to be successful? I think the foundations are really pretty simple: trust and credibility; accountability; becoming fact-based; managerial competence; and developing a new vocabulary to explain to funding authorities why we have value in what we do both in terms of how it will impact them in the administration of the overall county or state and what the impacts are from the perspectives of the constituents.

Why is it that the businessman who is the sole proprietor needs to have access to courts to get a civil matter resolved so that isn’t hanging over his head and has the business on hold? What is it that we can do through effective structuring of case management systems and early screening of cases to stop mentally ill offenders from hitting the jails, then going to the hospital districts, then coming back around . . . and that circle continues, at huge expense, without someone stepping in?

What can we do to reduce the number of folks who come back for return business who are poorest? We know there are effective strategies out there. We’ve seen it—whether in the drug courts, mental-health courts, family-violence courts. We’ve seen what happens when judges get involved and the resources are targeted instead of just moving cases through and getting dispositions. Unfortunately, we’ve been largely unable to put a value on that and explain that to the funders in terms that they can appreciate and recognize how that impacts the other areas of their budget.

In our county alone, through changing some case-management practices, we reduced the average daily jail population by 350 persons by having cases screened immediately, 24 hours a day, seven days a week, having judges provided information checking your key card: “Well, you came in at 9:15 in the morning. You should have been here at 9:00. If you want to get your cases through, then do the work on time and don’t leave before 4:30.”

And then, of course, that is just a fire for the press and it goes on and, all of a sudden, because you fought over a budget cut, you are now facing a public outcry as to your work habits and schedule, and we’re getting hammered on that.

The question here is the judicial independence. How has anyone handled that with budget cuts? Did you make the budget cuts? . . .

JUDGE LA BARRE: . . . I’m a general-jurisdiction judge from Portland, Oregon. We have 38 judges on our court. Oregon’s economy took a real dive in the last couple years and as a result, and maybe my colleague from a neighboring court, Judge Nachtigal, can give the exact figure, but I think it was around a 20% budget cut we took in the middle of a biannual budgeting time period. We had to go to four-day weeks with our staff. We had to give 10% budget cuts of our staff. Judges

The topic for today is, “Is judicial independence a casualty in state and local budget battles?” In Missouri, in many of the municipal courts the answer would be no, not because they’re not a casualty, but because they couldn’t get a ticket to the fight. They weren’t invited by the judicial branch . . . .

– Lawrence G. Myers
came in five days a week, but on Fridays there was no staff. There were no court sessions. We had numerous cuts.

In Portland, one of the things we did to try to take this crisis and turn it into an opportunity is we started a very active judicial outreach effort, which actually I have been chair of the committee. Among other things, we gave 60 speeches to community groups within about a 14-month period. We’re still doing this.

We’ve set up a program with our legislators in the Portland metropolitan area. The metropolitan area is about a million and a half people, and the legislators come to our court once a year. We have kind of an open house we present. We don’t put our hands out and say we want money, but we try to talk about the positive things we’re doing in the drug-treatment courts, what we’re doing in juvenile court, and so we’ve had kind of a multiple set of responses. We don’t think we’ve got it all figured out yet, but I’m very encouraged by some of the earlier presenters because I really do think we need to take a positive approach, and there really are many things we can do.

I don’t want to downplay this, but one of the things I think is an incredible strength we have that we don’t realize, we’ve had the one-jury, one-trial, one-day approach with our juries for a while. With our cuts we had to go back to juries for two days. We have 150 to 200 jurors come in the courthouse now every single day, four days a week. If you do the math on that on the back of an envelope, you’ve got over a hundred thousand citizens coming in the courthouse.

We have a judge give a welcoming talk. I’m one of the five judges—it rotates—and I give welcoming talks for about 15 or 20 minutes and I really try to touch on judicial independence, on how it’s so essential in our democracy. It goes to the very core of what we’re about as a country, and I think communicating with our citizenry this way, we can really turn this thing around.

So that’s a very long answer to what we’ve done in Portland with the big crisis.

**JUDGE CICCONEITI:** . . . Well, why is it so important that we maintain control over the budget process for our judicial independence? . . .

**MR. BUENGER:** I’ll go back to an earlier remark that I made, and that is that I think what has happened over the last 50 years is there has been a real growth in the sense of the judicial branch as an institution of government, perhaps more so than at any point in our nation’s history. What has come with that fact is also the opportunity for institutional attack, and I think that we’re seeing that, for example, in Missouri with an attempt to repeal the Missouri nonpartisan court plan. We’ve also seen it through the budget process because, whether we like it or not, the legislature’s ultimate weapon is always the budget.

I have been in numerous meetings with legislators. Recently a legislator who appeared before our presiding judges mentioned that if the court gets involved in the issue of tort reform, there will be no end to where the legislature might go on budget issues.

Today the administration of justice is intimately tied with the resources that are available to it. In the past, the notion of therapeutic courts, drug courts and the like, was a foreign concept, but the courts today are involved in the lives of individuals, perhaps more so than at any point in the past, and in order to do that effectively, to do that well, it has to have the resources to pull that off.

And to the extent that we can’t control, for example, in Larry’s case, to the extent that the judiciary has very limited control over its resources and over its budget, that does dictate our capacity to provide service to the people. But there is, I think, an important twist on this, and it was mentioned by the judge from Oregon and others. I think when we stand before our legislature and say, “You need to treat us differently,” that that rings hollow because then the director of the Department of Social Services gets up and says, “I don’t have any discretion over my caseload, either.”

Our capacity to articulate judicial independence in the budget context is fairly limited. We’re not very good at it. We simply are not. We kind of rely on this concept of judicial independence, but we really haven’t explained it well, and I think if we’re going to secure the resources that we need to actually administer the justice system well, part of what is incumbent upon us is to explain to the public what we do and to be willing to be held accountable for how we use resources.

I always think of judicial independence as two prongs. One is the judge’s decisional independence, your capacity as a judge to say yes and no, and to do so without undue influence from outside political institutions or outside groups. I also think that there is an institutional independence, and while I would never advocate judges having to stand before a legislative body as John Marshall once suggested to explain your decisions, the flip side of it is judicial independence cannot be a shield by which the institution holds itself accountable to the public.

I think that . . . the greatest challenge for us is to begin to think of ways that we are willing to institutionally hold ourselves accountable to the public, and to that extent I think we will be much more successful in securing the funding that we need. Organizations that demonstrate a capacity of success, succeed. Organizations that sit back and try to defend existing principles even in the face of evidence that you can’t do it that way anymore, will fail. And the challenge for us in this new change, this kind of paradigm of growth, I think, of the institutional judiciary, is to figure out ways by which we will hold ourselves accountable to the public, to one another, for the way we use resources, for the way that we run our courts.

I think in doing that we secure not only the independence of the institution, but I also think we secure the independence of what you do, which is the most important thing, which is to render impartial justice so that when people come into the courtrooms of the United States and our states, they at least have a sense that they have a fair shake.

**MR. MYERS:** I would agree with that and also clarify my earlier statement. We receive a great deal of support from Mike and his office. I think that there’s things that we need to learn and that we can learn, and I think the drug courts have provided us with some opportunities. There’s community involvement, including the location that Ron George was talking about, going out into the community, coalition building with stakeholders, service providers. There’s media involvement. The media is enthralled with drug courts.
But what I also think they are able to do and where the state office helps the municipal courts is they help to articulate and understand what their purpose is, what they are about, what they are doing, and then they are able to report back to the community how successful they have been in doing it, and I think that as I do my research on the municipal courts, I’m appalled at how they don’t understand—many of us in the system—what our purpose is.

There are those in the state of Missouri in the municipal courts who think the purpose of the municipal court is to generate revenue for the city. They forget our job is to do justice, to provide equal protection, to guarantee you liberty, to enhance social order, and to guarantee due process of law, and I think that’s what we need to be able to articulate, like Mike says, what our purpose is and then also how well we are doing that.

**MR. WESSELS:** You know you don’t get funded when the funding authority doesn’t understand both in terms of need and value, and I think oftentimes we begin in these situations to be reactive when every other department is going in and saying, here is the minimum level of X that we have to have. Pick an agency. You’ve been to the hearings. You know how those things go.

I think the judiciary and the court systems need to become much more proactive even before the budget starts, before you get in the mechanics of preparing the budget, and go in to funding authorities and be talking about here is what we need. Here is what we can accomplish if you will fund program X or Y, if you allow us to expand this, if you will give us the resources and invest in us to do a pilot program.

Having done that, though, the judiciary needs to accept being accountable for the performance of those programs, for how we’re using those dollars, and once again, instead of waiting for the legislature to say, “Here are your performance measures,” we should be going in and saying, “Here is how we are going to measure ourselves,” and turn the argument around and make the argument in terms of programs that relate to funding screens and the consequences of not funding, and get out in front of this issue instead of being reactionary to it.

**JUDGE CICCONETTI:** . . . You know you talk to judges at these conferences and I don’t think I’ve ever spoken to one judge who isn’t sensitive about the expense of attending a conference: “Make sure that all your expenses are documented, they’re reasonable, etc., to go back.”

Well, in Ohio, and there’s, I think, four or five municipal judges here from Ohio, we have a little secret and it’s a little out that we have. It’s a permissive statute called a “Special Projects Fund” that allows municipal judges to attach a dollar amount to each case that goes through the court, charge the defendant for that, and use it for special projects. The money is collected by the court, it goes into the city treasury, but cannot be spent without a journal from the judge, so you are accountable for it, but it also doesn’t come out of your general fund . . . —for educational expense, travel expenses, extra building projects that you may want to do. It can only be spent by the judge and only by journal.

So some of the expenses, come out of the special projects. It does not come out of my normal travel budget, which I use for the local northern Ohio and also for the state judicial programs. So that, I suppose, avoids some possible criticism under the general budget and it saves that. That’s not subject to the 6% cuts that we got.

Does anyone else have anything? How is your spending? When you come to these conferences, is anybody not concerned about public reaction to that, even though you know that you should be here and the education, the 13 1/2 hours that you gain here, is for judicial education? But who amongst us is not concerned about any public reaction to that? I think we all are, but is that another constraint on our judicial independence? . . .

**MR. RON H. GARVIN:** I’m going to make a statement and, of course, I come from a different perspective than most folks in the room here. For those who don’t know me, I’m the Vice Chairman of the Board, Veterans Appeals. That’s in the federal system and currently I’m the acting chairman.

Several years ago we had a cut in our budget that was given, passed on to us by the Secretary of Veterans Affairs. We had a cut in budget of about 15.4%. Now just to give you a perspective of where we are, I have 56 judges and about 228 clerks that support this system. We do about 38,000 appeals a year. That’s what we did this year.

When we were cut by 15%, I had a Board of Judges meeting and in that meeting we talked about judicial independence, but you also talked about judicial collegiality, and what the judges determined in that Board of Judges meeting is that with a 15.4% cut in budget, we were going to improve productivity, and we did.

We improved productivity for the clerks by 20%, measurable and articulate, and we improved the output of the judges by 25% in that year we were cut. Since then, because of our credibility, our budget has been increased every year and we’re almost back to where we started, and I think within a year or so we’re going to be beyond that.

So there is judicial independence. Nobody ever tried to tell us how to decide cases, what should be contained in those decisions, and as a matter of fact, during that period of time we improved our, what we call, deficiency-free decisions from like 90% to 93%.

So along with independence, you need leadership and collegiality and perhaps that will help, and I think you gentlemen are saying the same things. Prove that you’re going to do it. Thank you.

**JUDGE JAY D. DILWORTH:** I’d like to comment on your fund that you used to fund some of this.

Eighteen years ago, when I became a judge in Nevada, there was a statute that provided $10 for every traffic and misdemeanor fine to go into a fund that would be for court use. The original court would get $2.50. The $7.50 would go into the Supreme Court AOC, and specifically in the legislature it says your funding source cannot offset your budget by that amount.

However, it has now reached up to a maximum of a hundred dollars per year—and I don’t have the figures, but a real large percentage of the Nevada Supreme Court budget—that’s theirs, not initially with us. The Supreme Court’s [budget] comes from
that fund and any time we say we want to do it locally, [they say,] “You fund it.”

And so one of the things that happened is the legislature saw this as a way to grab some of the money that goes to the state, 50% plus a dollar goes to the court. Forty-nine [percent] goes to the Department of Vehicles, training, whatever the legislature wants to do. They found another funding source by just continually increasing this amount. You can have a $5 fine in municipal court and I believe it's $65, is what it works out to be.

So you got to watch out for that. It can really come back to bite you, and whenever we want something, they say, “Well, pay for it for yourself.” Yes, we do use it, but it's that kind of a situation, so it can be a double-edged sword . . .

JUDGE JAMES W. OXENDINE: . . . I'm a superior-court judge in Georgia and I have sat on the other side of the fence. I have been in the legislature.

You know what we do in Georgia, and we're funded by the state, we find through the Council of the Superior Court Judges, and I know most states have an organization similar to that, we at our midyear meeting develop our legislative package. We develop our budget. We then submit our budget to the supreme court justice, who speaks for the judges of general jurisdiction.

Now the state court, the magistrates, and the other judges in Georgia that are funded by local jurisdictions, they sort of paddle their own way, but at the general level with superior-court judges, once we get our budget in place and we submit it, we then break out into our own area and certainly if we had any influence in our own area of influence, and we will work with the legislature.

For example, I served with the Chairman of the Ways and Means Committee in the House. Well, I will go to Tom and say, “Look, Tom, we need some help.”

Now the governor has nothing to do with our budget. We bypass him and the governor's budget altogether and go straight to the chief justice. He presents our budget. The legislature votes it up or down or they can amend it. The only way the governor can get to us is he can veto, and that's not been done in the 20 years that I've been involved in this situation.

What I would recommend if you are in a situation like we're in, you need to do your planning and work the legislature. Now we have on our finance committee or our appropriations committee in the House, there's about 15 people, but about five or six of them make the decision, and we work those folks. I mean we don't let them go to bed until they know why we have in our budget what we have. Frankly, I have had some things that we've asked for we did not get, but the basic support of the courts we've always gotten and we've never had a decrease and we've never had the legislature to ask us to give back or to cut our budget, and I've been doing this for 20 years.

So I would just simply suggest that, and somebody said awhile ago, “Well, we have judicial independence.” That does not mean that we don't have to, ever once in a while, beg.

I learned a long time ago when I first got into politics if you ain't born with it, you have to beg people to vote for it, and I'm not above begging when it comes to money, and judges ought to realize that sometimes we ought to beg a little. Thank you.

I think what has happened over the last 50 years is there has been a real growth in the sense of the judicial branch as an institution of government . . . . What has come with that fact is also the opportunity for institutional attack . . . .

– Michael L. Buenger
Just as a short aside, there is a committee now established by the legislature to try to control these court costs to make sure that a legitimate request is made before it is voted on by the legislature. It doesn't work. Our own DA went and bypassed that committee, who turned down his request for a $25 additional fee to fund his truancies, and went directly to his legislators, put it in a local bill, and it passed. So be very, very careful about adding court costs. . . .

JUDGE NORMAN MURDOCK: . . . I'm retired. I'm a police-court judge from Hamilton County, Ohio, and spend my winters in Sedona and decided to come over because I have an interest in what happens in the courts.

Somewhat echoing what was said before, I spent a long time in the legislature and was a county commissioner in Hamilton County, and I'm sure the two Mikes are familiar with the processes in Ohio. I think it's important to remember—for the judges particularly—that other elected officials, especially those who do funding, feel a serious obligation for the accounting of those moneys that they're responsible for, so the judges must, I think, understand that and recognize that when they're dealing with the other branches of government.

I became a judge later in my political career and sometimes I felt rather demeaned by judges and their approaches to me either as a county commissioner, as a funder, or as a legislator playing a leadership role, and sometimes I think also the judges feel and exercise their authority in their role in a rather aloof manner, and I think that is counterproductive, quite frankly.

Echoing what was said earlier, we would see judges in the legislature essentially in the budgetary process when they wanted something, when they needed money, when they wanted to fund their budget, as well as on a county level in the major metropolitan counties see the judges and their people come before us when they wanted something, and I think judges forget that this is a political process, unfortunately or fortunately.

I think we're all accountable, whether we're judges or not, but I think it is essential that judges and their representatives on a regular and frequent basis become, if you will, friends of those in the other offices that account for those budgets and that make those decisions about budgets, and I don't think that's demeaning. I think, on the other hand, it is important and I think it goes towards establishing judicial independence, not aside from the philosophy that we all believe in, in judicial independence, but establishing that independence in your relationship with people on the county level and with people on the legislative level.

Other than the public confrontations, I would suggest and urge if you have those private, legitimate, and yet worthy meetings and explanations of what you're doing and why you're doing it, everybody knows the role of the judiciary. There's no secret in terms of the role of the judiciary, but establishing those relationships I think are essential, and I would encourage you to do that. Thank you.

Michael A. Cicconetti is judge of the Painesville (Ohio) Municipal Court. He was vice president of the American Judges Association in 2004-2005. He is known for creative sentencing practices in misdemeanor cases.

Michael Buenger has been the state court administrator in Missouri since 2000. Before that he was the state court administrator for South Dakota from 1995 to 2000. He is a past president of the Conference of State Court Administrators and has a law degree from St. Louis University School of Law.

Lawrence G. Myers is the municipal court administrator for the city of Joplin, Missouri. He is a past president of the National Association for Court Management. He spent 17 years with the juvenile bureau of the district court in Tulsa, Oklahoma, and served as administrator of the juvenile division of the circuit court in Jackson County (Kansas City), Missouri.

Robert Wessels has served since 1976 as the court manager for the county criminal courts at law in Harris County (Houston), Texas. He has an M.A. from Houston University and is a fellow of the Institute for Court Management. He is a past president of the National Association for Court Management.

What do you have to develop in order to be successful? I think the foundations are really pretty simple: trust and credibility; accountability; becoming fact-based; managerial competence; and developing a new vocabulary to explain to funding authorities why we have value in what we do. . . .

– Robert Wessels
The second panel discussion at the National Forum on Judicial Independence reviews the pressures to judicial independence that can come through the election of judges. The discussion was led by then-AJA president-elect Gayle Nachtigal, a trial judge from Washington County, Oregon. Panelists were Roy A. Schotland, professor of law at Georgetown University in Washington, D.C., and Jeffrey Rosinek, a circuit court judge in Miami, Florida. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JUDGE GAYLE NACHTIGAL: “Judicial Elections: Current Threats to Nonpartisan Elections, and Are Retention Elections Safe?” That is a topical discussion given the tenor of the times and where we are in the political election scene in this year of 2004. . . . I am the president-elect of the American Judges Association, and I just successfully waged a campaign for reelection in the state of Oregon.

Of course, I had no opponent. It was an easy election. I think it cost me $50, which was the cost of the filing fee, but if I had drawn an opponent, we were prepared in my small county to spend in excess of $50,000 to retain my seat, so I was very glad that I only had to spend $50 of the $50,000 we had set aside.

In Oregon it’s unique in the sense that we’re not allowed to raise any money to have our own elections. I can’t know who donates to my campaign. I can’t ask the campaign committee to form. It’s supposed to just happen, and I have to sign off all the forms and certify that they are in fact accurate over something I’m not allowed to have any knowledge of, so I was glad to only have to certify for $50, and that came out of my checking account. . . .

[Conference attendees then viewed some recent television commercials from judicial election campaigns, including ads for and against members of the Ohio Supreme Court.]

PROFESSOR ROY A. SCHOTLAND: . . . It is a special pleasure and privilege to be with you. Taking off from what you just saw from Ohio—and let me just note I hope it will please you—that the ads against Alice Resnick backfired; whether she would have won anyway, who knows? But she did, in fact, win with a very handsome spread, and just about everybody thought those ads were counterproductive.

Two years later, if anything, Ohio looked worse. Happily, thanks to the fact the bar association has done much more than it did back then, this year it’s looking pretty good. The bar association got centrally involved in 2002 and I think that changed the culture, and when all is said and done, there’s a great deal here about the local culture and the expectations and the level of tolerance.

Let me go back to 2002 two days after the election that included two seats on the high court. Chief Justice Tom Moyer said this about the ads run that time by interest groups on both sides, and the ads that kept running despite very strong all-out efforts by the candidates on both sides to get the ads stopped. The chief said this: “Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places his or her trust and confidence in a constitutional democracy should be outraged.”

Now, traditionally political campaigns for judicial posts have been about as exciting, it has been said I think by a Florida judge, as a game of checkers played by mail. They have been low-key affairs conducted with civility and dignity. Now what has changed and how widespread is the change? Well, in the how-widespread note, if you haven’t had it in your state, don’t think you’re safe, because it spreads. It has constantly spread and we’re getting, because of what’s been happening in the spread, unprecedented media attention.

The cover story of Business Week four weeks ago was, “The Battle Over the Courts: How Political and Theology and Special Interests Are Compromising the U.S. Justice System.” This midsummer, past midsummer, the outstanding magazine The Economist had an article.3

Yesterday’s New York Times had a front-page story,4 which I’m afraid belongs to the sky-is-falling school. For example, the headline is about “Partisan Battlegrounds,” but you can’t find

Footnotes
1. The Justice at Stake Campaign, a nonpartisan national organization dedicated to keeping courts fair and impartial, has selected television commercials that have run in campaigns in 2000 (Michigan and Ohio), 2002 (Mississippi and Ohio), and 2004 (Illinois and West Virginia) available for viewing on its website. Go to www.justiceatstake.org and click on “Resources” and then “Video for the Web” to view them.


the words “Republican” or “Democratic” or “party” in the ad. By partisan they mean overheated, and the facts they have were badly overheated. They quote a source that as of October 17, a week ago, more than $8 million had been spent in judicial races on TV in contrast, the source said, to 2002, when only $1 million had been spent by October 19, but if you go to the material from that same source, they report that the total spending on TV in 2002 was $8 million, and I know you spend more at the end. I’m just having trouble believing that $7 of the $8 million spent was in the last ten-plus days, and it also left out of the fact that TV is only a piece of the picture.

Total spending in 2002 was $29 million. This time we’re certainly going to be above that. We’re running around $35 million now, but total spending back in 2000 by candidates alone was $45 million, 90-plus percent up from two years earlier, and $45 million was only a piece of the picture. For the first time we saw, and we still haven’t gotten to this bad then, spending by non-candidate groups, both local and national, which totaled $16 million, most particularly from the U.S. Chamber, so we saw in 2000 $62 million.

Now the sky is not falling, and it’s appalling that the Times didn’t mention the major steps forward. North Carolina has taken one with an effort at public funding. I hope to get to that later. The Ohio Bar, as I said earlier, is entitled to enormous credit. The problems, however, are unquestionably getting worse than they had been. Let’s remember Sergeant Friday and try to get the facts and see what they mean.

Start with context, but first one last opening note. Last Wednesday in Minneapolis, the Eighth Circuit had an en banc hearing on whether Minnesota can constitutionally hold nonpartisan judicial elections. Now that affects only 20 states, so we do know about Chamber, so we saw in 2000 $62 million.

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Start with context, but first one last opening note. Last Wednesday in Minneapolis, the Eighth Circuit had an en banc hearing on whether Minnesota can constitutionally hold nonpartisan judicial elections. Now that affects only 20 states, so if they lose—and the way the questions went, I wouldn’t want to put a lot of money on winning—those of you from nonpartisan states have some interesting time ahead. There was another issue in that case, whether Minnesota can constitutionally require, as 29 other states require, that judicial campaign funds be raised not by the candidates personally, but by their campaign committees.

Two weeks ago lawsuits were brought in Alaska, Indiana, Kentucky, and North Dakota by anti-abortion groups trying to knock out both state limits on pledges or promises of what you’ll do on the bench. “I promise to take care of tenants.” I don’t know how many of you will enjoy that regime.

Now, of course, the cover is that these plaintiffs, anti-abortion groups—attacking the canons limiting campaign conduct—are trying to protect speech. That is misleading. What they’re trying to do is not protect speech, but take away the protection of choice because if they can get candidates to have to say their litmus-test questions, they can decide who comes in and who doesn’t.

Context. We have judges facing elections of some type in 39 states, 87% of our appellate judges and trial jurisdiction/general jurisdiction trial judges facing contestable elections. Nonpartisan or partisan are 53% of the appellate and 77% of the trial judges.

Now the difference between those percents and the 87 are retention elections. Retention elections come from the drive to end contestable elections, a drive that began in 1906 with a major speech by Roscoe Pound. That led, as probably just about all of you know, to the so-called merit plan with screening the appointments and retention afterwards, which Missouri adopted in 1940.

An awful lot of people don’t realize that Missouri still has two-thirds of their trial judges running in partisan elections. A history which I’ll give in one moment says that to talk about ending contestable elections is—for me—a copout. It is a distraction from moving forward to reduce the problems we have.

For example, Florida’s appellate judges are in the merit-and-retention system. Their trial judges run in nonpartisan contestable elections. Most of them aren’t challenged, but it’s contestable. In 2000, Florida voters faced a ballot proposition about whether their trial judges should change by local option to appointment and retention just like their appellate judges. The highest vote for that change in any jurisdiction in Florida was 41% for it....

Last year in Texas, the Senate voted to change from partisan elections to appointment. The House was just about to have a vote when in came the grassroots against change, again heavily motivated by the concern about a litmus test on choice, and the House did not even hold a vote.

Last year in Ohio, the chief justice opened a major effort to change the [procedure] to appointment for the supreme court only. That died at birth.

Next Tuesday in South Dakota, where just like Florida the appelates are appointed and [retained], and trial judges are in contestable nonpartisan [elections], the South Dakota voters face a ballot proposition to change their trial judges. They got nearly unanimous support for this in the legislature, and we don’t know what the voters will do, but we do know about opposition, which has surfaced rather recently from, and I quote, “pro-family groups”—here we are again—“Mothers
Against Drunk Driving” and—I don’t know if this is a frequent alliance with Mothers Against Drunk Driving—“bikers”—that does not mean bicyclists—“and other groups.” I love what one city official said: “This is simply anti-baseball and apple pie. It’s un-American.”

Please don’t tell him that 80 percent of South Dakota’s judges initially get on the bench by appointment to fill a vacancy.

Now what does history teach? From 1906, with a national drive to end contestable elections for judges, with the American Bar and so many state bars and local bars all out with other good-government organizations for change, well, if we continue at the pace of the last 98 years, in order to end contestable elections for appellates, we need only another 160 years and for trials we need only another 770 years, so let’s face the reality that we’ve got. We’re going to have contestable elections, and the question is how we deal with the problems in them . . . .

Let me just close on the key question, which is what is to be done, with three suggestions.

First, we should take advantage of what the Missouri Supreme Court did in response to White.7 Missouri and Minnesota were asleep, and they had this obsolete announce clause, which only six other states still had after the early nineties changed the model code, so Missouri had to repeal their announce clause, and they did that in about a page-and-a-quarter order, which ended with this: . . . “recusal or other remedial action may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”

Now that is an inspired step . . . . Missouri rotates the chiefs, and I knew the prior one, I didn’t know the one under whom this was done, and I saw him at a conference, and he said, “What did you think of it?” I said, “Well, I had an article out in which I called it an inspired step,” and he rushed over and gave me a big hug. He was just so excited. He’s Rush Limbaugh’s cousin.

That step supports the overwhelming majority of candidates who want to campaign judiciously. They can say look, I know what you want me to say, but if I say what you want, I will be unable to sit in just exactly the cases that you care about most.

Also the Missouri step enables a candidate whose opponent who is stretching the envelope in saying some variant of “I will hang them all.” The person facing that can respond with, “My opponent has told you what he thinks you want to hear. What he hasn’t told you is that by doing that, he’s going to be disqualified from the cases you care about most.”

Now, last week the suit by the Kentucky anti-abortion group

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― Gayle A. Nachtigal

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succeeded in getting an injunction to knock out Kentucky’s pledge or promise clause and the commit quotes, but the plaintiffs—again I say this is not about speech—the plaintiffs also tried to knock out Kentucky rules on disqualification, and a federal district judge who knocked out the canons said no, no, we’re not taking out the disqualification. So recusal, whether you want to call it that or disqualification, looms more important than ever. That’s Step 1.

Step 2: In the 5-4 White case, Justices Kennedy, with the majority, and Stephens, in dissent, both urged that we need more speech to meet speech. We need sensible speech from

representative, credible community leaders, if any candidates are campaigning inappropriately, or outside groups—because you can’t discipline the outside groups, but you can come out and say they are doing violence to our judicial system.

In 2003, the ABA formally resolved that state local bars should initiate committees to oversee judicial campaign conduct, and we already have this outstanding one in Ohio, which started two years ago. This year we have a fine one in Georgia and a number of Florida jurisdictions. We have statewide in New York and though we’ve had some that go way back, like Columbus, Ohio, and I think San Mateo, California. The spread of that is a wonderful step, and it’s very important that you should know the National Center for State Courts has an absolutely superb new pamphlet on how to start and operate such a committee, and for that superb new pamphlet, Dave Rottman is entitled to great credit. 8

Third and last, a very simple, very powerful change: How long are your terms on the bench? Of our appellate judges, 55 percent have more than six years, but 45 percent of elected appellees have six or less, and of our trial judges 18 percent have four years. Now I don’t know what you think of that, but I don’t understand having judicial independence and four-year terms. I cannot put those two things together. Fifty-five percent of the trial judges have six years. I applaud the 27 percent who are in states where they have more than six years. Fourteen percent of our state trial judges have 11 or more years. If you want judicial independence, you want to reduce problems in judicial campaigns. Let’s go for longer terms.

Chief Justice Moyer, in his major effort after the 2002 mess, put as his top priority—after the appointing of the supreme court, which went down right away—the lengthening of terms. Ohio has all its judges in six-year terms. Think how many judicial election problems are reduced by that simple step. Think how much more attractive serving on the bench is made by longer terms, and after all, isn’t the ultimate goal of all our judicial selection reform to attract more fine people to the bench and to keep more fine judges on the bench? . . . .

JUDGE JEFFREY ROSINEK: . . . . For those of us who are judges the question is: What do we do to keep our job? All the rest are sort of superficial. If we are in a state that has elections, then do we act as a politician? Do we set up campaigns? Can

we do that under the laws or the canons that we have in our state?

I just heard about Oregon's 50 bucks. Fifty dollars, that's a filing fee. Fifty dollars doesn't get you downtown in Miami by bus anymore. Our filing fee is about $6,500, so for someone to decide they'll run against me, he or she has to put up 6,500 bucks or for me to run I've got to do the same thing. And our law in Florida says something similar to that. We cannot raise funds. I cannot ask anyone for money. All I can do is set up a committee that asks everyone for money, and I am not to know who gives me the money and, of course, I have to send out thank-yous to those people who have given me money.

So these are the things, the quagmires, that we as judges are facing. In 1971, the people of the state of Florida changed our system. We had a conglomerate of judges. We had municipal judges and we had officers of the peace and we had justices of the peace. We had court-of-records judges.

We finally went to a three-tier system: the trial level and the federal level and the Supreme Court. At the trial level we have two groups of individuals, the county judges, which every county was required to have one and they were of limited jurisdiction, and we had general-jurisdiction judges, I think 20 circuits . . . had those, and five districts that handled the appellate judges and one supreme court, and then at that point in time what was set up was that the trial-level judges would run in a contested election. They could be appointed by the governor through a judicial nominating committee, but then at the next general election they would have to run for reelection, and they could draw opposition. It was nonpartisan, but they could draw opposition.

Well, that means if the governor appointed you in June, you'd be running for election in September on your record. Your record is that you know your way to the courtroom and very, very little else, and for years judges tried to change that, but of course the legislature got in its way because that's the way the system was set up. But the appellate judges, the appellate judges on the supreme court or the courts of appeal, once they were appointed, they would run against their own record as a merit retention. That was our modified Missouri Plan, and so what we had was this dual system, the contested election for trial judges and then the merit retention, and most of our states have a combination of some of these, but in Florida we try to become less political and so in between general elections when there was a vacancy, the governor would appoint based upon recommendations from judicial nominating commissions, and what was started in 1967 was that the Florida Bar would appoint three people, the governor would appoint three people, and those three would get together in each judicial commission and appoint three other individuals.

It seemed really fair until the reform took place . . . in 2001, and the reform—I don't know why they always use the word “reform” when someone is getting screwed. This time it was just judges, of course. The reform is that the governor would appoint everyone. The six people would select the three. The governor would make the appointment, but the Florida Bar could recommend.

Now this took place because for some reason there was animosity between the courts and the legislature and the courts and the governor, and I don't know if it had anything to do with election of 2000 that ended up in the Supreme Court of the United States, but apparently it did.

So in Florida we have an interesting system. We have a legislature that is basically . . . off the wall sometimes when it comes to judges. They used to use the words “liberal” and “conservative,” but now they use “activists.” I'm not too sure what that means, but I think it starts with the letter “L” anyway.

So the judges were becoming activist judges and, therefore, they should understand that that's not their place. I'm not too sure what that meant, but, anyhow, that was in Florida. So we have this system of selection in Florida, not unlike many of your systems. The thing that we don't have is partisan politics, political elections. We do not have Republicans who run against Democrats as judges, though for some strange reason the political parties do get involved and say that this nonpartisan Democrat is running against this nonpartisan Republican. I don't know what that means.

Generally the public gets the idea of what that means and we have limitations not of spending, but of how much a person can contribute, and it's $500, and that was by a judicial order a number of years ago in a case that took place in Florida from Miami.

So there are some limitations, but this year we've seen incredible spending. As Roy said, we've had—out of all the judges running—only three contested elections. I mean three incumbents received opposition this year in Dade County. All three lost the election, and that bodes well for those who are running in two years. I would say at this point in time most of them are very, very concerned about that and change underwears daily.

So in our communities in Florida, the judicial nominating commission can recommend, but this is what's happened in the last few years with our judicial nominating commission. The questions that these individuals are asking are somewhat intrusive.

Example: The new judicial nominating commission in a place called Broward County, which is north of us, in Montverde, one person asked a young lady who had some small children whether or not she could balance single motherhood with judicial service. Of course, was that a proper question?

Another one was, “How did you feel about the U.S. Supreme Court in 2003 striking down Texas law criminalizing homosexual activity? As a homosexual, what do you think about that?”

Another person was asked, “Are you a God-fearing person?” And the individual atheist said, “To whom it may concern.”

And then another question concerning religious views: “What do you think of the Alabama Supreme Court Chief Justice directive of the Ten Commandments mounted in his courthouse?”

An individual of the Florida Bar came in with a response by the president that troubles me about these questions, but I wasn't there and I don't know in what context they were taken. I believe these were fairly new commissions. They'll probably grow in the job. Am I sorry that people were offended? Absolutely, but this isn't a perfect world and we learn from experience, so it concerned a number of judges when the presi-
dent of the Florida Bar took such a sometimes called cavalier attitude.

Well, for judges the question is: What are the factors that threaten your judicial independence? In a survey taken and 40 percent of the judges responded [that]: (1) judicial independence [is] being eroded by excessive criticism of judges for issuing opinions that are at odds with the majority of individuals; (2) judicial reelection is too politicized; (3) judicial selection is too politicized; and (4) judges are too dependent on campaign contributions.

Well, in our state where contribution is a way of life the question is: Are judges too dependent upon them? And the answer is, well, it depends if you're able to raise money or not. We have one gentleman who raised $375,000. It didn't really matter that his wife had a TV program. She was a judge on the TV program and people recognized her that way and he raised $375,000 and he, by the way, won that election. But there is a perception that when you're taking money, it affects the way that you'll make a decision, and that is a concern that judges have. It concerns us that we have to take this money.

What has changed from not only using money in elections is the individuals who call political consultants, and in our community political consultants is sort of a nasty proposition because we receive as judges letters: "We hope that you will hire our firm. If you don't, we are looking around for other places to place our candidates." So you get a letter that is somewhat extortive in nature and you have to sit and think, "Do we hire this individual?"

One incumbent judge who lost spent almost a hundred thousand dollars on consultants. What he forgot to do is spend money on the campaign. He had all the consultants, but the voters did not vote for him, and why did he lose? Well, he would not respond. He did not respond to much of the criticism, and the criticism concerned some of his decisions. We in Dade County had a major . . . I don't know. Some of you may have heard about the Elian case. Elian? I don't know if that had anything to do with his comments on radio, but this individual lost the election.

Those are the concerns that judges have. I mean the politics that's involved with politicizing of a nonelection appointment, judicial nominating committee, the election campaign, and the amount of money that we have to raise. It's totally unlike Oregon for 50 bucks. Fifty bucks. Fifty bucks does not buy you the filing fee, let alone the ads.

So those are the concerns that we have and the question asked was, "Are nonpartisan selection or retention plans in danger?" The answer is judicial judges are in danger as a result of what's happening right now throughout our country.

JUDGE SAMUEL LEVINE: I'm . . . the retired past president of the Board of Judges of the District Court of Nassau County, the lower-level misdemeanor and the low civil cases in Nassau County, a suburb of New York City, and the miracle of '96. I was 67 years of age when I ran for the seventh time on a minority party line and because of seven different factors in my seventh campaign, including Clinton's coattails in '96, I became the chief judge of the District Court of Nassau County with 25 other of my colleagues.

However, I was in the minority party. Therefore, the chief judge or the president of the board was told I had no power to do anything, and the New York Times . . . of December 30, 1996, pointed out, "A Nassau Politician Lost Till He Won, or Did He? Partisan battle over new judge's powers in charge of 26 judges or
maybe just traffic ticket forums,” and the latter was the case because my chief administrative judge of all of the courts of Nassau County, population 1.3 million, 100 judges in all, said, “Levine, you have no power to do anything. Just sit in your courtroom and your chambers and do your job. You're being replaced.” Despite the fact that my predecessor had such a power.

The point I’m raising is that politics in our court system, especially in New York, is something that is challenging the very basic system of our judicial branch of government and the question is—how do we eliminate politics from our court system especially when you look at, in New York State, the chairman of each county’s dominant party has the control of the selection and the appointment or election—we have both—in their county throughout the state?

And in my particular county, one man, as the chairman of the dominant party, has the control of the selection, election, or appointment of 90 of the 100 judges and judicial hearing officers in New York State, and therein lies, I think, the greatest challenge to our judicial system here in the United States.

My question to the leaders of the American Judges Association is what action can we or will we take as a body, as an organization dealing with this serious major problem for our system? . . .

JUDGE ROSINEK: . . . As long as there are elections, there's politics, and that's one of the things that I think judges should not be afraid of. I think that too often judges who do not believe that they should be prepared to run for office are called former judges because they're not prepared to run for office, and if we are elected, we have to be prepared to run an election. Now there are certain things you cannot do because of the judicial canons, but outside of that we have to take the bull by the horns and actually run.

For you who have four-year or six-year or eight-year terms and then have to run, when I ran, after my election my campaign started the next day, and how did it start? Just by going to speaking engagements, going to schools, going to churches, going to synagogues, going to condo associations and speaking, meeting with people, opening up the court, and I was prepared. If someone ran against me, I wouldn’t be afraid of running a campaign.

But you can’t take politicians out of it when you’re running for office. . . .

PROFESSOR SCHOTLAND: Four points. First, I have to take issue with the over-lumped use of the word “politics.” There’s all kinds of politics in life. There’s office politics, school politics. You name it. There’s a big difference between the politics in partisan elections and the politics in retention elections and the politics in appointments, so the question is the kind of politics.

I think that too often judges who do not believe that they should be prepared to run for office are called former judges because they’re not prepared to run for office, and if we are elected, we have to be prepared to run an election. Now there are certain things you cannot do because of the judicial canons, but outside of that we have to take the bull by the horns and actually run.

The best thing you can do to avoid it getting worse is—if any of you knows an Eighth Circuit judge or knows anybody who knows an Eighth Circuit judge, take them to a very fancy resort as soon as you can and take them for a very long walk in the woods about what they’re about to do, maybe, to the 20 states that elect some or all of their judges through nonpartisan [systems].

. . . . I think you all ought to appoint a special committee at once to be ready to talk about what to do if that one comes in wrong, because if that one comes in wrong, you’re going to have suits in 19 other states. The only question is how fast.

Back in the end of 2000, . . . 17 [state supreme court chief justices] called a summit on judicial selection. Their very first recommendation was switch from partisan to nonpartisan, and now we have the federal courts telling us how to run the states. I don’t want to get into the Tenth Amendment because I think

there are plenty of stronger reasons that the federal judges shouldn't be telling the states how to run themselves. Chief Justice Abrahamson of Wisconsin just had fits when Justice O'Connor said, "Well, if you don't like elections, just don't have them anymore." That's just flat cuckoo land.

The last point is the chiefs put an amicus brief into the Eighth Circuit case and in that they have examples of six categories of things wrong with partisan elections. And what you described, I wish we had known about that because that would have been a wonderful episode to put into the brief and I will pursue that article.

**JUDGE ROSINEK:** Just one other thing, too. Most people want to elect their offices, and that includes judges. They want to vote. That doesn't mean they have to know anything about the person or know anything about the individual who is running or anything about the background or the abilities, but they want to elect people, and one of the best examples for us is in the state of Florida and Roy mentioned that before. When 41 percent now is the largest group of individuals—in I think it was Manatee County—said they wanted to have merit retention for their judges, but still 59 percent of them said no, and the average [statewide] was 32 percent said yes. Thirty-two percent. So 68 percent said no, they do not want to have merit retention for trial court judges. They want to reelect their judges.

Why? Because they truly believe in the electoral process. They believe that they have a right to select the individuals who will be in office, whether it's a judge or any other individual. It doesn't mean that it's good. It just means that they wish to do it. . . .

**JUDGE STEVE LEBEN:** I'm . . . from Kansas. I've got a question for Roy Schotland [about] the judge from Miami that Jeff Rosinek has discussed—who lost an election, who faced the mayor in a divorce case, and faced comments about the Elian case that really weren't about that judge. After the *White* decision, what would you suggest if you were speaking to that judge, who was being attacked in an election, as to what was permissible for him to say in his campaign and how to go about it?

**PROFESSOR SCHOTLAND:** You need what Miami/Dade has had—I don't know where they were in this one—a campaign conduct committee, the kind of thing I was talking about on which David Rottman has that superb pamphlet on how to start it and operate it. You need the bar, and not just the bar. The bar should initiate this, but it should include non-lawyers, and they come out with a press conference and state [that] this is not an appropriate bit of campaigning in a judicial election and here's why, and if you don't have that, if the candidate is there on his own, you're in trouble.

**JUDGE ROSINEK:** Let me add to that, too. The *White* case is not quite in effect in the state of Florida because the Supreme Court of Florida said that there's a limitation on it, and we still have that canon that says we really cannot speak directly to certain issues. In that case, it was not another opponent saying these things. It was an independent individual saying it. So even if we had those political committees and the bar association, they can come out and say, well, this is incorrect, and the judge should be able to say a few things, but it was not a candidate who made these comments. It was a former mayor, who also lost in the election.

**PROFESSOR SCHOTLAND:** I wouldn't underestimate the voters. If you have a credible, highly respected group of leaders who come together and say that doesn't belong in our judicial campaigns and our court system, I think it will make a difference. You can't do anything else. . . .

There are two more questions. One is absolutely critical. The judge mentioned the three incumbents who lost. I mentioned earlier the uniquely important role of names in judicial
elections. The three winners of those elections all had Hispanic names.

For a second, the most important thing about Florida that neither of us has said yet, but back in June, the unanimous opinion of the high court of Florida, written and delivered by Chief Justice Anstead, reprimanded a judge for improper campaign conduct. . . . Chief Justice Anstead's opinion is the best thing ever written on judicial elections, and by “thing” I mean opinion, article, speech, anything.

Now, yes, there may be something out there I'm just not aware of, but I've been looking at these things for awhile and that is just an absolutely golden bantering of the risk and the opportunity that there is in judicial elections, so if you take nothing else from our moment together here today, go look at the full Florida Supreme Court opinion from last June and just think of the beginning.

Judge Carmen Angel. “The first matter of the new court's docket is a public reprimand of Judge Carmen Angel. Judge Angel, would you please approach the podium and remain standing?”

And it ends, “Judge Angel, your public reprimand is now concluded and you may leave.”

Just think of yourselves standing there and read this opinion. . . .

JUDGE LEVINE: I neglected to ask one question. To what extent can we as judges running for reelection or election follow and carry out Canon 3 of the Code of Judicial Conduct, and that is to engage in activities to improve the law, the legal system, and the administration of justice? How do we carry that responsibility out? . . .

JUDGE ROSINEK: I think by doing that which we do best: that we handle our positions professionally as judges, that we respond to our communities as we add judges, and make decisions based upon the law. I think Canon 3 is pretty relevant for all of us that actually live in a courtroom and make decisions. I don't think that we can hide from it. I think we shouldn't hide from it.

I think there are a number of things. Whether we're called activists or non-activists, I think we have to do what we determine to be best with an individual case and make the rulings that we think are fair and proper. We have an independent judiciary, and if we are concerned about making comments that others may not like, then our independence is taken away by ourselves and so we can't be fearful of what we say.

The worst thing that can happen is we lose an election. So what? I mean it. Ideally, so what? The point is if we get up there generally and make comments and make rulings based upon reason and law, generally we're not going to lose the election, and all of you are examples of that. . . .

PROFESSOR SCHOTLAND: He says that so well. I just want to add that I think we need to get more serious and much more organized about outreach. We need to get Rottman to bring out the pamphlet, for example, on what do we mean by judicial activism? We need to take issues about why are the judges' jobs different? Why can't you have ex parte contacts? Why can't you make promises about what you're going to do? We need to educate, and I start again with that superb Florida Supreme Court opinion about judicial elections are an opportunity to educate the bar and the public about the role of the courts.

JUDGE ROSINEK: Just one last comment. In Sunday's San Francisco Chronicle, there was an article on judicial activism on the docket at a Stanford event, and I'm going to quote Justice Stephen Breyer, who said, “By judicial activism what you mean in part is a judge who doesn't decide the way I like it decided and if that's what you mean in part of an attack, then so be it.”

We will never have a hundred percent. You know when we make decisions, 50 percent of the time we are going the wrong way for somebody, and so we have to do what we think is right and just, and if we're to be guided by somebody else's opinion, then we should not be wearing those robes.

Gayle A. Nachtigal is a circuit-court judge in Hillsboro, Oregon. She was president-elect of the American Judges Association in 2004-2005. She recently completed two terms on the board of directors of the National Center for State Courts.

Roy A. Schotland is a professor of law at Georgetown University in Washington, D.C. He was the reporter for the ABA's Task Force on Lawyers' Political Contributions and coauthored an amicus brief in Republican Party of Minnesota v. White on behalf of the Conference of Chief Justices.

Jeffrey Rosinek is a circuit-court judge in Miami, Florida, where he has served as a judge for 19 years. Since 1999, he has been in charge of the Miami-Dade Drug Court. He is a past president of the American Judges Association.

10. The oral reprimand given by the court was reprinted in Roy Schotland, Resource Materials on Judicial Independence, COURT REVIEW, Summer 2004, at 38, 46-47. For the court's written decision, see In re Angel, 867 So.2d 379 (Fla. 2004).

Problem-Solving Courts: Do They Create Judicial Independence Problems or Opportunities or Both?

Michael R. McAdam, Kevin S. Burke, and Mary Campbell McQueen

The third panel discussion at the National Forum on Judicial Independence explores the tension between setting up specialized, problem-solving courts and maintaining judicial independence for the judges assigned to such courts. The discussion was led by then-AJA president Michael R. McAdam, a judge on the Kansas City (Mo.) Municipal Court. Panelists were Kevin S. Burke, a district judge and past chief judge of the Hennepin County (Minn.) District Court, and Mary Campbell McQueen, president of the National Center for State Courts. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JUDGE MICHAEL McADAM: This was a topic that I wanted to be particularly involved in as my background was to start off as the Housing Court Judge of Kansas City, which was a newly created position. That position came about because of a charter change in our city form of government that created a judgeship. The underlying reason for the creation of that judgeship was because our court . . . was rotating the housing court docket amongst the then . . . seven judges, and there were several that the constituency group that was heavily involved in testifying and keeping an eye on neighborhood properties and zoning violations . . . did not like in that rotation. So they went ahead and got a charter change, which is not unlike a constitutional change, and created a permanent, but part-time, position of Housing Court Judge so that it would be one person.

Now my guess is that when they did that, their idea was they could then put pressure on that judge. Now I can’t quote anyone on that, but that’s kind of my speculation, and so what was interesting was I had been previously the prosecutor prosecuting those cases, and so now it went through the Missouri Plan of a selection of judges. We had a panel of three, I was one of them, and then the mayor and the city council voted on the final judge and I was successful.

But as soon as I became the judge, obviously my relationship with the constituency groups that I had been working with previously as prosecutor was different, and it was traumatic, to say the least, to explain that I’m no longer in the role you once thought of me as and I can no longer be in that role, and so it became kind of an ongoing battle, to the point that when there was a full-time position that opened up on our bench, I immediately grabbed that and went to the full-time position because it was a general ordinance violation docket that doesn’t have any particular focus.

I’m no longer the Housing Court Judge, but I did it for three years. It was very interesting work, but there was that element—and I didn’t have any formal thought about judicial independence at that time—I just knew that it wouldn’t be proper on an ethical basis to engage in the kind of activities that a prosecutor can engage in once I became a judge.

So, with that background, let me introduce our two esteemed panelists, and I mean that literally. These are two very dynamic people. I am in awe of their talent and I will say that probably more than once today, but I will say it for the first time, at least.

Let’s start with Mary McQueen, the new President of the National Center for State Courts. Before that she was the State Court Administrator for the state of Washington, responsible for 175 employees, a budget of $105 million, and a very outspoken member of the Conference of State Court Administrators . . . And then Judge Kevin Burke. Judge Burke, as you know, is a member of AJA. He’s also a member of our Board of Governors. He’s the Chief Judge of Hennepin County District Court in Minneapolis, Minnesota, and he’s the 2003 recipient of the William H. Rehnquist Award for Judicial Excellence. . .

The format we’re going to use is I’m going to give each of our two speakers, beginning with Kevin, five or ten minutes to give opening remarks about this particular topic. I do want to point out that Kevin has two articles in the Court Review special edition on judicial independence, so you can check out both of those articles because I’m sure they will be coming up as part of our discussion.

So with that I’ll turn it over to Kevin first and then after that, Mary.

JUDGE KEVIN BURKE: A couple weeks ago my friend Mary McQueen gave me a great opportunity. She convinced me to go to Beijing, China, to talk to Chinese judges about judicial independence and accountability and their connection to the community, and so I had a chance for four days to talk to a large number of Chinese judges, and what really struck me

Footnotes
I think one of the things that plagues this discussion was something I mentioned in one of the articles I wrote, and that is the tyranny of the one or the other. Too often we look at this as either it's one thing or the other, and I believe that the issue of problem-solving courts, the issue of judicial independence, and the issue of judicial accountability is very susceptible to . . . the tyranny of one or the other. Courts need to be accountable. Courts need to be connected to the community. That is fundamentally how we preserve judicial independence.

We have had in our country a long history of problem-solving courts. A hundred years ago, the juvenile courts were established in Chicago. We've had probate courts, family courts, lots of different courts that have proven that you can have an independent judiciary that solves people's problems.

Last year there were over a hundred million cases that were filed in the state courts of the United States. There are only about 27,000 of us who are judges dealing with those cases. Surely with those numbers judges throughout the United States need to be aggressive, willing to innovate, and willing to make a difference to try to reduce the amount of litigation that we see.

I think one of the things that contributed to the perception that problem-solving courts are an entanglement or a threat to judicial independence in part is [that] although they were well-intentioned, some advocates of problem-solving courts, some advocates of drug courts, some advocates of domestic-violence courts, have come across in such an evangelical fashion that they turned some of our colleagues off. That was unfortunate. It wasn't necessary because I really do believe that problem-solving courts fundamentally enhance the judiciary's ability to be independent.

What we heard this morning to begin with was a discussion about budget, and in the 20 years that I've been on the bench, you can't go to a meeting in which judges won't talk about their concern that we don't have enough money and we're a separate branch of government and they ought to adequately fund us—and that's true, but the fact of the matter is kids ought to get an education and senior citizens ought to get health care and a lot of other things that we compete with [in] society to get the scarce resources that we need.

I think fundamentally what problem-solving courts have done is make the judiciary more responsive to a lot of our society's needs. We're a lot more effective with that. So one problem I think was we oversold it internally and created this image that it is a problem of judicial independence.

The second problem is real. While it's important that the judiciary work with the other two branches of government, some of the problem-solving courts came with strings that really did conflict with a lot of the things most of us in the room thought were important. I'll give you an example. There were probably 800 or 900 drug courts that were created around the country, largely federally funded. Many of those courts were grant applications in which courts went into it, got the federal grant, and then weren't able to sustain it because the grant application came with so many strings that when the federal money ran out, the court died. That was a problem that we should have anticipated. The money was great, but the strings were too tight to make it effective for us in the long term.

If we're going to be adequately funded, it is many times easier to get new funds for a new initiative than it is to put money into your own base. So the problem-solving courts are a good opportunity to get additional money, but it is a problem in terms of our courts being in a position to design your docket based upon a grant application. I think that is one of the areas where the temptation to get the money sometimes overrides the judgment that most good judges have.

In the end, I think the answer to the question that was posed is [that] problem-solving courts are no threat to judicial independence. They come from a long tradition of courts trying to do well for people.

There's a social scientist that many of you are aware of, Tom Tyler. Tyler's research, I think, shows that problem-solving courts in whatever fashion they come about are effective, but Tyler says and what his research shows is almost all people, almost all the hundred million people or hundred million cases that come into the court, those people come into our court not expecting to win. They come in expecting to be listened to. They come in expecting to leave the court understanding what happened, understanding why the judge made that decision. That is the common thread of all the problem-solving courts.

That message is important to maintain judicial independence. The reason that we advocate this is it is a means to an end, not an end in itself. Judicial independence ought to make us more effective. Problem-solving courts are a method of us being more effective. Problem-solving courts for the most part have been places, in which in whatever form, dating back a hundred years ago, people came in and felt like that judge listened to them and that they understood what happened and why it happened when they left, and fundamentally the problem-solving courts in whatever fashion they had were judges throughout the United States who demonstrated to litigants who came before them that they cared about the people and the issues that came before them. Judicial independence is always strengthened when people come in our courts and see judges who care about the people who appear before them. . . .

MARY McQUEEN: Since I'm now removed from a state to a commonwealth, I wanted to find out exactly what the found-

2. See generally TOM TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 CRIME & JUST. 283 (2003); Public Opinion of the Courts: How It Has Been Formed and How We May Reshape It, COURT REVIEW, Fall 1999, at 46-53 (panel discussion including Tom Tyler).
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In Washington State when we had the recession and the downturn into the economy, the issue wasn't whether or not we could get additional money for new courts. The discussion formed around, “What are the core functions of the court?” And mental-health courts or drug courts or DUI courts or unified family courts were [said] not [to be] core functions of the court and so therefore shouldn't be funded.

So if we look at the ability of the individual court to determine how to handle dedicated dockets or triage cases, that is a threat on independence, and I think we have to change the discussion to move from the boutique court or the specialty court to a discussion of judicial triage and dedicated dockets.

I think Alexander Hamilton said it in Federalist 7, that nothing contributes more to the public's respect and esteem for government than the effective administration of justice, and it's that public trust and confidence that judges can bring about and garner to ensure that the services that are necessary to cut through the cycle, whether it be of family or of domestic violence or of drug abuse, will be applied.

It’s no different than the U.S. Supreme Court’s decision in *Miranda*. Sometimes it takes a judge and the influence of the court to ensure that the resources that are necessary are applied, and I believe that that’s what problem-solving courts have done.

I think one of the challenges that we have is because problem-solving courts do garner the interest of the public. Sometimes I know that my former Chief Justice in Washington really felt good about being asked to attend drug-court graduations, and I think what we have to caution ourselves against is cutting into the core funds for the court that would then be dedicated by a funding agency rather than obtain additional funds for additional services.

I also believe that as we’re moving forward to establish the elements of a problem-solving court, we have to ensure that all the judges on the bench appreciate the direction that we’re going because I think that sometimes we’re our own worst enemies, that somehow the judge that is on the problem-solving court is viewed by her or his colleagues as getting more resources or getting more public attention, and there has to be an ability for everyone to see the importance and the improvement in the entire administration of justice, rather than it being seen as an individual judge’s special advocacy or issue.

In looking at the public’s reaction to problem-solving courts, the National Center for State Courts . . . conducted a public opinion poll. Resoundingly when you ask questions about the types of services that problem-solving courts provide, there was overwhelming support on the part of the public that, yes, courts should be providing these services, and it increases almost by 20 points if you’re asking African-American defendants or Hispanic defendants because you are the face of justice and the courts are where the defendants look for an open and fair forum.

So when we’re talking about accountability, the cautions that we’ve already heard are: Is there a balance between accountability and independence? I noticed that you’ll have a panel that will talk more directly on that later, but I think that the accountability issue in looking at problem-solving courts, the measure people want to use is recidivism, and I think we have to be very cautious of that.

We don’t have to look more recently than when we first started pretrial diversion programs to know that in the first four or five years the recidivism rates look great, but then they tend to start a downturn. Well, it’s just mathematical. The bigger the pool, the more opportunity that recidivism is going to have to affect what looked like a 90% success rate. But I think the evidence that we’ve seen still supports the adoption of the elements of problem-solving courts across the lines for all types of courts.

The final thing that I wanted to mention that I don’t think is a problem, but that when you’re having discussions about problem-solving courts gets raised, are issues of judicial ethics, and specifically that somehow when you participate with advocacy groups and social service groups, does that somehow raise an issue under Canon 3 about ex parte communications?

The ABA now, in reviewing the model Code of Judicial Conduct, is specifically addressing that issue. I think with a close reading of Canon 3 it is not a concern because it says “ex parte communications otherwise provided by law,” so if in fact there is a court rule or a statute or a local ordinance that is establishing a problem-solving court, I think that we can work closely with the legislative branch of government to ensure that those types of interactions are “authorized by law,” so I don’t think that there’s any attack on judicial independence or judicial conduct from that area.

And the final thing I just wanted to mention was that I think that the central goal of the judiciary is to speak with one voice. My colleagues here from Washington, that’s not a new mantra. They heard that from me for 25 years. But I think that when we speak as individual judges and we speak as individual court levels, it’s not in the best interest of the judiciary because the legislature when finding a vacuum will fill it, and I think the American Judges Association is that place for us to speak with one voice. Thank you.

**JUDGE McADAM:** Very good, Mary, and I agree a hundred percent with your final comment that the AJA needs to take up this challenge and fill that void, because it’s certainly being filled whether we do it or not, and we may not like the result that we get if we don’t step up and get involved in this issue.

I have a question that I wanted to ask that was based on what Mary was saying because it’s . . . almost changed my thinking about this.

Kevin, tell me, do you think that problem-solving courts are like the magic bullet? I mean they respond to community needs as we’ve heard they do, and I think they do; they’re favored by funders and budget types, legislators and executives alike; and they’re an efficacious way to handle our dockets, our caseloads, certainly in certain kinds of cases, anyway. Have we discovered the magic bullet?

**JUDGE BURKE:** I don’t think that there is a magic bullet. I don’t think that there’s a magic way to deal with an assignment system of judges and so it seems to me a natural extension of that to say problem-solving courts are important, but it’s not the most important thing that’s on in judicial administration.

I think one of the difficulties is if you look at the problem-solving courts around the country, they’re all different. For example, I mentioned the drug courts. If you look around at
the evaluations, what do we know about them? One, there was a cottage industry of people who were evaluating them. They were almost all different. A lot of them had screenings on who could get in and some of them were really narrow so that only Mother Teresa who was caught with a small amount of marijuana could get in—and surprisingly enough, she was successful—and then there was another group that did other kinds of things.

So I've been trying to think about what made them uniquely successful at the time, and I think it comes down to this. The judges initially who went into the drug courts were not afraid to exhibit to the defendants that they cared about them. Neutrality is really important for the judiciary, but it's not the same as saying that you don't care about people and I think too often judges, in their understandable desire to be neutral, have masked that they care about the people who appear before them.

Secondly, I think the atmosphere and awe of the drug courts and all the other problem-solving courts that initially were quite successful is that they were by design a place in which the judges put a premium on listening to what the defendant had to say and making the defendant believe that you were really listening to them, so their atmosphere was a little different.

I think the third factor was that there was a premium in the problem-solving courts that the people who left those courts understood why we made those decisions. Those principles apply in every area of practice that courts have, and so if we could just take the lessons from problem-solving courts and say my court, whether it's designated as problem solving or not, is a place in which people will be listened to and people will leave my court understanding why I made that decision, we will be a lot more successful.

And then the point that I made which I will repeat: I think neutrality is really important. Don't misunderstand what I'm saying. But being neutral doesn't mean that you don't care, and I think that there have been instances in which judges have been afraid to show the community that they care about the problems that appear before them.

**MS. McQUEEN:** I would just add one element to that, and I think it's defendant accountability. I think that one of the aspects also of the judges that participated in the early problem-solving courts is they held defendants personally accountable. It wasn't that you showed up for one judge for a pretrial motion and another judge for the plea and then a final judge if there was some kind of revocation. There was an individual judge who showed an individual interest, as Judge Burke said, and we've had a lot of research on settlement conferencing and whether or not settlement conferences are effective or not, and we know because of judicial involvement that they are, so I would say that one of the other aspects of problem-solving courts is that sense that there's judicial follow-up.

**JUDGE McADAM:** A question from the floor.

**JUDGE MARK FARRELL:** Judge Mark Farrell from the Buffalo, New York, area. I've been running a drug court for the past eight years and a domestic-violence court for six and now a gambling court for two years, and one of the things I would agree with the judge's comments about is the fact that initially when these courts were formulated and brought about, they were brought about with an element of china-breaking and creativity and spontaneity, which I'm going to pose the question as to whether the tenor of problem-solving courts now has changed since judicial bureaucracy has overlaid them and now we have bureaus of people at state levels saying, well, you can't graduate someone from drug court until they do X, Y, and Z, and we now have standards and goals as to what they are. . . .

But the concern I have after running these for eight years and being involved in a number of different areas is that the judicial independence is sponsored and fostered more by allowing the judges to be creative without an excessive amount of bureaucratic overlay, and I just would like your response.

**MS. McQUEEN:** I agree a hundred percent. I think that that's why when I talk about judicial triage, I think that it's the attending physician who evaluates that client when they come into the emergency room, and I absolutely think that that is the one thread on problem-solving courts and judicial independence that are, I guess, barriers that are established by these funding bodies and/or legislative, either state or local, on entrance or exit criteria, and so I think that's why when I talk about problem-solving courts, I've tried to—and I think Chief Justice Kaye has as well—tried to move the discussion away from boutique or specialty courts to more of a discussion about the way that we do business and hold us accountable for the way that we do business and let the laboratories of the trial courts and the state courts find the best way to deal with these defendants.

**JUDGE BURKE:** I, too, agree with you. I think that one of the problems that we have had, though, in problem-solving courts is our reluctance to figure out how we are going to measure or hold ourselves accountable, and that becomes difficult.

I'll give you my experience in our drug court. We did not say that our goal was abstinence. We said we were going to reduce drug usage, and the reason that we said that is ours was largely a crack cocaine court. If you take a crack cocaine addict of ten years and get them simply to smoke marijuana, is that failure or progress? I think that you can make an argument it's progress.

So I think some of the difficulty for people who are in the trenches like I think you and I have been is that we recognize that that's progress or we believe it's progress, and I think if you look in drug courts 29% of the people who go to Hazelden, which is one of the premier drug programs in the country, are there on their fifth admission. So the difficulty, it seems to me, for people who are doing drug courts is that if 29% of the people can go to Hazelden for their fifth time, then three strikes and you're out of my drug court doesn't quite work.

I would go back for the comment I made before, though, to say that there should be some universal measures of program effectiveness. I believe that no matter what court you have, you ought to be able to measure and assess whether or not people felt like they were being listened to and that when they left, they understood what was going on.

I think that is what Mary indicated: People only being held accountable. For the most part, the problem-solving judges were good, if not great, at making sure that people understood
what the expectations were and that the expectations were, by
and large, reasonable.

**MS. McQUEEN:** I would add one thing because I know that in
every panel that we’ve heard today, I think the “A” word has
come up, accountability. I would, if I could take a moment,
put in a paid political announcement. Ncsconline.org is the
National Center’s website, and the National Center has done
an excellent job on developing workload measures as well as
trial performance standards. . . .

When I was working in Washington State, we had a pilot
project of unified family courts, basically one judge/one family
but trying to pull together dependency/juvenile-delinquency/
family-violence issues under one judge, and so the discussion
there was what do we measure?

Resoundingly, when you ask questions about
the types of services that problem-solving
courts provide, there was overwhelming
support on the part of the public that, yes,
courts should be providing those services . . .
because you are the face of justice and the
courts are where defendants look for an open
and fair forum.

– Mary Campbell McQueen

Well, the ability for the judge to have better information to
apply when making that decision I think is a valid measure of
success and I don’t think that we should back away from the
court system establishing what we think the measures of suc-
cess are.

**JUDGE McADAM:** Any other questions?

**JUDGE RICHARD KAYNE:** Richard Kayne. I’m a municipal
court judge from eastern Washington, and I have a question for
Mary. I will preface it by saying Washington State’s loss is the
National Center’s gain, and this is not a parochial question to
Washington State, but in addressing the lack of state funding
for trial courts in the state of Washington, especially courts of
limited jurisdiction, Washington State is, through the court-
funding task force, seemingly trading court reform or nominal
court reform for funding, and it seems to Washington State
judges that we’ll probably get nominal court reform, but no
funding, and it will result in a great deal of centralization.

Mary, do you think that this trend will limit the ability of
courts to innovate in areas that we’re talking about now?

**MS. McQUEEN:** I think it makes a difference in the definition
of centralization, and you’ve worked with me long enough to
know that my position on that is that the role of the judicial
counselor of the supreme court is to provide the trial court
with the tools they need, not to direct how they do their work.

I know that there’s been a lot of discussion over the years
about court reform and the trial-court-funding task force in
Washington. Washington, by the way, is fiftieth out of all 50
states in the amount of money that the legislature provides for
the trial courts. It’s basically a locally funded system and I say
that to preface my response. So when we were talking to leg-
islators about what the nexus is between the state’s interest and
what goes on in the trial court, it was kind of like what’s going
to change? Is there going to be major judicial reform?

Well, those of you who have been visionaries in looking at
unified court systems were, I guess, the testing ground for
those of us who came later to look at that, but all the efficien-
cies that have been gained, I think, in unification have been
through the consolidation of administration, not through the
change in subject-matter jurisdiction. So I think at least what
I know is going on in Washington at this point in time is that
there is probably going to be effort to look at consolidation of
the administration, which I don’t think will interfere with an
individual judge’s ability to develop and handle the way that
they would handle cases, but probably not a consolidation of
subject-matter jurisdiction.

**JUDGE McADAM:** Any other questions from the audience?

**JUDGE DARVIN ZIMMERMAN:** Darvin Zimmerman from
Clark County, Washington. That’s across the river from
Portland, Oregon.

I was wondering how many jurisdictions have problem-
solving courts. In Clark County we have a domestic-violence
court; we have a substance-abuse court and a substance-abuse
judge; we have the mental-health court, sort of a newer court;
and we have a homeless court. With five judges it gets a little
bit tough to run all those courts and those on specialty dock-
ests like for non-support [of children]. With so many other sta-
tistics, I’m wondering how many or what jurisdictions or what
percentage jurisdictions in the United States or whatever actu-
ally have problem-solving courts, is my question.
JUDGE BURKE: The National Center would know that. I guess my flippant answer, and it's not actually that flippant, is I don't think there's probably a court in the country that doesn't have some form of a problem-solving court. If you start with juvenile court, which was originally identified as a problem-solving court, there is one of those everywhere in some form. There's a family court in some form all around the United States. There are then a lot of the smaller things that you have mentioned, homeless courts and mental-health courts and drug courts, and to a certain extent even probate court is a problem-solving court for the recently passed, so my guess is that there probably is no court that isn't. I think that some part is just the rhetoric has taken over.

JUDGE McADAM: Next question, front row.

JUDGE SAMUEL LEVINE: [Samuel Levine, Nassau County, New York.] I was very involved in disability law before going on the bench and my question to the panel is shouldn't every judge in every courtroom be a problem-solving judge, especially on the criminal side? Whether it's an arraignment and you see that there's a health-related problem, shouldn't you be ordering some health treatment when they get over to the jail, and especially in the sentence where you're asking your probation department not only for recommendations about punishment? [B]ut I've had the experience of asking for a treatment plan as to what will be done while they're incarcerated or when they get on the street, how are they going to be corrected in their health-related problems?

MS. McQUEEN: Couldn't say it any better.

JUDGE McADAM: When we had the conference call for this committee, one of the things I pointed out was that I don't really see the difference between what I do as a judge in what is called the general docket, the limited jurisdiction docket in a city, and these particular modalities of treatment and identification of what the course of action should be taken with any one individual person. I mean we're relying on probation reports. We're relying on providers to let us know if someone has failed and why and we have to deal with why that is. We find out from family members who may attend court that there are problems and elements that we didn't know about.

I mean these are not new skills that we're learning here, I don't think, and I agree. I think this is something that we don't recognize as being what we've always done in the past because it has this label of problem-solving courts. It sounds like it's something new and different even though, as Judge Burke pointed out, we've had juvenile courts for a hundred years now...

JUDGE RAYMOND PIANKA: I'm Ray Pianka from the Cleveland Municipal Court Housing Division and we were set up in 1980 as a specialized court by an act of the state legislature, and so we handle all the housing-type issues/health issues in the city of Cleveland. There's 13 judges on the municipal court, but I just handle the housing docket.

It's interesting on judicial independence if you go on the City of Cleveland website, “Community Relations,” they've set up a program called “Court Watch,” which if you go into that section, it says send criminals and judges a message that you won't tolerate crime in your neighborhood and join Court Watch to come and watch the judges in the courtroom.

I have been on the bench about eight years, and so I've taken that as a challenge to turn things around, and those people who are court watchers, we have trained court watchers so once they get in a courtroom, they know what they're watching and they know what the judge is doing.

Then every quarter I meet with code-enforcement advocates, those people who want their neighborhoods to be upgraded through code enforcement, just to talk about in an informal way what the state of the art is in code enforcement.

I handle about 16,000 cases a year—6,000 criminal, 10,000 civil in the housing court—and one of the things, there are only three courts in the state of Ohio that have housing/health-type jurisdictions, and it would be helpful if the [National] Center for State Courts could help weave together those type of courts throughout the state and then also the municipal courts. Each municipal court has a docket that handles housing-type issues. It's not the favorite part of most judges' dockets. In fact, I go to judicial conferences and they say, “Well, you're with rat court,” and of course I specialize in a type of rats. In fact, I have a video program on how to keep
out of housing court, one of them devoted to rodent infestation, so it plays about six times a week on access video.

So trying to weave together these specialized dockets for people that may have problems with them and also talk about state of the art, vacant abandoned property, foreclosed property, all those type of issues that are of importance to cities and even suburban and rural areas, I think would be helpful, but identifying the people that are involved would also be helpful, so maybe the [National] Center for State Courts might be of assistance.

**MS. McQUEEN:** I think one of the things that I’ve seen that has changed, too, is that in the past where we were kind of looking at a pyramid with the court sitting up here and then, you know, different layers down, starting maybe with social service agencies and prosecutors and public defenders, now you have more of a wheel where the judiciary is in the middle and we’re almost the air traffic controller trying to coordinate all these partners in the process, and I think housing courts have been an excellent example of that.

Even when I talk to judges who [work in] mental-health courts, housing is a very important issue in helping the defendants in those cases develop a treatment plan. In Washington, the new issue that I found kind of interesting that the legislature adopted as a problem-solving court is water courts. Now there’s legislation being considered of creating a water court.

So I think that part of it is accountability, I think part of it is people wanting to see that there’s actually some benefit for the dollars that are spent, but given the issues that Judge Burke and most of you have identified, I think it can be balanced within an independent judiciary.

**JUDGE JAY DILWORTH:** I’m Jay Dilworth, of Reno, Nevada. We have the municipal court and we also have a fund for three counties for a drug court.

I have two things that concern me. They aren’t really questions. They’re concerns. One, I don’t see myself as solving somebody’s problems. In fact, I wrote that down here. I do not solve problems. I try to provide tools so somebody else can solve their own problem because if I solve the problem, that’s easy, but then it will come back to me again when we have new problems.

And the other is, as you spoke of before, a lot of folks go through treatment five times. We can’t give up on them. At the same time, we have an offender who continues to buy [illegal drugs] and I can’t say, “Well, okay, go back to drug court and just do better.” At some point I have to say, “I don’t care about drug court anymore. You’re going to jail because you continue to violate the law.”

We have a felony drug court and they get around it by . . . no longer . . . doing cocaine. They’re smoking marijuana or they’re doing methamphetamine or something like that. They’re still dealing on the streets and as soon as they get arrested [say,] “Well, I’m in drug court and I go to see Judge Williams.”

And I say, “No, you don’t. You go to jail.”

And so I have this problem with how many times do you give a person a chance. At some point I have to say, “No. I don’t care. Jail won’t help you, but I’m going to do it.”

And the other is I don’t see myself as solving somebody else’s problem. I just put out tools that they can possibly use.

**JUDGE BURKE:** Let me try to answer real quickly. I actually respectfully disagree with part of what you say. Let’s take family law as an example. A judge who is effective in dealing with a family who is going to reorganize themselves by getting divorced is not encouraging them to enjoy the experience and come back for a second divorce, and so I do think that judges can end up doing things to people in the family-court example that will prohibit them or discourage them from coming back again, so I think that there are instances in which undeniably judges are in a position to help people solve their problems.

The second thing is you’re right: You’ve got to hold people accountable. The drug offender is a very good example. On the other hand, almost all states look at intervention for treatment and use the least expensive intervention that they can, and so as between putting somebody in outpatient treatment or letting them quit on their own, they say quit on your own. As between outpatient and inpatient, they say outpatient. When that doesn’t work, no one holds the assessor accountable and says to the defendant, “Well, we’re going to hold you accountable and put you in jail.” That may be appropriate, but I do think that there are public policies that have contributed to people’s inability to get straight.

Michael R. McAdam is a judge (and former presiding judge) on the Kansas City (Mo.) Municipal Court. He was president of the American Judges Association in 2004-2005. He has been a member of the Kansas City Municipal Court since 1987, initially as its first part-time Housing Court Judge (1987-1990) and then as a full-time judge since 1990. A graduate of the University of Missouri-Kansas City School of Law and Rockhurst University, he has served as an adjunct faculty member teaching real-estate law at Rockhurst University.

Kevin S. Burke is a judge (and former chief judge) on the Hennepin County District Court in Minneapolis, Minnesota. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts, having previously received the National Center’s Distinguished Service Award in 2002. Burke established the drug court in Minneapolis and has engaged in detailed studies of court fairness, including ones exploring what factors determine whether criminal defendants and victims believe a proceeding was fair. He is a 1975 graduate of the University of Minnesota School of Law, where he is a member of the adjunct faculty.

Mary Campbell McQueen is president of the National Center for State Courts in Williamsburg, Virginia. Before taking that job in 2004, she was the Washington state court administrator for 16 years. While there, she initiated a program to reduce appellate-court delay, created a court-consulting unit to provide professional management evaluations to the courts, and played a key role in getting increased funding for the Washington judicial branch during an economic recession. She is a past president of the Conference of State Court Administrators. McQueen has a law degree from Seattle University.
Friends of the Court?  
The Bar, the Media, and the Public

The fourth panel discussion at the National Forum on Judicial Independence explores the way the public thinks about judicial independence and ways in which the media and members of the bar may affect judicial independence. The discussion was led by then-AJA secretary Steve Leben, a state general-jurisdiction trial judge from Kansas. Panelists were John Russonello, a pollster and consultant to nonprofit organizations, political campaigns, and other clients, and Malcolm Feeley, professor at the Boalt Hall School of Law at the University of California-Berkeley. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

**JUDGE STEVE LEBEN:** John Russonello and Malcolm Feeley are going to talk about the ways in which the public can be mobilized to assist us in preserving judicial independence and the ways in which the public may have different views than we do. They will also talk about ways in which the organized bar may be either a help or a hindrance to the goal of judicial independence.

In the [Summer 2004] *Court Review*, there’s a short article by John Russonello with some of his thoughts about public opinion and the courts. We want to start off with John Russonello telling you some of his thoughts from the various polling he’s done and the focus groups he’s done over the years about the way in which the public thinks about judicial independence.

**MR. JOHN RUSSONELLO:** This panel I noticed in the program is entitled “Friends of the Court? The Bar, the Media and Public.” Well, I don’t know much about the bar because my practice is in public opinion, but I know something about the public and the press, and one might say that they’re fair-weather friends. You might say that their attitudes are situational rather than faith-based in the coming message.

So if they are situational as opposed to faith-based, the question is how do we meet the public and the press and cross that river of skepticism and doubt onto the other side of trusting the courts and having faith in the courts?

Well, one thing that we should establish right off the bat, and that is no matter what we do, there’s nothing we can do to avoid rulings that will create hurt feelings and heated debate. It’s just the nature of the courts and what you all have to deal with every day, but there are steps that the courts can take, court advocates can take, to minimize the impact that controversies have on long-term attitudes toward the courts.

Where are most Americans on the courts? Most of the public doesn’t follow the day-to-day workings of the courts, but they hold a basic understanding of how the system should work. For instance, most cannot recite the Constitution, but they know that the Constitution protects their rights and they know that the courts protect the Constitution. They know what their rights are. They can’t tell you who Miranda was, but they can tell you what the police officer has to say to you if you get arrested.

A lot of this comes from popular culture. Americans have been taking weekly courses in kind of court procedure, you might say, civics lessons in the judicial system, by watching television from shows as far back as the *FBI* with Efrem Zimbalist, Jr., to *Hill Street Blues* to *Law and Order*. When I do focus groups with people about the courts, those are the things they recite.

They also recite things like the woman who burned herself on McDonald’s coffee as the reason why lawsuits are out of control, but that’s a whole ’nother topic.

Attitudes are grounded in four values. By values I mean the core beliefs that are rock bottom and determine our attitudes and our behavior and everything that we do. There are a limited number of values that really motivate people and on courts there are four: Fairness, we’ve heard a lot of about that today; independence, obviously; accountability; and adherence to community norms.

Those are the four values that come up over and over again as the foundation of how people form their attitudes about the courts, and as you know, these attitudes conflict from time to time. People say judicial independence is important and they need it. Sixty-eight percent say that federal judges should only consider the Constitution and the facts of a case without any—the word “any” was put in the question —any attention to public opinion. That’s 68%, but we know that when a controversial case comes up, the dedication to principle which I just out-

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**Footnotes**

lined, that principle of independence, sometimes bends to the application of independence, and you’ve got many instances, I’m sure, to attest to that.

These values conflict often. People want accountability. They want independence, but they also want accountability. How do they resolve that? Well, it’s hard. Seven in ten oppose lifetime appointments. They tell us they oppose lifetime appointments because they think there’s not enough remedies for correcting bad decisions by judges. The majority say that. The majority also says that lifetime appointments will result in judges who are out of touch with the world of people. Sixty-one percent nationally say that judges’ decisions are more likely to reflect their personal political views than independent judgment.

Critics of the judiciary play on these attitudes, play on these public sentiments of judges not being fair and not being responsive to national norms. These turned into criticisms, so-called liberal judges or activist judges. Our research suggests that these labels stick and can do damage if they’re not countered with another point of view.

That other point of view—to bolster public appreciation for the judicial system—should have four basic elements. First, the public must hear a constant drumming of messages from court advocates about how the courts defend the rights of all Americans. It’s not about judges. It’s about the rights of people, which is why people think the courts are valuable.

I’d ask you to pretend that the courts are a candidate—not judges—but pretend the courts as an institution are a candidate and you’re all political consultants now and you’ve got to figure out how to present that candidate in a way that has meaning and value to people. Why is your candidate more qualified than his or her opponent?

With the courts it would be stories of individuals. This is what you would put on the air for your candidate: individuals who have been wronged by big institutions—government, industry, business—who use the courts as the last resort for justice. Stories of an elderly woman getting her right to stay in her apartment; the veteran using the court to obtain health care that was denied by government bureaucrats; communities like Woburn, Massachusetts, or Anniston, Alabama, who held corporations accountable for the poisons dumped on their ground, to actions that prevent the same things from happening to other communities. These are the type of affirmative cases and stories that make the case to fairly defend the courts.

The second element of the four is to make your stories contemporary. We do a lot of work for the civil-rights community, and they’re always wanting to harken back to Brown v. Board of Education and other important milestones in the civil-rights struggle and other areas. Americans remember historical allusions, but we’re a society that believes that things are constantly changing and that yesterday’s solutions should not be expected to fit today’s problems. Using historical references doesn’t usually connect with the public.

Third, and this is a tough one to say to this crowd, always remember that your cause is not to defend judges, but to strengthen the faith in the courts. The public’s point of salience is that the courts defend individual rights. That’s why you’re important. Protecting the institution that’s the defender of rights is more important than focusing on individual judges.

And, fourth, we found in our polling that building long-term public support for a strong judiciary will require a better informed public. In our research we’ve done a lot of questions of people over the years and running through different statistical analyses, and we found that the correlation between strongly supporting the courts in the face of attacks and knowledge of the courts is very high. Having an understanding of the role of precedents, appeals, constitutional review, and other aspects of the courts reinforces an appreciation for the courts and their role as guardian and protector of individual rights.

These things can be woven into programs by state judges associations, state bar associations, civil-rights organizations, and other organizations. If we tell the stories of courts as champions of fairness, they can only be fair if they’re independent. This will not prevent individuals or interest groups from protesting specific decisions or vilifying specific judges. What I said at the outset will always be true. You’ll always get criticized. You’ll always get hit. These four elements aren’t going to protect you from that, but they will provide a more informed public that will see more clearly how the system benefits them that will withstand the courses in the future.

**JUDGE LEBEN:** . . . John Russonello has given you a view on how to improve public respect for an independent judiciary as seen from someone who has been a political consultant and who works now in polling and focus-group research and works as a consultant to a variety of organizations.

For a different perspective on the same idea, what’s necessary for a public support system of judicial independence, Professor Feeley will discuss things that are related to what’s important in a society and what’s important in a governmental system.

**PROFESSOR MALCOLM FEELEY:** . . . I want to explore with you or share with you a problem that I’ve been puzzling over for the past several years and then my tentative solution to the problem that is posed. For the past 20 years, 25, 30 years, I’ve been writing books about folks like you. I’ve been teaching at the National Judicial College in the master [of] judicial studies program up at Reno. . . . I know what you think. I know how you’re selected. I’ve watched you in benches across the country.

Now, for the past 20 years I’ve been going to Japan on and off a number of times. I’ve spent time sitting on the bench. I haven’t understood much, but I haven’t understood much when I’ve been sitting in your courtrooms as well.

I’ve talked to prosecutors, defense attorneys giving talks to the bar in Japan, and learned something about the Japanese judiciary as well as here.

Here’s the problem: Japanese judges are selected by vigorous competition. Only 3 percent of the people that take the state-sponsored bar exam pass it. Out of that tiny group, only the best and the brightest are selected for the two-year internship in the judicial school run by the Supreme Court of Japan. Some of those are weeded out. So it’s a highly selective, professional, merit-based judiciary, the best and the brightest across. It’s well paid—better than you all, by and large—and high prestige—better than you, by and large. It is the ideal judiciary: well paid, high prestige, merit selection or professional career advancement, and the like.
You all know what your prior backgrounds were, you all know how much training you got between the day you were selected to be a judge and you put on that black robe, so it's a world of difference.

Well, here's my problem. Why is it? Why is it do I think that American state, not federal, but state trial court judges are more independent than Japanese judges given everything I've said about it? I do think that, and then I set about trying to convince myself or explain. I came to the conclusion first and then I wanted to work backwards and figure out why that was the case, and I want to share with you some of my tentative thoughts...

I think we can understand a lot about us if we know something about them. We can see us clearly in contrast to them, so I think the comparative enterprise is useful, but let me identify some things. I'm going to dramatically simplify, but bear with me.

Let me suggest that there are two types of law. I mean there's a variety, but let me identify two polar opposites. One I'll call bureaucratic law. The term “bureaucratic” gives part of what I want to convey. Its distinctive features are the source of the law is the state and the cast of the judge is to apply the rules. There's limited discretion, there's... a high degree of effort to maintain consistency, procedural regularity is important, and judges can even be selected and trained to be able to follow in this tradition. They can be like professionalized civil servants, as it were. Independence can be maintained as bureaucrats everywhere maintain independence, keeping their eyes averted and their nose to the paper in front of them and narrowing their horizons, crossing the T's and dotting the I's and hoping that controversy will sail over their head. So that's one view of law. It's a very common view of law. It's a view of law that begins to look a little bit like law in Japan.

Now the challenges to this, of course, are the converse. If there's limited discretion and procedure is paramount, that means there's not a lot of discretion, there's not a lot of autonomy to move and adjust and, in the terms of the previous panel, solve problems. One is bounded by the rules, as it were. Secondly, it fosters a type of civil-service-like mentality that is not especially creative and it emphasizes procedure over substance. In short, it's not a very creative and not a very exciting enterprise, although we all value bureaucracy and see the values of those sorts of things in a lot of ways.

Let me contrast that with another view of law and I think you'll begin to recognize this. I call it, because I steal from a colleague, I call that responsive law. Let me identify some of the distinguishing features.

First, the sources of law. [I]n bureaucratic law, the source of law is the state: If the legislature passes it, my job is to enforce it, to apply the rules.

In responsive law, the source of law can be vague. It can be the state, obviously, but it can be general principles. It can be natural law. It can be aspirations, constitutional aspirations. It can be one's fidelity to a sense of justice that is more than the sum total of all the rules. It's a vague or an ambitious enterprise, but it suggests that law is something more than the subtotal of those rules passed by the state. It's anchored out there somewhere. You'll remember this from civics lessons in undergraduate days if nothing else.

This view of law also embraces the discretion of judges. It suggests that the judges should be responsive not only to the rules, but to the sense of justice that is behind those rules that gives them a fair degree of flexibility and some discretion, at least invites that. It invites a concern with the effectiveness of outcome. In the previous panel, we heard problem solving. Responsive law generally and I think the common-law tradition, certainly the American common-law tradition, invites problem solving and concerns with outcome and substance and effectiveness in a variety of ways. The function of the law is not to apply the rules narrowly, but to fulfill aspirations. Now these two are not mutually exclusive, and I don't mean to suggest they are.

It also suggests that judges, courts—and I like John's

There are a limited number of values that really motivate people and on courts there are four: Fairness . . ., independence . . ., accountability, and adherence to community norms.

— John Russonello
emphasis on courts rather than judges, the individual judges—the institution of the judiciary more generally, I'm saying the institution of law, is designed to reflect in some way and capture and express and give substance and meaning to social values, so law is consistently changing in a variety of ways.

Now the problem, the challenge of responsive law, strikes me as this: If it embraces expansive aspirations and identifies substantive concerns to address, it also invites . . . public controversy. It's going to be linked with public controversy because it's dealing with substantive social issues, and as society changes, the effort to work through those is going to generate a variety of controversies. That's going to play out in a variety of ways, including the process of selecting judges. It just strikes me it's a feature of what I would call responsive law. It's not abnormal. It's not weird. It's not inconsistent with. It's just an aspect or a feature of what I call responsive law.

Now obviously these challenges need to be met. They need to be moderated. We can't have the distinction between legislator and judge disappear, and law means something more and something different than what legislatures are, so let me identify two institutional arrangements that I think go some way to foster judicial independence and to gain an excessive amount of accountability, I suppose you might characterize it, in terms of public oversight of judges.

Now these two features I suggest are sort of counterintuitive on the face but will become, I think, obvious after reflection. One is a competitive party system. A competitive party system, I maintain, is a necessary condition for an independent judiciary. Now we think of competitive party systems often as leading to competitive judicial selection processes and the like, but let me identify why I think competitive party systems are important for independent judges, and by a competitive party system I mean a party system in which the reins of government shift from one party to another in the two-party system or multiparty system—in which there is some rotation in office by different parties, is what I mean by that.

Look everywhere and always. Those who control the reins of government want to harness the judiciary to their purposes. If you control the reins of government, one important engine or one important horse pulling that is the judiciary, and it makes sense, and everywhere all these parties want to. Parties in control want to use the judiciary to advance their causes.

I invite you to think of any. You name a one-party state anywhere in history you can think of that's been in power for some time that has had an independent judiciary—that is a one-party country, I mean, and I think you would be hard pressed to find one.

Why is that? Well, I suggest this. In competitive-party systems everybody who is in power can anticipate at some point they will be out of power and they will quickly agree, for all sorts of reasons that I will skip over right now, that there are certain institutional arrangements that make sense to be independent. The judiciary is one of those. Those who pass legislation or adopt laws when they are in power would like some guarantee that they would be enforced when they're out of power, and an independent judiciary is one way to do that.
Now, it's a lot more trouble. I mean they can repeal the legislation, obviously, but it takes some considerable effort, more than simple majorities, usually, to repeal legislation. So that's one of the reasons.

So I suggest that a two-party competitive party system, two parties normally, creates an incentive to keep the judiciary independent and I think that goes a long way—a long, long way—to explaining why the American judiciary is as independent as it is, but there's a second factor and that's more problematic and I'm not going to dwell on it, but I'll hit it fast.

The second factor enhancing independence is what I'll call an economist legal system. I want to shift now and not talk about judicial independence, but I want to talk about something broader that incorporates independence, and I'll call it an autonomous legal system. I'll go back to my idea of responsive law and suggest that by responsive law I mean a legal system that responds to a quest for justice not simply as applying particular rules embraced by the state.

Now the two-party system goes some ways to protecting that, but let me suggest another necessary feature of a robust economist system, and that is a strong and robust bar. The law as it belongs to anybody, it belongs to us all and it belongs to the people, yes, but there are two institutional stewards that are necessary to protect a robust autonomous legal system. That's the bench and that is the bar. They work in concert to protect the autonomy of that universe, the autonomy from takeover by the state, as it were, on one hand and the autonomy for being overly responsive to the public on the other. That is you two together, the bench and the bar, have this stewardship obligation.

Now the reason, the reason that I've concluded that the judiciary in Japan, for all its professionalism, is not independent is that it lacks a two-party tradition—the liberal Democratic Party has been in power since World War II—and it lacks a robust and independent and large bar that is joined in partnership with the bench. You're either a lawyer or you are a judge [or] a prosecutor, in Japan. The idea that you can be a judge and a lawyer or lawyer/judge is not heard. You're either a lawyer or a judge. They don't fraternize.

The American Bar Association has a section, a division for judges. Judges move in and out. You guys, some of you guys will go back, maybe even unwillingly, to practice law at some point. There is a connection between bench and bar and it's that connection, I think, with a large and robust bar that goes a considerable way to make the American judiciary as independent as it is.

Now I don't want to suggest that I think everything is okay, but I do want to make several sort of concluding remarks with regard to this. One, to the extent that there are problems of a lack of judicial independence in the United States, let me suggest that the most egregious examples of those, I think—this is a hypothesis—are found in those regions, in those communities, in which there is not a robust competitive party system. Think of Chicago, old Chicago. Maybe not new Chicago. You tell me. That is one.

A second thing I want to suggest is that I think that the bar in recent years, preoccupied as it is with getting rich and protecting its monopoly, has failed in its stewardship responsibilities to protecting the autonomy of the law. Now one important way to do that is to protect the autonomy of the court system and judges.

The bar has failed to speak out enough—a long way to explain why the American judiciary is as independent as it is, but there's a second factor and that's more problematic and I'm not going to dwell on it, but I'll hit it fast.

The final thought I want to pass is that to some extent controversy, vast amounts of controversy, are just inherent in what I have termed a robust autonomous responsive legal system because a robust responsive autonomous legal system is one in which the judiciary takes new issues, tries to formulate new policies, new rules facing those, and is likely to get caught in the controversy about those issues generally.

JUDGE LEBEN: I want to start with a question to both of you. Professor Feeley has noted with respect to the bar that in some respects they may have failed in their obligation to really be a defender of the judiciary in recent years, and one reason for that may be the increasing segmentation of the bar, that you have a plaintiffs’ bar with one set of interests, a defense bar with another set of interests, and other splinter bar groups that are working.

So my question to Professor Feeley would be, from your prospective how do we get around that, and to John Russonello it would be, as a consultant who works with groups like that that want to have a particular message, how do we get them to focus a little bit differently?

PROFESSOR FEELEY: It's a hard problem. Tony Kronman, the former dean of the Yale Law School, has written a book called The Lost Lawyer, and he laments the decline of the public-regardfulness of lawyers and the bar. In the law schools we are trying to revive that spirit that says as a lawyer you wear two hats. You are a provider for your family and an advocate for your client, and the other one is that you are a steward for the legal system, and you guys might in your various talks at various local bar functions remind the lawyers that there can be heated differences, but at some level they ought to come together to protect the institution of the judiciary.

MR. RUSSONELLO: Lawyers can help the judiciary if they have more credibility themselves, and let me say two things about that. The first is we've done a lot of work for lawyers and for legal services and what we found is when people criticize lawyers, you hear it in the campaign: “Lawyers are responsible for frivolous lawsuits that are clogging the courts.” People agree with that, but it doesn't affect their opinions on things like support for legal services, support for the courts, because they see through it. They can agree with that but still take the right position, the aggressive position about supporting the courts and supporting programs for the people. That's number one. That's what you have going for you.

Number two, the number-one thing you find that you can do to improve the opinion of lawyers is to do pro bono work
and let the public know about it because the charge that sticks is not so much that you’re clogging the courts with frivolous lawsuits. It’s that you charge too much and that you make too much money, and there’s no way to tell people no, we don’t make too much money because when you tell them what you make, they get even more enraged.

The way you counteract the money thing for the bar is to get them to do more pro bono work that shows that they care, so (a) the bar should not pay attention to the noise about frivolous lawsuits because it’s just noise, and (b) they can help themselves and the courts by doing more pro bono work and letting the public know about it.

**JUDGE LEBEN:** John Russonello, let me ask you this question. Professor Feeley has described a complicated legal system, one in which judges have discretion, one in which the law comes from multiple sources, one in which the judge is clearly exercising discretion and making choices that may be policy related. On the other hand, the public would prefer or might react more easily to a judge who has no discretion and is simply applying the law fairly and impartially. Is there a way to defend the more nuanced legal system or is it necessary to dumb it down in public presentations, as if there weren’t as much policy choice in the development of common law as there really is?

**MR. RUSSONELLO:** This goes to the heart of mandatory minimums because for years it was assumed that the public supported mandatory minimums because they thought it was fair to have judges be locked in so that one person that commits a crime gets the same penalty as another person who commits a crime, which is why the liberals proposed mandatory minimums in the first place. It didn’t turn out that way. What we found five years ago was that the public is starting to turn on mandatory minimums because they’ve started to see they’re unfair.

So you can explain nuances to people when we put it before the public and say this doesn’t allow judges to take into consideration the circumstances in which a crime was committed. That made them understand and it went from 65% for the public supporting mandatory minimums to 68, 69% opposing mandatory minimums.

**JUDGE LEBEN:** Professor Feeley, any comment on presenting a nuanced view of the system to the public?

**PROFESSOR FEELEY:** One is, as I said, you’re just going to have a fair amount of controversy, and certainly during an era of “Get Tough on Crime” you’re going to have to weigh that. What has been really disappointing certainly here in California, the years I’ve been here, is the bar organization has not stepped forward to run interference for the courts, has not come forward to say, look, it’s complicated. Stand back. Simple solutions don’t work.

It has remained silent and let the legislature run over us and institutionalized terrible sentencing mandatory minimums, as it were, to the Constitution, making it really difficult.

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**The bar has failed to speak out enough . . . when crazy complaints have been made against judges . . . .** [O]ne of the things you might think about is asking yourselves institutionally how you can revive a more vigorous and robust connection between bench and bar.

— Malcolm Feeley

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**MR. LARRY HANSEN:** I’m with the Joyce Foundation. I live in Cook County. It never occurred to me until this moment that we were so close to the Japanese model. We have neither a competitive party system in Cook County and the bar association is not particularly vigorous in defending the courts, although at times it could hardly be faulted for that, given the behavior of our courts on occasion.

I have just have a question for John. One reason the Joyce Foundation got involved with this issue five or six years ago was partly the advertisements we saw coming out of Ohio and
other jurisdictions, but I was particularly shocked by I think it was a 1999 poll that had been done by the Texas Bar Association and by the Supreme Court of Texas, and one of the questions that was asked of lawyers and the general public and court personnel and judges was whether or not campaign contributions had any effect on the decisions that judges made.

Not surprisingly, the public by a very substantial margin said yes. Court personnel said yes, but at a lesser level. Even lawyers, in excess of 50 percent, said that campaign contributions made a difference, but what astonished me the most was that 49 percent of the judges who were surveyed said that this was a problem.

John, in your polling [what] have you seen? Have you raised this issue with the general public? I think the merits poll for Judith Kaye's commission raised it last year. I think in Ohio and perhaps in Pennsylvania, it's been raised in some polls as well. You and I come out of political backgrounds. I would just say that I think the public and the judges actually may have an exaggerated view, but in politics perceptions count a lot and people very often act on perceptions, not just the facts.

**MR. RUSSONELLO:** We haven't done polling specifically on this, but our research suggests that what you're saying could be a strong campaign with the public if one wanted to cut down on the contributions or have some tougher reporting on contributions of judges. The public is usually loath to do away with election of judges because they see it as giving themselves a voice that they wouldn't have without the funding process.

**JUDGE LEBEN:** Earlier, in several of the presentations, there was discussion about judges being accountable to the public. How would either of you suggest either from a public-opinion standpoint or from a systems standpoint judges could best both hold themselves accountable and be publicly perceived for being so?

**MR. RUSSONELLO:** I think that's a long-term issue. There are some issues that are short term that you can do. Short term is focus on individual rights, show how you help. Those examples I gave in my talk, show how you help to better people's lives, and give them you're the institution of last resort when you've got a problem against an institution. That's short term. You can do that right away.

The accountability thing is a long-term issue that has to be done with education in the schools about all the checks and balances on judges. You can't do that in the short term. That has to be ingrained in public education because you can't go out and tell people you're accountable. It's just nothing that you can sell, yourself. They're just going to have to understand over the more long-term education. . . .

[A]lways remember that your cause is not to defend judges, but to strengthen the faith in the courts. The public's point of salience is that the courts defend individual rights. That's why you're important. Protecting the institution that's the defender of rights is more important than focusing on individual judges.

– John Russonello

**PROFESSOR FEELEY:** . . . The one thing that I don't think you should do, and I think it's consistent with the polling he found, and that is the more people know about how your court operates, the lower their estimation of you is.

One of the reasons they hold you in such high regard is they don't know the great details. There is something odd about that. You know judges are held in very high regard in this country, but the more you tell, the more they know about the operations of your courts, the less they know, and that's not totally surprising to me.

So you have a good rep. I think you need to build institutional alliances, as John said, for the court system, for the legal system, to embrace the enterprise and not a particular judge, and so I would echo many of the themes that he's spoken of.

**JUDGE LEBEN:** Professor Schotland, did you have quick point you wanted to bounce off this panel?

**PROFESSOR SCHOTLAND:** It is about the lightning rod called the Ten Commandments. A rising number of people in a rising array of states are of the view that it's wrong to insist you not have the Ten Commandments in the courthouse. In
Alabama in the primary this year, somebody known as for the former chief justice beat others who wouldn’t speak to it. What should be done to try to educate people who certainly are far, far from aware of what some of us would think is clear as clear, First Amendment religion? What approach would you suggest?

PROFESSOR FEELEY: I would say that’s a good case where the bar ought to be front and center, and you ought to be goosing them to get front and center and say what the judge did in that case was ordinary, first-year constitutional law, and they ought to be out there running interference for you, rather than you doing it yourself.

MR. RUSSONELLO: I think people need to see, put themselves in other people’s shoes. I think that people revere the Constitution, but when you use the Constitution as your reason for why something shouldn’t be done, it lacks salience. If you say don’t do that, it’s unconstitutional, people say, “So?”

Now they revere the Constitution because they revere what’s in it for themselves, so I would say if I was going to run a campaign on this, I would show what would happen if we applied this to all religions and how it would be a power battle in terms of religious artifacts in the courtroom, because this is a tough issue in the long run, and the moral of it is to get people to step inside someone else’s shoes. . . .

Steve Leben is a state general-jurisdiction trial judge in Johnson County, Kansas. He was secretary of the American Judges Association in 2004. He has been the editor of Court Review since 1998; he received the Distinguished Service Award from the National Center for State Courts in 2003.

John Russonello is a partner in the public-opinion research firm Belden, Russonello & Stewart in Washington, D.C. He does public-opinion research, polling, and focus-group studies for groups such as the American Civil Liberties Union and the Open Society Institute on topics related to the judiciary and judicial independence. Before joining his present firm, he had a political consulting practice; before that, he was a press secretary and speech writer for U.S. Rep. Peter Rodino (D-N.J.).

Malcolm Feeley is a professor at the Boalt Hall School of Law at the University of California-Berkeley. He is the author of several books, including The Process Is the Punishment: Handling Cases in a Lower Court, and Court Reform on Trial: Why Simple Solutions Fail, and the editor of the book, The Japanese Adversary System in Context: Controversies and Comparisons.
The fifth panel discussion at the National Forum on Judicial Independence explored the intersection between judicial independence and public accountability. The discussion was led by Michael W. Manners, a circuit judge on the Jackson County Circuit Court in Independence, Missouri. Panelists were Michael L. Buenger, Missouri state court administrator; Kevin S. Burke, a district judge in Hennepin County District Court in Minneapolis, Minnesota; Bobby B. DeLaughter, a circuit judge on the Hinds County Circuit Court in Jackson, Mississippi; Malcolm Feeley, professor of law at the University of California-Berkeley; Michael R. McAdam, judge on the Kansas City (Mo.) Municipal Court; Mary Campbell McQueen, president of the National Center for State Courts; Jeffrey Rosinek, a circuit judge on the Miami-Dade County Circuit Court in Miami, Florida; John Russonello, a pollster and consultant; Roy A. Schotland, professor of law at Georgetown University; and Robert Wessels, court manager for the county criminal courts at law in Harris County (Houston), Texas. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JUDGE MICHAEL W. MANNERS: Mary [McQueen] said earlier that the word “activist” had become the “A” word when applied to judges. I can tell you I practiced law for 24 years and when I applied the “A” word to judges, I was talking about the body part and nothing to do with their political leanings, but times change. Times change.

Let me tell you, and Judge McAdam alluded to this earlier in talking about Missouri, the home of the nonpartisan merit selection plan for judges, that there’s been a threat to that. Let me give you a little bit more context about that because it maybe provides context for the first question I want to ask of the panel.

The way that that controversy came about, very briefly, was this, and perhaps it’s coincidental, but Missouri a few years ago had a referendum election on whether or not its citizens should be permitted to carry concealed firearms, and that referendum failed. Political times changed and last year the state legislature adopted a law allowing people in Missouri under certain circumstances to carry concealed firearms. The law was so broad it would have permitted, in the absence of some special local regulation, carrying of concealed weapons in courthouses.

We live in an era in which all sectors of the public are asking government agencies to be accountable, and I think that it’s important that we define what it is that we’re willing to be held accountable for as opposed to letting other people or the legislature or executive branch define what issues are important.

— Kevin S. Burke

Many of us on the bench were not crazy about that aspect of it, but there were other constitutional challenges raised to that statute.

A judge in St. Louis City struck the law down as being unconstitutional and in violation of a particular section of the Missouri Constitution. It went up immediately by a special writ to the Missouri Supreme Court, and while the case was pending in the Missouri Supreme Court, 53 members of the House, all members of one particular political party that supported the legislation, introduced a resolution that would call for the popular election of members of the Missouri Supreme Court, the court of appeals, and those circuit judges, judges of general jurisdiction like me, who were appointed rather than elected.

Now, Judge Burke, how does that kind of legislation implicate judicial independence?
JUDGE KEVIN BURKE: For the soon-retired members of the Missouri Supreme Court, probably not very much.

I think there have been a number of instances around the country in which legislative bodies have been rather blatant in their attempt to intimidate or direct what the judiciary is doing, ranging from the federal court's jurisdiction-stripping bills... In my state Judge Rosebaum made comments to the House Judiciary Committee and incurred the wrath of the chairman of the committee, and he's been suffering from it ever since.

I think that some part of the reason that it has been so successful is that we in the judiciary and our natural allies—or unnatural allies—have not been very effective in speaking up against that or showing dangers to the public of that happening. I think that was the professor's comment, that it becomes the sport, the present-day sport, now: picking on judges...

JUDGE MANNERS: Let's talk about judicial accountability for a minute because that has been posed as at once the opposite of judicial independence, but also the antidote to claims that we need to limit judicial independence.

Let me give you an example of a bill that was introduced in our legislature and if you have similar situations in your individual states, I'd like to hear about it. But we had a bill introduced by a pretty good senator, one that I've known for a number of years, who had a complaint from one of her constituents about how long it was taking to get motions to modify decided in family court cases, so she came up with this solution. She introduced a bill that would have said that if a judge does not decide a motion to modify within 90 days after the evidence is completed, that judge would be stripped of his or her health-insurance benefits.

That is a form, I guess, of judicial accountability to make sure that we perform expeditiously. Judge Rosinek, would that make you perform expeditiously?

JUDGE KEVIN BURKE: I hate to tell you this, but Minnesota already has that law. It passed 20 years ago.

JUDGE JEFFREY ROSINEK: Is that a full literal rule or something?

JUDGE BURKE: It goes to our entire salary.

JUDGE MANNERS: The entire salary?

JUDGE ROSINEK: Well, apparently they keep them coming. I thought I was having problems...

Absolutely. Absolutely. It's the Golden Rule and he who controls the gold rules, and that's the legislature, has the control of the dollars and if they were going to strip us of a meager thing like our health insurance, let alone our whole salary, I think that would cause us to act. Obviously, the major problem there is: Is that the right type of accountability to have?

Now we're supposed to have this concept of three coequal branches of the government. The only branch that thinks that way is the judicial branch, because I sure as hell don't believe that the executive or legislative branches believe that, but if the legislative branch would come up with some type of enactment like that, it would force judges to make [rulings on cases]. It doesn't mean they were ruled well. It just means they were ruled, and so that's the concern I have.

JUDGE MANNERS: Judge Burke, you wrote extensively about accountability in the article that is in the most recent Court Review on why accountability is a good thing and that we ought to welcome it.¹ Tell me, from a practical standpoint, for those of us who are in the trenches trying cases every day..., what does accountability mean for a trial judge?

Footnotes
1. See Kevin S. Burke, A Judiciary That Is as Good as Its Promise: The

– Michael W. Manners

[T]here is an institutional interest that the bar has... in having competent judges, and they are our natural allies and there's a lot more of them than there are of us. For the most part, a lot of us can't make political contributions. They can. They can influence their legislators in ways that we never can.

JUDGE BURKE: I think the reason that I think it's important now is that we live in an era in which all sectors of the public are asking government agencies to be accountable, and I think that it's important that we define what it is that we're willing to be held accountable for as opposed to letting other people or the legislature or executive branch define what issues are important.

So put another way, if you're going to get run out of town, get it up front and announce it's a break, and I do believe that the judiciary, the trial court, does need to do that. I think there are some simple principles.

I think that even though I joke about not getting paid after 90 days, prompt disposition of cases is important. We can be held accountable for that, and we should be held accountable for that.

The thing I alluded to earlier... is I think that we should have courts, trial courts, that people feel that they were listened to. It's not that I'm overworked. It's that the effects of budget cuts are too many people coming in too fast through court and just recycling them isn't an unacceptable public policy?

So that goes back to my argument about accountability. I think that we have to have simple measures of accountability that the public can understand and that legislators can be forced to deal with because I think right now it's amorphous, and they can kind of get away with things—that you can do more with less when actually, in many instances, you can only do less with less.

JUDGE MANNERS: Is it practical, though, for that to occur? And maybe my state is unique in this regard. Let me know if some of you have this experience, but when I was on family court, which I was for the last two years, I was faced with a huge docket. Being able to make quick decisions would have been a luxury. I wish I could have done it, but the practical reality was I had a huge docket. I tried 590 contested divorces of one kind or another last year. Some of those were pretty simple cases. Others involved a lot of property, child-custody issues, things like that, that invited reflection on occasion and being able to listen to evidence and give people a complete hearing.

Isn't there an inherent tension between saying you have an arbitrary time standard that you have to meet and being able to give people the kind of attention that they deserve?

JUDGE MANNERS: Judge DeLaughter, earlier today a lot of our focus has been on the current-day problems with judicial independence and the assaults on it, but some of our speakers reminded us today that this goes back to the founding of the republic, that there are long periods of time in our history when this has been a controversy, and through the nineteenth and early twentieth centuries.

Let me ask you about a practical problem, and I have no idea what the answer to this is, but you prosecuted a case in 1994 that had been tried once or twice before in 1964, 30 years earlier—a vastly different time than when you tried the case,

I think term limits are probably one of the most ill-conceived ideas that we've come up with, and the reason I say that is in 2002 we had about a 65% change in the legislature in Missouri... [T]here was an enormous amount of institutional history between our branches of government and within the legislature itself that suddenly evaporated.

—Michael L. Buenger
involving the prosecution of the man who allegedly—and I
guess finally was proven to have—murdered Medgar Evers. In
your review of that case, and I realize you were, what, in the
third grade at the time that the case was originally tried, but
what you know about the original trial of that case, how was
judicial independence upheld at that time, in 1964 in Jackson,
Mississippi?

JUDGE BOBBY B. DeLAUGHTER: Well, the very fact that there
was a trial or two trials in 1964. We had a hard time in 1994,
so you can imagine, given the times and the given the setting,
the pressure that would have been exerted upon the district attor-
ney, for one player, not to prosecute the case, and the pressure
on the trial judge in allowing the case to proceed on and vari-
ous rulings that he was called upon to make during the course
of the trial, so just the very fact that there was a trial, when you
consider the times and the place, I think showed tremendous
courage and independence involving the rule of law.

If the players involved strictly had been playing to account-
ability only, and every official in Mississippi is elected—judges,
district attorney, everybody involved—if it was just account-
ability that was the primary concern, then you wouldn't have
seen two trials.

JUDGE MANNERS: So maybe this isn't an intractable problem.
If judges could withstand pressure in Jackson, Mississippi, in
1964 of that nature, we can stand being called activist
judges in 2004. Do you think that's possible?

JUDGE DeLAUGHTER: I think so.

JUDGE MANNERS: How does that square with public-opinion
polls? I mean we just heard about a case that 40 years ago was
tried in Jackson, Mississippi, by judges who had to be at least
cognizant of the possibility that they were making unpopular
decisions by even permitting a trial to take place. Does that
give us some hope for the future of being able to shape public
opinion, to recognize the importance of judicial independence?

MR. JOHN RUSSONELLO: The public has a strong commitment
to an independent judiciary, but like its commitment to civil
rights and the right to privacy and all the other rights that go
along with the Bill of Rights, the application, sometimes they
fall off in terms of how its applied even though they're for the
basic principles. So what we need to do, what the bar needs to
do and the rest of us [as] advocates for the courts, is to give
them the examples, the applications that reinforce the impor-
tance of judicial independence.

Your very first comment about the concealed-weapons legis-
lation, which was a way to hurt the independence of the
courts—an answer to that would not be this is going to hurt the
independence of the courts. An answer to that would be to
show to the bar, to show the motivation of the people who are
bringing that particular piece of legislation.

In other words, when you get attacked it's better not to have
to defend. It's better to show that the other side has motivations
beyond judicial activism—that that's only a label, but they have
another agenda as to why they're doing it, why they're proposing
curbs on the courts' independence.

JUDGE MANNERS: Professor Feeley, I might follow up on that
comment by pointing out that I don't think anybody who intro-
duced that legislation would have said, well, we're doing this to
try to focus the court on a particular path, but it is interesting
the members of the same political party that introduced that
also made sure—I shouldn't say made sure—that bill didn't go
anywhere, and we have a contested governor's election coming
up this year in which the political party in control of the gov-
ernor's mansion may change so that the governor who appoints
judges may be of the other party.

Does that validate your idea that as long as we have a strong
two-party system, we will continue to have strong support for
judicial independence?

PROFESSOR MALCOLM FEELEY: Well, my argument wasn't quite
that strong. One of our problems is that our party system has
weakened as well. We now have lots of prima donnas running
on their own and running their own campaign and the party
systems have declined, and so there's a certain virtue not only
of building up the bar, but building up the party structure as
well. But it does seem to me possible that candidates and lead-
ers of the parties can sit down in advance of certain campaigns
and try to structure the rules of the game that will proceed and
to try to keep some things off the agenda. They can't always
succeed, but it's probably an effort to start.

I think there's one other issue that's even more threatening to
judicial independence, and some of you guys are going to par-
ticipate in it, and that's the rent-a-judge movement. I think the
rent-a-judge movement, to the extent that it takes off—and it
has taken off here and is going to continue to take off in
California—is going to allow the best and the brightest in the
bar, particularly in commercial litigation, go to an alternative to
the public courts, select a judge, often a retired judge, to decide
the case and have a streamlined trial. And, as is the case in
California, this can be a trial of record and if you don't like the
outcome, you can go to the appellate court.

If it takes off, the judiciary is going to be the same way that
public schools are in this state and lots of states. . . . Imagine
if the best and the brightest of the bar opted out of concern with
the public judiciary. We would be in a real big fix, and I think
that's what's going to happen over the next few years. It's cer-
tainly a threat.

JUDGE MANNERS: Professor Schotland, you made a comment
during your remarks about the purpose of a system or at least
the purpose of judicial—and I'm paraphrasing and if I mess up
your statement, I don't do so intentionally. Tell me if I'm wrong
on this, but I believe your statement was that the function of
judicial independence ought to be to ensure that the very best
possible people want to be judges, want to go on the bench.
Am I correct in that and is that one of the principal imperatives
of judicial independence?

PROFESSOR ROY A. SCHOTLAND: That's certainly a happy
amendment of what I said, which was actually the purpose of
general reform is to get the best possible people to come to the
bench and to stay on the bench, but I think judicial independ-
ence very slightly in that we're very concerned about the jus-
tice produced by the judges.
I'm just so struck by what was just said about 1964 and I was about to give you a note with a footnote from history. The Scottsboro case of the 1930s, the Scottsboro Boys, the United States Supreme Court overturned the verdicts of guilty and sent it back for retrial . . . and that judge was defeated the next time he was up, and I think there are times when you have to do what your judge in '64 did.2

JUDGE MANNERS: Let me change gears a little bit, and I see my role as being as partially, at least, a devil's advocate. There is a school of thought that is that this whole concern about judicial independence is more an effort to try to cover up or insulate judges from valid, legitimate public criticism, and I know I'm not a perfect judge. The Court of Appeals has told me that on several occasions. I honestly try to do what I think is right, but I'm frequently wrong in my thoughts about that.

There are some members of our profession, and we all know of bad instances where judges have done things that are contrary to the Canons of Ethics, who do things that they shouldn't do, who maybe don't work the hours that they should and they get caught by members of the media. Is judicial independence simply a way to try to deflect valid criticism of judges? . . .

JUDGE ROSINEK: No. I think that judicial independence is more than just making decisions. I think that along those same lines we have to have judicial accountability. If a judge decides to pay golf at eleven o'clock every single day, then that judge should be called a former judge because that individual destroys it for all of us.

I think independence is you have the independence in decision making and you have judicial independence as an institutional thing for retention selection, so you have lots of mechanisms of independence, lots of concerns for independence, but without accountability, then judicial independence dies.

We just cannot be a profession just to make decisions for ourselves or by ourselves. There will be, as you found out, somebody telling you that you made the wrong decision. I don't know if you really believe that, but at least they ruled last and you went along with it, whether you liked it or not. It doesn't make you less accountable, though, for what you have done. I think that you have to take both in mind. I think an individual judge has to have the independence of thought and the independence of processing, the independence of running his or her court, but also we must be accountable to what we do.

I think that judges should be thrown off the bench that do not follow. I think it's unfair for judges to spend three or four hours a day in their job while others are spending eight or ten hours a day. I think it's wrong for judges to get money when they're not performing and I think that accountability is important, too, so I think that independence goes along with accountability.

JUDGE MANNERS: . . . Is there anybody in this room who has not seen some kind of exposé on television or read it in a newspaper about judge so-and-so who plays golf every day at eleven o'clock or something of that nature? We've sure seen them in our area of the country. Anybody who hasn't seen those kind of articles or TV programs, things of that nature?

Given that premise, let me tell you a concern I've got, and tell me how we can address this. You were talking about the importance of publicizing the good things that we do, and I think that is absolutely critical. I don't know that the media particularly cares about it, to be honest with you, but I can tell you for every good article there is out there about judges doing something or members of the bar doing something that's good, pro bono work, things of that nature, my impression is it's wiped out in a heartbeat when you have the kind of negative articles, the sensationalist TV programs that we see from time to time.

Can we counteract those with stories about good things that judges do and members of the judiciary in doing their duties?

MR. RUSSONELLO: Unfortunately, you may not like my answer, but this is the reality that exists: You can't do much about the bad stories about judges. They're going to always be there, and you can't get people, journalists, to do good stories, happy-faced stories about you and what you do every day. That's not what I meant. You're just going to have to live with that.

What you need to do is get the stories out about the importance of the courts, because the people believe the courts. If they're educated about the courts from high school, about the role that they play, and they believe that, that education is reinforced with stories that are newsworthy because they are stories about people who have been victimized by big institutions and they are controversial. They're not Pollyanna stories. They're not happy-faced stories. These are grim stories about people who got their water poisoned or were thrown out of their housing or other instances where the courts have done something to help somebody get justice.

It's not exactly about you, but that will help to reinforce what they learn about the importance of keeping the courts independent. You're still going to have to put up with the negative stories on judges, but they will have less meaning for people if people have a respect for the courts.

JUDGE MANNERS: Mike Buenger, I want to change gears a little bit. We spoke a little this morning about problems in dealing with the legislature in convincing them of the importance of judicial independence, and in your position you deal on a

2. For a review of the Scottsboro Boys case and the heroism of the judge who handled the retrial of the case, see Douglas O. Linder, Without Fear or Favor: Judges James Edwin Horton and the Trial of the “Scottsboro Boys,” 68 U.M.K.C. L. REV. 549 (2000); and Dan T. Carter, “Let Justice Be Done”: Public Passion and Judicial Courage in Modern Alabama, 28 CUMB. L. REV. 533 (1997/1998). Judge James Edwin Horton, Jr. was assigned to handle the retrial because “he was one of the most capable and highly regarded judges in the state.” Id. at 556. He set aside a jury verdict of guilty—and punishment of the death penalty—after the retrial of one of the defendants as being contrary to the evidence. Id. at 557-59. Judge Horton drew two strong opponents in the next election and lost, receiving less than 20 percent of the vote. Id. at 559.
regular basis with people in our General Assembly in Missouri, correct? . . . And, I think, Bob, you and Larry, to one degree or another, deal with elected officials, lay people. . . .

And I don't know if this is true in your states or not. In Missouri, every year it seems like we have fewer lawyers in the legislature. Is the decreasing number of lawyers in the legislature a problem in being able to communicate with people about the importance of judicial independence?

MR. MICHAEL L. BUENGER: I think the issue of lawyers in the legislature cuts two ways. We have certainly seen in Missouri a decline in the number of lawyers in the legislature, and the defeat of what Judge Manners referred to, House Joint Resolution 50, that sought to undo the Missouri nonpartisan court plan, ultimately was set aside because of some of the lawyers in the legislature.

The flip side of it is in my experience, sometimes the lawyers in the legislature can prove to be as problematic as they can be helpful, and what I attribute that to is they are familiar with the system and they know what they want to change in the system, whereas oftentimes with lay people, if you sit down, you can at least have what I call an education session.

I have found with some lawyers in the legislature that the openness to understanding the judiciary from a larger perspective than “I try civil cases” or “I try criminal cases,” there isn’t the openness to have that kind of education session. There isn’t the openness to want to wrap one’s mind around some of the issues that the branch of government faces, not a court in St. Louis or a court in Kansas City or a court in Joplin, but the branch, and so I certainly think that lawyers in the legislature can be helpful, but as with anything, it depends on who they are.

Barbara Tuchman, the historian, has a wonderful line when she says, “History is formed by personality,” and I think very much the relationship that the judiciary has with lawyer legislators or any legislator is a function of relationship and personality more than it is anything else.

I like to see lawyers in the legislature. I like to encourage that. Certainly our [bar] president before, our immediate past president, was very active in trying to get lawyers in the legislature, but it’s not a panacea. It’s not a magic bullet. It doesn’t solve all problems and, as I said, in certain circumstances they can prove to be more of a challenge than other legislators . . . .

MR. ROBERT WESSELS: I concur with what Mike said. That is exactly our experience and it goes to something that we talked about this morning, and that is it’s all about relationships. It’s all about understanding and understanding how courts impact the responsibilities of particular elected officials that you’re dealing with [and] are interested in, and the time to meet them is not five minutes before the budget hearing begins or when there’s a crisis. The time to start developing those relationships is months and years before, because sooner or later when the mechanics of the budget process are completed and the forms are filed and all of that is done, people have gone through the motions of the hearings.

He decided, first of all, that he would issue a written opinion . . . . [H]e spent one and a half pages of that opinion explaining his role and the rule of law and why this was not a decision by one individual against majority rule. And he was overwhelmingly congratulated by every editorial board . . . .

— Mary Campbell McQueen

Those of us involved in the process know that sooner or later it comes down to a visit between the presiding judge or the leadership judge, the court administrator in someone’s office having a conversation about okay, what are we going to really do? What are the impacts? What are the implications of funding X program or Y or taking a cut? If you want us to take a cut, we don’t want it, but let us decide where the cut is going to go. Don’t go in and line-item it for us. Do you realize if you cut this, it’s also going to impact you in three or four or five other areas?

Which means you have to know an awful lot about and be prepared to talk about how court operations impact other areas, particularly in social service and mental health, jail populations, prison populations, and those types of areas. . . .

JUDGE MANNERS: How have term limits affected this?

MR. BUENGER: I think term limits are probably one of the most ill-conceived ideas that we’ve come up with, and the reason I say that is in 2002 we had about a 65% change in the legislature in Missouri. Somewhere in the neighborhood of a third of the Senate left and well over 60 percent of the House was term-limited out, and there was an enormous amount of institutional history between our branches of government and within the
legislature itself that suddenly evaporated.

No one knew why the budget process was the way it was, no one knew why the Judiciary Committee process was the way it was . . . . [W]hat I saw in Missouri, a very young crop of people came in. Our appropriations chairman that handled the judiciary budget was 26 years old and quite literally got elected and then became chair of the Appropriations Committee.

And so to some extent, I think, going to what Bob said, the effect of term limits has been the destruction of relationships that for many years was the foundation by which government operated, and the effect of term limits and Missouri changing every eight years now leaves that whole area of relationships and processing history and procedure constantly in flux. There's no predictability to the process. You don't know who is in leadership this year and who is in leadership next year. Getting back to one of the other comments, the effect of that has, I think, been a lack of what I would term “party and legislative discipline.” There is no more discipline in that particular body of government. It's a free-for-all and it's very difficult to work in that environment.

JUDGE MANNERS: Judge McAdam, we have all these problems. A lot of people say we're in a crisis in terms of the independence in one of our three coequal branches of government. What can AJA do about this? What's the magic plan? Do you have the silver bullet?

JUDGE MICHAEL R. McADAM: No, I do not. I do not have the silver bullet or a golden wand or a magic wand. Here's what I think AJA can and has started to do. First, what we did today is the beginning. I think that the process of going through the organization and planning on this day actually is a help also because what we've done is we've forged these links with other organizations and either the linkage was rather weak before or nonexistent, and so now we have relationships with the National Center. They're obviously stronger than they were before, even though they were strong before. We also have the relationship with the Joyce Foundation that we had never had before. We have the relationship with the Justice at Stake campaign that we mentioned throughout the course of the day.

These kinds of group inter-organizational, common-purpose kinds of activities I think are very helpful because that's the way you get the word out.

We don't have all the answers and sometimes people would say, as you kind of implied earlier, “You're talking about judicial independence, Judge, but that's just a cover for your areas and a cover for your golf game that you play every day or a cover for a bad decision that you made,” and so coming from a judge, it may not have the impact that it would have if it came from what would be considered perhaps a more neutral source and a more respected source, quite frankly, and so I think those kind of linkages are very important.

The other thing that I was going to suggest, too, that we're also working on, and we hope to have this become a feature of our conferences and it's something that our president-elect, Gayle Nachtigal, has been working on for a long time, . . . is the judicial leader symposium.

What that is, it's kind of a high-fallutin' phrase, but what it really is talking about are presiding judges. Presiding judges are not trained to be presiding judges. Lord knows, judges aren't trained to be judges unless they go to the Judicial College, and so a presiding judge is even less so, particularly when you consider that what they're being asked to do, as Bob and Larry have talked about, and Mike, deal with state legislators, deal with county legislators and executives, deal with mayors and city councils on issues of budgets that the average judge is not even worried about.

The only time I worried about the budget before I became presiding judge of my court was when my paycheck was a day late. Then it became a real big issue, but until then I never really gave it a second thought.

And so the leadership symposium . . . , and we hope to have it be a regular feature of our training program, is for presiding judges to get involved in these kind of ancillary issues that our legal training certainly doesn't prepare us for, but nonetheless, if we're going to be presiding judges or are presiding judges or hope to be presiding judges, then we would need to know these things and get this training.

So that's just two things I can think of off the top of my head,

You can't do much about the bad stories about judges. They're going to always be there . . . . What you need to do is get the stories out about the importance of the courts, because the people believe the courts . . . .

– John Russonello
but I really think that it’s important that AJA, regardless of what tool it uses, that the AJA take a leadership role in this process. We have to become the voice of the judiciary in this country. I feel that we sometimes let our brothers and sisters—and the other big organization that we probably all belong to that’s also a three-letter organization, that we’ve let them carry the load for us. And I feel that it’s a great organization. I belong to the ABA, but the ABA is a lawyers’ organization, and while we need to have relationships with lawyers, we still need to speak as judges, and I think that the AJA provides that vehicle, and my goal in starting this process was to reach that goal. That was what I had in mind. We’re not going to get there yet, but we’re getting there.

JUDGE MANNERS: All right. We’ve talked to you. We need to hear from you. We’ve talked about ways that the AJA can become more involved—Judge McAdam has, as president—but this is your organization ultimately, not just ours. What can we do for you to help you maximize judicial independence to prevent the decline in judicial independence? Let’s hear from some of the people in the audience, either questions or comments about how about AJA can help you.

JUDGE JOHN CONERY: I’m John Conery from Louisiana. I want to know from Professor Feeley where I can get one of those rent-a-judges for a juvenile court.

I’ll tell you basically that’s a court problem and it will probably work itself out. It’s a cycle. But certainly there’s no demand for rent-a-judges in the domestic docket or criminal and juvenile work, as we all know.

But my question basically for the panel is in Louisiana, as in most of the country, Louisiana just passed an amendment to its constitution, a gay-rights amendment, which prohibited gay marriage. A courageous trial court judge in Louisiana declared the state statute unconstitutional. Ironically, it was a Republican judge from Baton Rouge, . . . and he was attacked and lambasted by those who were affected.

The particular amendment in Louisiana sought to do two things: ban gay marriage, plus it impacted civil unions. So the judge’s decision was based on the fact that the constitutional amendment dealt with two issues instead of one and it should have been separate, separate constitutional amendments on each issue for the people to decide.

But in not responding to the attacks on the judge, we, as the Louisiana judiciary, seem to have dropped the ball. We’re prohibited by our judicial commission from commenting on pending cases. The bar didn’t step up to the plate. A lot of the things you talked about today, the weaknesses in our system, were demonstrated in that case. Here you have a judge with . . . a no-brainer constitutional problem, a two-issue thing but it was unconstitutional, being attacked.

And I hate to see that’s going to happen to him, Judge DeLaughter, when he comes up for reelection unless this issue is handled properly.

So how do we respond? How do we get a rapid response, taking the ball and play? How is this thing handled the correct way? Perhaps the public-relations person or Professor Feeley or others might have some suggestions.

MS. MARY CAMPBELL McQUEEN: I just want to give you an example of a similar type of case that happened in Washington State with an absolutely opposite response, and I think as judges you have an opportunity, and I think Judge Burke has said this over and over again, for the people that appear before you to understand why you make decisions.

Similar issue, different topic. Subject matter was tax reform. The initiative that was on the ballot in Washington State passed overwhelmingly, close to 70 percent of the vote, as I recall. The issue came up before a trial court judge in Seattle, which is King County, so he decided, first of all, that he would issue a written opinion, which sometimes I think as trial judges you don’t consider, but even if [it] had been an oral opinion, he spent one and a half pages of that opinion explaining his role and the rule of law and why this was not a decision by one individual against majority rule.

And he was overwhelmingly congratulated by every editorial board, got probably every best-judge-of-the-year award I think that any group in Washington could take, and had a television interview on two of the local national affiliates explaining that in the judiciary we are the only branch of government that has an institutionalized review process, and so in this situation where it was the same issue, single issue versus multiple issue, [which] was the reason it was stricken down in Washington, he explained why that was not his decision as an individual judge and pointed out as to why he made his decision.

And so I think you as judges can be some of the best advocates. I think what Judge Burke was trying to say is rather than wave the standard of judicial independence, explain what this means to a fifth-grade child if this type of legislation or this intrusion into the discretion of judges passes.

When I speak to high-school groups and they say, “Well, what makes a good lawyer?” one of the things I tell them is you have to be a good storyteller because when you get before a jury, it’s about telling a story and having people do something that they might not personally want to do but are compelled to do because of the rule of law, and I think what we have to do are take these issues that come up that attack judicial independence and turn them into real live personal stories that this is how it’s going to affect you. Judicial independence isn’t just a concept that the framers of the Constitution thought up. It has real implications for the public today.

And even though we’ve talked about today all the gloom and doom and the lack of respect of the judiciary, the judiciary is still held in higher esteem than any other branch of government. People still view you as the truth finders, the seekers of the truth, and so I think as judges when you speak to civic organizations or classrooms or from the bench, you’re the ones who can tell that story best.

MR. RUSSONELLO: I would strongly encourage you to get a copy of those interviews that Mary mentioned. I’ve seen them, and this judge was brilliant in his interview with the press because he never talked about the merits of what he decided. He talked about the process and he was brilliant in those interviews, and so I think that certainly given the fact that it was the same exact issue, it was single subject, putting two things in a referendum, I would encourage you to get that . . . .
JUDGE MANNERS: Who else has questions or comments?

JUDGE WILLIAM O. ISENHOUR, JR.: I'm from Kansas, and as I've sat here all day today, I think this has been a wonderful experience for us, but I wonder if we're doing a lot of preaching to the choir here. I don't think anybody here has to be convinced about the importance of the topic that we're talking about.

My question is where does the AJA go from here and how do we reach out to other segments of the community? Do we include bar associations in forums like this? Do we invite members of the media to forums like this? Do we invite those politicians that like to complain about activist judges? Do we maybe even invite the cowboy that's in the White House right now?

I think just to persuade ourselves is only the first step. I'm fired up and I'm excited from today's forum, but I think we need to have a plan to go from here. . . .

JUDGE McADAM: Bill, an excellent question, and here's what I have in mind. First of all, the program that we're going to tape tomorrow . . . that will appear on Inside the Law, . . . probably next spring, early summer. This will actually be on television, on PBS. So the first thing I can tell you is that the result of that program will have some kind of a national ripple effect. It may be minimal at first, but it's going to have some kind of an effect and some kind of impact.

Now the other thing that we need to do is not rest on our laurels. That's not the end product, at least not that I had in mind. What I have in mind, and I think the leadership of the AJA that will follow me is in agreement on this, and that's what we need to pursue a relationship with, and you mentioned bar associations.

I think that's the next logical step, is to get involved, to maybe have a summit meeting that the AJA sponsors and hosts maybe within the next six months or year, using the program as kind of an introductory card to invite commentary, to invite the various national bar associations such as the ABA, obviously, but also ATLA, the criminal defense lawyers and the prosecutors, and come up with group strategies, and we can expand that to other organizations that are more segmented, such as the National Association of Women Judges. I say that because I see their president, Judge Thompson, still sitting here and participating . . . .

And so I think that is something we can do, and I think then we gain strength by having more disciplines in this process, but we also have to, as judges, control the process. As I said earlier, we can't have lawyers telling the courts how to operate, but we can have the bar association provide some amount of educational function that doesn't appear to be, as I said earlier, defensive, because if it comes from us, it will appear to be that way. It's got to be a positive thing.

I've been on the negative side. Trust me. I was attacked last year when I got back from Montreal with an article about my court that was like a kick in the gut, and some of it was deserved and some of it wasn't, and of course the part that wasn't was emphasized, and this is life. This is the way it is. But what I learned from it was you can't be negative about your reaction and your response. You have to be positive. A negative reaction only causes people to think that you really are as bad as the paper said you were, and of course that's not true, at least in most cases, and the one that we were involved in with our court—it wasn't just me, but our court—it was not true.

So that's the best I can come up with, Bill, but I think pursuing some kind of a summit meeting with bar associations is the next logical step for us to take.

JUDGE ROSENEK: I have a comment I'd like to make on that, too. I think there is another avenue that we could take, and I think it's a future avenue. Every year millions of high-school kids learn about the Supreme Court. They learn about the federal courts. They do not learn anything about the state courts. Ninety-seven percent of all the cases that are heard each year happen in state courts. These kids will be affected more by their municipal court, the traffic court, a divorce court, than they will by Supreme Court decisions. I think what we can do, there are organizations, and we did some years ago, but I think what we can do, too, is to take this message maybe on a more simplified basis and bring it to the high schools.

All of us have to be advocates. All of us can go back to our communities and become advocates for what we do every single day. We don't have to give a decision, we don't have to discuss decisions, but we can talk about the process, “What is that process?” so that people feel more comfortable, so as kids go on from high school to college and they are voting, then they understand the concepts that we deal with every single day, and I think it behooves us to get involved on that level, not only work with our peers, which is sort of a bit easier than working . . . middle-school or high-school kids, but I think that we have to do that to get our message across. If we do not get our message across to those kids, then we'll never get our message across to the next generation of voters, our next generation of lawyers, our next generation of judges.

JUDGE BURKE: I think that before you go to the Rotary Club, you ought to go to your own employees. I think there are a huge number of employees around the country, and I had an experience at the time that O.J. Simpson was tried. I had given a number of talks around the country and so I asked people, “Have your neighbors asked you about what Lance Ito was doing?” And every single court employee everywhere in the country raised their hand. Even though they were a probate clerk in Falls River, Massachusetts, their neighbor knew they worked in court and so they had some belief that somehow that person knew what Lance Ito was doing.

And so I think before we go out to the Rotary Club and all the other good things we should do, it's about making sure that we have organizational lessons in your court, that your own court employees know what's at stake and that they're engaged in that, because when you make a mistake or I make a mistake, which we will, I want that court employee to say Kevin Burke cares about what's going on in this courthouse and give me the benefit of the doubt when they're at their Rotary Club or they're at their church or they're at whatever event. They will absolutely be asked about what's going on, and I think in some instances judges have not used that base of a large number of employees who either can become allies or bystanders in making sure that the judiciary is supported by the public.
JUDGE MANNERS: I’d like, if I may, to amplify on something that Judge McAdam said, and that is the importance of reaching out to the Bar. I can tell you I practiced law for 24 years as a trial lawyer and I tried cases in front of all kinds of judges, some good, some bad, and obviously I was an advocate for my client and I wanted to win, and so if I had judges who viewed things the way I did, you know I was always pleased with that, but, quite frankly, that didn’t happen very often. And what I really would be pleased and satisfied with—and I think most trial lawyers would, too—is a judge who is competent, who is going to be fair, who is going to listen to both sides, and there is an institutional interest that the bar has, both the defense bar and the plaintiffs’ bar and the criminal bar and all other kinds of bars, in having competent judges, and they are our natural allies and there’s a lot more of them than there are of us. For the most part, a lot of us can’t make political contributions. They can. They can influence their legislators in ways that we never can. So when Judge McAdam says we need to reach out to all segments of the bar, that is absolutely true because it is in their interests to see to it that judicial independence is protected. Otherwise, you’re not going to have the best and brightest on the bench.

I think that judicial independence is more than just making decisions. I think that along those same lines we have to have judicial accountability. If a judge decides to pay golf at eleven o’clock every single day, then that judge should be called a former judge because that individual destroys it for all of us.

– Jeffrey Rosinek

Michael W. Manners is a circuit judge on the Jackson County Circuit Court in Independence, Missouri. While a trial lawyer for 24 years before taking the bench, he was president of the Eastern Jackson County Bar Association and the Missouri Trial Lawyers Association.

Michael L. Buenger is the state court administrator in Missouri. He is a past president of the Conference of State Court Administrators.

Kevin S. Burke is a district judge and past chief judge of the Hennepin County District Court in Minneapolis, Minnesota. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts.

Bobby B. DeLaughter is a circuit judge on the Hinds County Circuit Court in Jackson, Mississippi. A former district attorney and past president of the Mississippi Prosecutor’s Association, he handled the 1994 prosecution of Byron De La Beckwith for the 1963 murder of Medgar Evers, a case portrayed in the movie, Ghosts of Mississippi.

Malcolm Feeley is professor of law at the Boalt Hall School of Law at the University of California-Berkeley and the author of several books about the court system.

Michael R. McAdam is a judge and former presiding judge on the Kansas City (Mo.) Municipal Court. He served as president of the American Judges Association in 2003-2004 and organized the National Forum on Judicial Independence.

Mary Campbell McQueen is president of the National Center for State Courts. Previously, she served as the state court administrator in Washington for 16 years.

Jeffrey Rosinek is a circuit judge on the Miami-Dade County Circuit Court in Florida. He is a past president of the American Judges Association.

John Russonello is a partner in the public-opinion research firm Belden, Russonello & Stewart in Washington, D.C. He does public-opinion research, polling, and focus-group studies for various groups on topics related to the judiciary and judicial independence.

Roy A. Schotland is professor of law at Georgetown University in Washington, D.C. He is an expert on judicial selection, including elections, and teaches courses on administrative law, campaign finance, constitutional law, and election law.

Robert Wessels has served since 1976 as the court manager for the county criminal courts at law in Harris County (Houston), Texas. He is a past president of the National Association for Court Management.
The final panel discussion at the National Forum on Judicial Independence was moderated by Jack Ford, host of the syndicated Public Broadcasting System program, Inside the Law. The discussion explores topics of judicial independence in a manner designed for use with the public at large and formed the basis for the one-hour PBS program, “Judicial Independence: The Freedom to Be Fair.” Panelists were Leo Bowman, chief judge of the District Court in Pontiac, Michigan, Kevin Burke, district judge and former chief judge of the Hennepin County (Minn.) District Court, Michael Cicconetti, judge of the Painesville (Ohio) Municipal Court, Malcolm Feeley, professor of law at the University of California-Berkeley, Steve Leben, district judge in Johnson County, Kansas, Michael R. McAdam, a judge and former presiding judge on the Kansas City (Mo.) Municipal Court, Gayle Nachtigal, circuit court judge in Washington County, Oregon, Tam Nomoto Schumann, superior court judge in Orange County, California, and William C. Vickrey, state court administrator in California. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JACK FORD: Whether judges are elected or appointed, as they say, at the trial level or at the appellate level, they’re sworn to decide cases based solely on their merits, but is it naive of us for us to believe that judges’ personal or political beliefs might not enter in some fashion into that decision-making process? Well, Inside the Law has put together a panel of distinguished judges and other experts to take a look at that and other issues that are important to the administration of the justice system. . . .

We hear often nowadays the term “judicial activism” and when we hear it, it’s not often as a compliment and it comes from a variety of different points of view.

Professor Feeley, let me ask you this: What does judicial activism mean?

PROFESSOR MALCOLM FEELEY: Activism can be interpreted in several different ways. . . . The most prevalent one is if a judge decides in a way you don’t like him to decide. More generally, though, it is a term that means that judges breathe new meaning into old, old doctrine that substantially moves it forward.

MR. FORD: Is it, then, a concept that the public should fear?

PROFESSOR FEELEY: Well, in the common-law tradition it’s a concept that is inevitable in the evolution of law.

MR. FORD: So it’s something, then, as you said, in the common-law tradition we . . . shouldn’t be surprised that it exists?

PROFESSOR FEELEY: We should be surprised if it doesn’t exist.

JUDGE LEO BOWMAN: I would say that in fact it is not the case that judges, for the most part, incorporate personal views into their decisions. . . . I’ve been a judge for 16 years and I cannot think of one instance where personally I have incorporated it. In my discussions with colleagues who’ve served fewer years, as well as longer, I haven’t seen that. As the judge here, there may be instances where a judge looks at the law in a fresher or newer way. That may be called activism, but that is not a factor.

JUDGE MICHAEL MCADE: I was just going to say, Jack, that judicial activism is not a legal term, it’s a political term, and therefore I’ve never heard someone who won their case describe their judge as a judicial activist. It’s usually, as Professor Feeley says, the person that’s on the losing side of a case that will use that term, but it’s usually in a political context, not a legal one.

MR. FORD: Judge Bowman, how about that? In your experience is there validity to the claim of judicial activism?

JUDGE KEVIN BURKE: I think it’s an overstated case. I’ve been a judge for 20 years. There are very few cases that I see that are great, monumental things in which I’m going to try to redefine what marriage is about or other kinds of issues that really have driven that claim.

I think the large part of judicial activism is simply this: There are a hundred million cases in the state court system. There are very few judges. You need people who are going to be innovative in looking at how to solve today’s problems.

Family court needs to be reformed. Judges need to be active in looking at how you can deal with it.

So the social things that really drive the politicians to criticize judges are a very, very small part of what happens with state court judges.

MR. FORD: Judge Bowman, we’ve all heard the expression about the perception becoming the reality. I suspect if you stop people on the street and say to them, “Do you believe that this judicial activism exists, that judges incorporate their personal and political beliefs into their decisions?” I suspect there are an awful lot of them who are going to say yes. What would you say to those people?

JUDGE MICHAEL MCADE: If that’s the perception of the public, then that’s the reality. I think the public’s perception is very often reality, and I think the public believes what they learn, whether that’s true or not. So the social things that really drive the politicians to criticize judges are a very, very small part of what happens with state court judges.

MR. FORD: What about the idea that so many of our judges nowadays are actually selected through an election process? Some can be nonpartisan, others can be in partisan elections, and again a member of the public would say, “Well, here is a judge running for election and has answered and said this is what my beliefs are about certain issues.”

Judge Leben, let me ask you this question: Why shouldn’t a member of the public think that that judge who has said this is
what I believe as part of my campaign for election here is going
to vote that way no matter what the facts of a particular case
might be?

JUDGE STEVE LEBEN: Well, if the judge has given their views on
a legal issue, I think that's probably appropriate at some broad
level. If they've tried to get to a microlevel where they are really
deciding a specific case, then they've gone too far and in some
states—for example, Missouri has adopted rules which say that
judges will have to recuse and disqualify themselves if that case
ultimately comes before them if they made too specific a
promise during an election campaign.

So you're entitled to know something about what a judge's
views are about the way they approach the law, but not neces-
sarily as to a specific case.

Statutory interpretation would be an area. If a judge is going
to be consistent on whether they look at legislative history to
interpret a statute, that's perfectly appropriate and they should
tell you in advance, as members of the U.S. Supreme Court
have, as to whether they will or won't consider it. But if they
consider it only in the cases in which they want the outcome to
come out in a certain way but in other cases they won't consider it,
then they are judicial activists, kind of a threatening sort.

MR. FORD: . . . And, Mr. Vickrey, let me ask you this, as some-
body who administers the largest court system in the country.
Once we are in a situation where we are electing our judges and
they're making promises to be elected, doesn't the voting pub-
lic then have a right to ask of them how would you vote if
indeed you had to decide a case dealing with the existence of
abortion, if you had to decide a case about flag burning, if you
had to decide one of these real hot-button issues? Why is the
public not entitled to find that out before they cast their vote
for you?

MR. WILLIAM C. VICKREY: Well, the public isn't entitled to know
that, because what we want out of a judge is someone who has
integrity, who is fearless in ruling on the most difficult case
based on the facts and the law in that case. We're not electing
representatives. The judicial branch of government does not
reside in the representative branch of government. We leave
that role to the legislative and executive branch, and I think
that's why the election of judges causes such tremendous con-
fusion and conflict.

And as to the word “judicial activism,” I think the public
ought to be concerned about it because in spite of what the his-
torical background of that term may be, it is a term used today
meant to intimidate politically judges on how they might rule
on some of the most intractable problems that the public brings
to the courts for solutions.

MR. FORD: But if a judge is elected, and let's weave in another
concept here. If a judge, as part of that election process, has
received contributions from various sources and then that judge
is up for reelection and that judge knows that there is a contro-
versial case coming before them that a group that contributed to
that judge's campaign has a real hard-and-fast interest in, does
the judge owe any allegiance to those people that helped that
judge become elected? Judge Schumann?

JUDGE TAM NAMOTO SCHUMANN: The Canons of Ethics are
quite clear on that. If you receive a contribution, a political con-
tribution of any source . . . —there is really no bright line. The
standard rule is a two-year recusal period. The Judicial Council
and the Commission of Judicial Performance has even extended
it to longer periods of time, depending upon the amount of the
contribution and the closeness of the relationship to the candi-
date, and we have had judges in California that have been disci-
plined who have taken cases where contributions were made to
that judge even beyond that two-year period.

MR. FORD: Does the public understand that?

Judge Nachtigal, let me ask you. Does the public understand
there's a Canon of Ethics or is the public just going to say, “You
know what? You asked for my vote. You asked for my ballot. I
gave you my ballot, I gave you my vote, and I'm entitled to
expect something from you”?

JUDGE GAYLE NACHTIGAL: No, the public doesn't under-
stand. The public views us in many ways the same way they
would their local legislature, who they should expect that
kind of response from. The understanding that a judge's role
is to decide a case on its merits, no matter how I might have
voted in the privacy of the voting booth, which may be very,
very different—in fact, in some cases in my case have been
different. How I voted and how I ruled ultimately on the
issue were diametrically opposed because when presented
with both sides of the issue and both sides taken into consid-
eration along with the laws and the Constitution applied, it
was clear to me what my judicial duty was . . . , and the pub-
lic doesn't understand that.

MR. FORD: . . . Judge Cicconetti, how can we help the public to
understand that just because you may well have been elected
deputy, just because somebody might have contributed to your
campaign, and just because in running for your new judicial
seat you offered some thoughts about your judicial viewpoints,
that the public is not entitled the way they believe they're enti-
tled to a vote from a politician?

JUDGE MIKE CICCONETTI: Well, Jack, here's the irony. We are to
be the safeguards of the First Amendment rights of the individ-
uals that come before us, yet we are prohibited from stating our
beliefs. We are not permitted to give our view on issues, on
social issues, or, “What if this case came before you?” So it's
really almost a blind vote to the public when they go to the polls
and vote for a judge.

Now you can't strip your personality when you go on the
bench. You always have that. But you have to follow the law,
like it or not. If somebody contributed to your campaign and if
they really believed in you, then they should know that you will
make the right decision based on the law, and if it's against them,
well so be it.

JUDGE BURKE: See, I think that the public doesn't have the right
to win in a courtroom. They have a right to be listened to, and
we have an obligation to make sure that anybody who comes
before me is listened to and can understand what the decision
or why the decision was made when they leave. That's the obligation that we have.

The corrupting influence of money or other kinds of stuff like that interferes with the first thing, which is you aren't being listened to because you made up your mind before, and horribly corrupts the second thing, which is people will leave the courthouse not understanding why that decision was made. Those two things judges can be held accountable for: Are you listened to and do you understand why that decision was made when you leave?

MR. FORD: What, then, would we say to a member of the public? You said before that term “judicial activism” is often utilized by somebody who just lost in the courtroom. What then do we say to members of the public if they feel as if they have lost . . . ? What sort of recourse do they have? What do we tell them to do and where do they go?

JUDGE NACHTIGAL: The obvious answer is you go to the court of appeals, the next court up. That's why we have multiple levels.

MR. FORD: But suppose they have lost at the court of appeals? Suppose they lost at the highest level of the appellate court in that state?

JUDGE NACHTIGAL: . . . Go back to one of your first, your earlier questions. I said that we don't always explain. We don't go to the public very often and explain how the system works. This is part of the process that we're making here today, but not everybody watches public television, so it's a matter of going out in the community and explaining how the system really works.

We don't teach civics the way we used to, and judges have not been good at tooting their horn, in a sense, and going on and explaining the value of an independent judiciary in spite of what I may think about a particular topic. We need to be better at going out and explaining the process. . . .

PROFESSOR FEELEY: There's a huge amount of research that suggests that if judges, police officers, other public officials that are forced to apply the law act with procedures that are fair, open, honest, and give an opportunity for those that are before them to speak their minds, speak their peace, that people will accept losing. There are not lots of sore losers in a fair legal process. They can be disappointed, but they're not angry and they don't delegitimize the process.

MR. FORD: . . . Let's take a look at another question about the operation of our courts. You like to believe that as a litigant you walk into a courtroom and there will be a level playing field, you're anticipating, but the reality, Judge Leben: Is there always a level playing field inside a courtroom?

JUDGE LEBEN: Of course not. There's not a level playing field in most areas of society because if you have wealth, you can get things that you can't without wealth. Are public defenders as good as the best criminal defense attorney? No. Are pro se litigants, people who self-represent themselves, getting the same level of justice that others are? No.

On the other hand, there are many things that can be done to improve their situation. Many courts today are providing assistance centers to self-represented litigants to make sure they have a reasonable chance to get most of the types of things they want to handle in court taken care of: simple divorce cases, landlord-tenant cases, consumer cases. Those things we are in many parts of the country providing a lot of help to the self-represented litigant, because they do have a right to access to our court system.

MR. FORD: Well, what happens, then, to the person who is on the other side of the self-represented litigant? I'll tell you, one of the most difficult cases I ever tried as prosecutor was when I had a pro se defendant who decided he was going to represent himself—and throughout the course of the trial my trial judge, who's a wonderful judge and even a friend, was killing me as a prosecutor, just bending over backwards, clearly because this judge truly believed that if justice is going to be served in this courtroom, it can't work because this person is so inadequate representing himself.

But is that right, Judge Bowman? Was that right for the state
that I'm representing, that once this person made his decision “I'm going on my own,” that they basically got the judge on their side, too?

**JUDGE BOWMAN:** Well, I don't know so much as it was a judge on their side as much as it is a judge's responsibility to make sure that the proceeding is fair, and that sometimes requires the judge to, with pro se litigants and otherwise, to explain more, to give some direction to, so that the process is just that: fair.

**MR. FORD:** But don't we find ourselves in a situation where by the judge attempting to be fair, and essentially helping out the one who is, for whatever reason, not qualified, not capable, or just not handling it well, that it can have an impact on the other side?

Aren't there situations where you have, all of a sudden, a lawyer—a not very competent lawyer—fails to ask an important question and I, as the adversary, am sitting there thinking, “This is great. This is great. Missed the whole point. Let's get this witness off the stand and let's get out of here because I'm in great shape now.” And, all of a sudden, the judge asks, “Let me ask you a question, sir, before I let you go from the stand,” and I'm sitting there going, “No!”

Is that fair to me?

**JUDGE LEBEN:** Jack, you've got two contexts you've brought up. One is the criminal situation and you, as a prosecutor, probably in the end result would appreciate what the judge did.

**MR. FORD:** . . . Because it provides me with a fairly appellate-proof case?

**JUDGE LEBEN:** Exactly.

**MR. FORD:** I still like to win.

**JUDGE LEBEN:** But we have to make sure we protect that defendant's rights, and doing so will make sure that he will only have one trial and that the conviction is certain. The trial court has to be fair to both parties. You don't have to make an evidentiary objection on their behalf, but you do have to explain things. We are a branch of government. We have to be accessible to the people.

**PROFESSOR FEELEY:** With all due respect, that's hardly a big problem in the unfair, the problem of unfairness, is the judge bending over to help a pro se litigant. The problem, the big problem, is the one shot, the occasional person that comes in to file a consumer complaint or the tenant trying to manage a battle against a landlord where the other side are repeat players. The real problem is the one-shotters that are at the mercy of the frequent repeat-player litigants.

**MR. FORD:** Why is that such a problem and what should we be doing about it?

**PROFESSOR FEELEY:** Well, the problem is obvious that one gains a great deal of knowledge through experience. If one side is more experienced than the other, the experience is a great resource. It benefits you. The obvious answer is to make sure the one-shotters are represented by adequate counsel.

**MR. FORD:** Do we see that, for instance, in municipal court, in your court?

**JUDGE CICCONETTI:** Sure. When we have a defendant who comes in represented by perhaps an inferior attorney, this isn't a ball game. You can't spot the other team two touchdowns from the bench, but you have to ensure that that defendant has a fair trial, so you tend to bend over a little more backwards to assist that defendant. I think most of us do.

**JUDGE BURKE:** I think the truth is this is hard. It is very hard . . . when you have a good lawyer on one side and a not-so-good lawyer on the other side. And we've talked here about it being the defendants' rights, but I've seen some prosecutors who weren't as good maybe as you were, and all of a sudden, you see here's a slick defense lawyer and you have a victim who's saying, “What happened?”

This is hard for judges, on how you end up giving them a balance, and when you intervene and when you don't is not an easy decision judges that make.

**JUDGE BOWMAN:** I think in the great majority of the cases, judges stay out of it. It's generally the rare circumstance, especially when both parties are represented. They don't have a judge that helps any of them. It's generally the case where it's a pro se litigant and she's questioned . . . [with an] attorney . . . on the other side where a judge does get involved, [but] that's still a rare circumstance.

**MR. FORD:** But is there, then, inherently some obligation on the part of the judge to make it fair, to step in if they have to?

**JUDGE SCHUMANN:** If you're talking about the criminal-law context, which is very important, you have to be fair. I think we've forgotten one area . . . and that is in the area of family law. We have a large percentage [of self-represented] people, and the stakes are so high. The stakes are not only financial, but the well-being of our children, and every one of us, unfortunately, may have exposure . . . to family-law courts.

That's the real headache. That's the real heartache that a judge has—how we see this fairness to that pro per [self-represented] party who is looking at—because they don't know the procedures, the dotting of Is, crossing of Ts in the case—may lose visitation and custody of their child. That is the heartbreak.

**MR. FORD:** And what is the answer to that question?

**JUDGE SCHUMANN:** You know, at least in my state it is not a jury trial. It is a court trial, and that gives me some flexibility, some flexibility to ask important questions and get to the heart of the issue.

**MR. FORD:** How do you know as a judge where the line is, where one side of the line says all right, you're helping the process, but when you cross over that, you've begun to help a
litigant, not the process? How do you know where that line is? . . .

JUDGE NACHTIGAL: Sometimes that's hard to say. It comes with experience. Certainly where I jumped in at the beginning, and where I may jump in now are at different points in the continuum of learning to be a judge.

I think that the answer is that you are responsible for the fairness of the trial. I'm not necessarily responsible for the ultimate outcome of the trial, but was the trial done fairly? If there are two attorneys involved, my response is very different than if there's an attorney and a pro se or two pro se's, where I jump in and what my responsibility is.

MR. FORD: So the process, you may help ensure that the process is fair, yet the result might not necessarily be fair? Is that acceptable?

JUDGE NACHTIGAL: If the process is fair, then the outcome should be fair. One side is not going to think it's fair. That's where you get the disgruntled party from. But if the process is fair, you can understand maybe not winning everything that you want. If the process is not fair, the outcome cannot ultimately be fair.

JUDGE BURKE: I think that's what the professor was trying to say. A lot of people come into court knowing—look, they're not necessarily going to win. But their expectation is that they're going to understand what that process is. If they get leave frustrated with the process, even the winner can be dissatisfied. I mean, the idea that 50 percent of the time is the maximum level of satisfaction, a bad process can have both the winner and loser going away from the courthouse saying we're idiots and we can't afford that.

JUDGE McADAM: I'm on a high-volume municipal court in Kansas City, Missouri, and there's been many a time when I'll have a short trial, a traffic violation, let's say, where the defendant will come away and say thank you after I've found . . . them guilty because what they wanted was their day in court. They wanted to be heard, they wanted to be treated with respect, and when they found that, and they didn't expect it necessarily, but when they found it, they were grateful, and so even though the result may not have been what they wanted, I think it was a favorable result and fair nonetheless.

JUDGE SCHUMANN: I think an important part of the process is demeanor. . . . In other words, if you are respectful, courteous, and attentive and don't look like, you know, this is a bunch of nonsense: “Why am I here? Why are you taking up the time? I've got 30,000 cases behind it. Move it.” With that kind of attitude and demeanor, they have people who lose total respect for the court system and the judiciary. So it's demeanor. I think that's critical.

MR. FORD: So as long as the litigants are satisfied that the process was fair, including all of these factors, then even though they might not be happy, justice has been served?

JUDGE McADAM: I would say so, and . . . these cases are not just concepts of law in a vacuum. They are fact-based and because of that, every case has their sets of facts, and therefore you may think that your case is equally worthy of one you just heard that day or read about in the newspaper, but because of a difference in facts, the judge may have to go a different direction, or if it's a jury-tried case, the jury does. So that becomes the change of result that could be justified because of facts. . . .

PROFESSOR FEELEY: We're discussing this as if most cases are adjudicated at the end of trial. The fact of the matter is most cases settle, and I think one of the reasons they settle, and are negotiated, is that leads to a win-win situation while an adjudicated case is likely to lead to a zero sum, a win or lose. Ninety percent, 95% of your dockets are resolved through negotiated settlements rather than trial, and I think that facilitates the win-win situation. That maximizes the likelihood that everyone goes away happy.

MR. FORD: We know that fairness, integrity are all essential to the administration of justice, but we also know that there is a financial cost to operate the justice system.

Mr. Vickrey, how much does it cost to operate California courts per year?

MR. VICKREY: It costs about $2.7 billion a year to operate the trial and appellate system in this state.

MR. FORD: How does that compare to other systems around the country?

MR. VICKREY: Well, I don't know how the costs compare, roughly. California has fewer judges per hundred thousand compared to states like New York, New Jersey, Florida, and Arizona next door to us, Washington State even more, so the cost in California I would assume is probably about, in equal-ized dollars for cost of living, is probably about the average spent around the country.

MR. FORD: Obviously when you're talking costs, you're talking about a wide array of items, ranging from judges' salaries to simple supplies in the courtroom. Have we reached a point—with all the budget battles that are going on in the jurisdiction, have we reached a point where the justice system can actually be damaged because of a lack of financial resources?

JUDGE BOWMAN: I don't know that we've reached the point, but I say without question that that potential is there. In Michigan where I sit as a district judge, in our court, because of budget issues that are at the state level, funding has been reduced and it gets down to practical problems in court of: Are you going to have enough personnel? Is the judge going to be able to open the court up on a given day to process the cases that people are waiting to have processed? And while we haven't reached that point, the potential and the danger is there.

JUDGE BURKE: I don't think that courts have been very effective in explaining this issue to the people. People understand that if you have a large class size and you get too big, kids can't learn,
and that social promotion is a bad idea, and yet when it comes to the justice system, if I have a courtroom that’s too full and people don’t have an opportunity to be listened to and they leave the courthouse not understanding what happened, we’ve done damage to the justice system that may be irreparable for the people who were in that day.

Most people are only going to end up in court once or twice in their life. . . . That experience is really critical for them. If it’s the divorce and the family that you say is affected—I may have to get it done real fast and you leave and can’t figure out why you can’t see your kids as much is a big issue for us, but I don’t think the judiciary has been very effective in explaining that issue generally to the public and more particularly to the legislature. . . .

MR. VICKREY: I was just going to offer maybe a slightly different view. I don’t disagree with the fact that the courts have not been effective, perhaps, in making their case with the public about funding, but I do think we cross the line in terms of harming the court system and even placing in jeopardy the understanding of the judicial process in terms of how we fund our courts, and I think we need to do more than be better advocates and better public educators. We clearly need to do that, but I think we need to redefine the system of checks and balances between our branches of government and the relationship to our branches of government.

A hundred years ago, the courts basically were funded with the judges’ salaries. Today they are very complex operations and the courts depend on technology and they depend upon the staff in the operations. They depend upon resources for special courts, for the drug courts and complex-litigation courts, and I think we need to redefine accountability in the court system as we relate to the executive and legislative branches of government.

It is not appropriate today to have a governor to decide what level of funding for a balanced budget and to decide substantially this is the area where funding will go, “I will fund business courts,” “I will fund drug courts,” or wherever the issue may be; or for a legislature, either through benign neglect because of the pressure from other strong interest groups that are pushing money for other activities or because they’re upset about a decision, to not fund adequately the courts in a manner that will allow equal access for every citizen, regardless of what area is seen, in which their case comes to court.

MR. FORD: . . . You touched on an important point and, Professor Feeley, let me ask you about this. What about the idea that here we have supposedly three independent branches of government, the executive and legislative and judicial, and yet it’s the legislature that essentially says, “I’m going to tell you folks in the judicial branch how much money you’re going to make, what your salary is going to be. I, as the legislative branch, am going to tell you what you can use your money for and how much you’re going to get for any programs you want. Basically I’m going to tell you how many staples and papers and pens you can have in your system.”

What’s wrong with that?

PROFESSOR FEELEY: Well, in a sense, nothing is wrong with it. We ought to have the legislature as being the possessor of the purse, but I would certainly agree with the point that was just made. That is, the appropriation ought to go to the judicial branch and the judiciary in turn ought to figure out how best to spend the money. We don’t need the legislature trying to micromanage the courts because in a sense that’s micromanaging justice and the judicial councils are better equipped for doing that than are the people in the legislature.

But I see nothing wrong with the budget being set by the legislature. In fact, it’s hard for me to imagine who else would set it.

MR. VICKREY: Well, let me offer a different point of view. I think surely that’s a concept we all think about, the power of the purse, and that responsibility belongs to the legislative branch. I think as it relates to a neutral, independent judiciary, that system no longer works today in the United States and I think some other mechanism, whether it is providing by constitution a mechanism that provides for the funding of the courts or the process that our legislature and governor supported this last year in California—to have a mechanism that adjusts the base of

People understand that if you have a large class size and you get too big, kids can’t learn and that social promotion is a bad idea, and yet when it comes to the justice system, if I have a courtroom that’s too full and people don’t have an opportunity to be listened to and they leave the courthouse not understanding what happened, we’ve done damage to the justice system that may be irreparable for the people who were in that day.

—Kevin S. Burke
the budget of the courts automatically each year, trying to treat
the judiciary as a coequal branch of government, because the
judiciary at the state level, across the United States, are, for the
most part, only in theory a coequal branch of government. In
reality, they are not a coequal branch of government that can be
held accountable for how effectively and how efficiently and
how fairly they’re handling the administration of justice in their
respective states, and that’s where the accountability needs to
be: How timely is the justice? How responsive is it? Is it han-
dled in a way that’s perceived as being fair, as being fair in reality
to the parties in the process? Material when you file it—if a
warrant is recalled, is it recalled a day or three weeks?

There’s been a case in California about resources in the last
several years in the operations of the courts, and so I believe we
need to do something to protect an independent judiciary in
this process. When judges are worried about whether or not a
pay raise will go through, they’re worried about whether or not
the courts are going to have shorter hours of operation, which
they have here today, the clerks’ offices are cut back, so some-
body goes in for a protective service order and they may not be
able to get it in a day, that isn’t right. That isn’t an independent
judicial system. The public have—should have the right to
access to resolve their disputes.

MR. FORD: When we talk about the quality of justice, obviously
an enormous number of factors into it, into this, but ultimately,
ultimately when we’re talking about justice, we’re talking about
the judge on the bench. That’s where it all comes in. It funnels
through. You need the staff. You need the resources. You need
the programs. Ultimately it’s the judge, and when we talk about
budget battles here or the legislature as being unhappy with the
courts’ decisions or just saying we don’t have the money, we’ve
got to cut it someplace, how damaging is it to the justice system
that we now have a scenario where judges have to leave the
bench because we can’t afford to stay on the bench and put their
children through college; people who would [be] capable, qual-
ified, wonderful additions to the bench have to deny the invita-
tion because they say, “You know what? I can’t afford to do
that,” because the judge’s salary is so different from what they
would make in the [private] sector.

Is there real damage being done to the justice system because
of those financial constraints?

JUDGE BURKE: The hard part for judges is the delay in getting
regular salary [increases], so you go four or five years and noth-
ing happens. That’s a big issue for judges.
The second issue is there are a number of places in the coun-
try where judges’ salaries are not competitive with other public-
sector employees. It’s not about whether they’d make more
money in private practice, but in the school system they get
paid more than the chief justice of the state, and so I think those
inequities are as troublesome as the fact that, sure, if I’m in pri-
ivate practice I’m going to make more money. I like public ser-
vice, but I do think that it’s appropriate for judges to regularly
have a compensation package that is appropriate.

MR. FORD: Does the public share that view? Does the public
understand that it can be a financial hardship for somebody
willing to engage in public service? .

In my county we have 450,000 residents and 21
judges. They can’t know me by name; they don’t
know the cases I handle. But they need some way
to evaluate whether as a public official I’m doing
a good job.

– Steve Leben

PROFESSOR FEELEY: Oh, yes, I think so. Most capable public
servants are well underpaid for what they would get in the pri-

cate sector, and that’s part of the challenge of public service .
. . . Like the judge said, we certainly wouldn’t want to peg judi-

cial salaries to the incomes of successful lawyers. What we
need to do is pay them to the salaries of other successful public
servants, which, as he suggested, is not the case in many places.

JUDGE BOWMAN: I don’t think that the public understands
that judges’ salaries are not competitive. I believe that actually
they view judges as being well paid and don’t appreciate that if
a judge chose to leave the bench, that they probably could make
two to three times more in the private sector. I think that the
general view is that we’re well paid, and hopefully, in the minor-
ity view, overpaid, but I think they don’t understand.

MR. FORD: How do you get the public to understand that?

JUDGE CICCONETTI: The public perception of judges, they may
say, “Well, Judge, you chose to run for this office. You knew
what the salary was when you took your petitions out to run, and then two or three years later you’re out there with your organization lobbying legislators to have a pay increase.”

So they look at us and say, “What are you doing?” And I understand that.

**MR. VICKREY:** I do think that the issue that Judge Burke raised is an important one, and that is when judges come to the bench, their salaries are less than other public sectors. I think that is a matter that is demoralizing to judges in terms of both stature and in the judiciary, probably, in the first place, but more importantly, the process for setting the salaries. The public may not understand the level of salaries. I think they do understand when the process is politicized. I think they also understand—you look at the opinion polls that has an effect on the independence and the neutrality of the trial judges, so I think in the states, some 15 states, they have set up independent compensation commissions, [which] is one step that could be taken to reform that area.

And another issue is I think at least when we have asked the judges in this state, certainly they’re concerned about salaries and retirement, but they’re more concerned about having adequate professional staff to support them, reasonable caseloads so they have time to prepare for the hearings, so they have time to contemplate and rule on the cases, and those types of things, so I think there are people who come with the spirit of public service; and we have been fortunate, I know, in this state, in looking back at the appointments in the last five or six years, that tremendous pull coming out of the partnership ranks of the best firms in the state, the senior positions of the public sector for the district attorney and county counselor’s office, . . . but it certainly becomes a challenge to keep them on the bench when you go through these episodes of six years without a pay raise or political warfare just to get a pay raise in which all of the issues of unpopular decisions are brought forward when we look at the complaints they have.

**MR. FORD:** One of the things we’re talking about here today is the need for the public to better understand what happens inside a courtroom. The last decade or so, we’ve seen an enormous explosion of media. There are any number now of 24-hour news cable networks. We’ve seen that people have a real, genuine, and compelling interest in trials that are taking place. Do we see too much media focus and attention on trials now or not enough media focus and attention on trials now? . . .

**PROFESSOR FEELEY:** Well, I tell my students that the courtroom drama has replaced the superhero and the Lone Ranger of my generation. When I was a kid, the Lone Ranger used to ride into town to save, to save the vulnerable folks, and now it’s the Super Lawyer who rides into town, and so, as one that doesn’t own a television and doesn’t watch television, I can’t give you too much of an answer other than—other than the belief that the lawyers have replaced the solve-it-all role of superhero in popular culture. I don’t think that’s really bad.

**MR. FORD:** If you ask a poll, a group in a room, whether or not cameras in the courtroom during the course of a trial are a good thing or bad thing, chances are you’re going to get more people saying that they’re not a good thing. What do you think about cameras in the courtroom? . . .

**JUDGE SCHUMANN:** I have had them in my courtroom on relatively high-profile cases and I’ve noticed there is a definite change in behavior of participants in the trial. With all due respect to you, Jack, the attorneys do start to “posturize” a bit and they tend to be a little bit more flamboyant in their language.

The jurors are very self-conscious and have to be constantly reassured that their faces will not be photographed. And I know that cameras can go without the red light, without any light indication on, but people are very conscious of that.

And I think the witnesses also are very uncomfortable, particularly if it’s a high-publicity trial or there’s some sort of spice in it—for example, it’s a homicide or it’s a sex-related crime—and so generally it is a very unnatural atmosphere in the courtroom.

**MR. FORD:** Understanding that and understanding the impact that cameras have on people in everyday life, is that a small price to pay, to allow literally millions of people to understand exactly what’s going on inside a courtroom, to see the role of a prosecutor in a criminal case, to see the role of a defense attorney, to see how a judge handles that all, and to walk away saying even though I might disagree with the verdict in that case, I really appreciate now the process of the administration of justice?

**JUDGE BOWMAN:** I think that if it gets to the point of affecting the way that the trial proceeds and ultimately has an adverse effect on the outcome, particularly in a criminal case, then it is not a small price to pay because the first responsibility is to have the case and the trial occur fairly and have justice be served.

**JUDGE BURKE:** I don’t think it’s our call. I think that when Jefferson and the Founding Fathers said you come in with your quill pen, today’s modern equivalent is the camera, and so it’s not our call. We are in the tradition of saying we are going to have open courtrooms, and the fact is technology shouldn’t interfere with the way the courtroom goes on.

If you look at the most visible case in the country, O.J. Simpson, I can make an argument, or would make an argument, that the public understood that much better because of the cameras—that had that not been televised and you had talking heads standing outside and saying what was happening in the courtroom, there would have been much more revulsion as to what that verdict was than when people saw it on TV and they said, “I understood why that verdict occurred.”

**MR. FORD:** Even though they might have disagreed with it—

**JUDGE BURKE:** Right.

**MR. FORD:** —they can say they understand? . . .

**JUDGE NACHTIGAL:** I don’t think it’s a problem if a camera in the courtroom is there from the beginning of the trial to the end.
of the trial, showing the trial of what's happening, protecting the people. The problem with the camera in the courtroom is when they come in for two minutes and take that 30-second sound byte out of context and that becomes the case. That's the problem, not with the camera in the courtroom showing the entire trial. I think that's a very good thing.

**MR. FORD:** And do judges then have the ability if we're talking about those concerns that Judge Schumann mentioned? Do judges have the ability to say, "I'm going to handle that problem. I'm going to talk to the lawyers. I'm going to make sure they understand it. If I have a witness who is reluctant to appear, then I'll make a decision that this witness will not be shown"?

Are those issues that are manageable in order to accomplish both things, justice in the courtroom and the public understands about justice in the courtroom?

**JUDGE LEBEN:** They're definitely manageable, and I agree completely with Kevin Burke that the camera is the equivalent of the notebook today. On the other hand, we also have to keep in mind we're dealing with human beings.

I had a very simple civil case in which we were just dealing with whether a neighborhood association could force somebody to get their fence down from 6 feet to 4 feet because that's what the subdivision regulations required. To the surprise of the young woman attorney who was on her last day of working at the law firm she was at and was forced to go to trial even though she didn't want to be a trial lawyer, a camera showed up because one of the parties wanted publicity for the case, and there was a television camera man there and the woman attorney was in tears immediately before the case. I talked with her, I talked with the camera man, and I got both of their interests accommodated—and we went on and had the trial in a positive manner.

On the criminal side, most judges will sit down in a high-profile case with the defense attorney and the prosecutor at the start, talk about what's going to be done and how it's going to work, and work that out as it goes along. I think it can be accommodated.

**MR. VICKREY:** Jack, I think there is one other issue that needs to be considered in this. There's one that we're talking about, criminal and civil cases, but if we're not careful, one of the implications, if there is no discretion, is we inadvertently, I think, create a two-tiered justice system: Those individuals who want to a divorce and want their privacy go out into the private sector, and those individuals who have their civil dispute and they want privacy go out to the private justice system, and those who can't afford to go to the private justice system end up in the public justice system.

And so I think just as we're dealing with the issue about making records available electronically, that the same kind of debate about cameras in the courtroom needs to go on as we try to adjust the public's access to their justice system and, at the same time, recognize and try to respect a respectful environment for those who come to the courts to resolve their problems.

**MR. FORD:** Clearly, when you're talking about a justice system and how it functions, you need to focus on the judge. The judge is the centerpiece of that justice system. People need to have confidence in the honesty, the integrity, and the competence of their judges. What standards should we use as members of the public to determine if a judge is doing a good job? . . .

**PROFESSOR FEELEY:** The fact of the matter is it's hard to know, for a member of the public to know whether a particular judge is doing a good job, unless they've seen them directly, but one of the values of elections is endorsements. And if judges are endorsed by organizations that are well regarded, that should give members of the public some considerable confidence . . . . I think we've seen a failure of public agencies and private agencies and organizations to do enough endorsing of judges.

**MR. FORD:** Various states and bar associations have groups, committees that are designed to make sure that judges are functioning properly; to step in if there are complaints, to handle complaints, to determine what sort of result, if any, is necessary based upon the complaints . . . . What role should the public, members of the public, have in determining whether judges have made mistakes, have erred, have not been judge-like in their demeanor, and then what consequences of that? Should the public have any role in that? . . .

**JUDGE BOWMAN:** In Michigan, there are public representatives on our judicial review commission. And I think that is a good thing. Judges are also involved, and lawyers are involved on commissions. It's a balance and I think ultimately it works well.

**MR. FORD:** Why does it work well? The argument can be made that you know what? I'm a member of the public who hasn't gone to a law school, who hasn't been under the pressures of practicing law or administering justice. While it's nice to have them on the panel, you can argue they don't understand what's going on, the pressures that a judge might be under. Why isn't it a good thing to have them?

**JUDGE BOWMAN:** I think the balance of ideas that flow—because people, citizens, have good common sense, and in the end, with judges involved on the panel and lawyers involved and the citizenry, that the citizenry is able to use their good common sense and the result is fair.

**MR. VICKREY:** The majority of the complaints involve the demeanor and the behavior of professionals, and I think it's important for the public to be involved in that process.

In California, the lay citizens represent the majority of the individuals on the panel; the hearings are open to the public, as well as, obviously, the final results of the decisions, and I think it important that that system of accountability be strengthened, just as we want to have a strong appellate review process.

We shouldn't be focusing on the ballot box as a way to address behavior that falls outside of the norm—the behavior by 2 or 3% of the judges that falls below the expectations of the judges, members of the bar, [and] the appointing authorities for a jurist in any jurisdiction. So I think it's important that the
public is educated to know what's available to them so they can file complaints. It is also important they be a part of the investigating and hearing process to make decisions about specific judges.

**JUDGE LEBEN:** Jack, we're really talking about two different ways of evaluating judges. What I'm talking about here and Bill is talking about is the judicial discipline process in which there is a complaint against a judge or a serious problem involving a judge. But the public also wants another way to evaluate the function of their judge, and they need one.

In my county we have 450,000 residents and 21 judges. They can't know me by name; they don't know the cases I handle. But they need some way to evaluate whether as a public official I'm doing a good job.

The American Judicature Society a few years ago looked at the four states then that were having formal judicial evaluation programs, and they have surveys not only of lawyers, but other court participants—jurers, police officers, probation officers—to look at what the judge is doing, look at the statistics on how quickly they're handling their cases, whether they're appropri-

**PROFESSOR FEELEY:** . . . . I'm going to confess. Professors have tenure, and I don't think one professor at my university . . . has been removed for incompetence in the past 20 years. I wonder how many judges here in their states one, at least one judge in the past 20 years, has been removed for incompetence. My hunch is that most of these procedures or these institutions for discipline and removal don't work very well in the universities, in the bar, and on the bench. But I may be wrong. I'd be interested in hearing.

**JUDGE BURKE:** I disagree. I think that the experience is that, one way or the other, we're pretty good at getting rid of the worst, at least, in the judiciary. In most states, one way or the other, either the public or the judicial commission, is going to get their reports.

I think it is a challenge, though, for how you can balance a person who can improve and how we end up dealing with the person who is not so bad that it's so obvious to everyone to get rid of them, but that they need to improve, and that is a big challenge for the judiciary.

**MR. FORD:** When you say it's a challenge, part of the challenge is communication, to get the public to know that, yes, there are mechanisms in place to deal with judges who are not competent, but also part of the challenge is to get the public to know the flip side of that is there are an enormous number of talented and competent judges out there that are working very hard and they're trying to make this justice system work and, for the most part, it does work. So how do you tell the public? How do they know that?

**MR. VICKREY:** Jack, I think there are things. We want the judiciary to be insulated, but I don't think it has to be isolated, and there are things that the court system can do to get the public invested in the well-being or the health and vitality of their justice system.

In California, programs like having members of the public participate with the local courts on planning for the future of that court system, making it a responsibility of every judge in the state as part of their responsibilities as jurists to participate in public outreach activities.

For the court system to assume some responsibility for public education—we've got to get over blaming the public education system for doing a poor job on civics because the public doesn't understand our court system, and we need to assume some responsibility for that.

Out of the 35 million people in California, 8 million have some contact with the court system as a direct party to a case or a traffic offense or some other activity every single year, and when we add the jurors to that and we add the witnesses and other people in court, half the population can have involvement inside the walls of our courthouses.

— William C. Vickrey
other people in court, half the population can have involvement inside the walls of our courthouses.

We ought to be willing to openly evaluate and criticize ourselves, and I think things like race and ethnic bias studies, . . . studies on how fast the cases are being resolved, which courts are effective and which ones aren’t. We should be sharing every bit of information we have and involving the public in all of that, because I don’t think that information is going to threaten the trial-court system or threaten any individual judge. It’s being aware of his or her constitutional responsibilities.

I think those are the things that will help the public invest in our system. It’s not the headline or the sensational case that is dictating the opinions in the public. I think it’s their direct per-

sonal involvement with our courts, or that of family or friends, so we have to look at ourselves and address that population that we do have contact with.

Leo Bowman is chief judge of the District Court in Pontiac, Michigan, where he has served since 1988. He is a past president of the Michigan District Judges Association. Before his election to the bench, he served as a legal advisor to the Pontiac City Council.

Kevin S. Burke is a district judge and past chief judge of the Hennepin County District Court in Minneapolis, Minnesota. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts.

Michael Cicconetti is judge of the Painesville (Ohio) Municipal Court. He was vice president of the American Judges Association in 2003-2004. He is known for creative sentencing practices with misdemeanor offenders.

Malcolm Feeley is professor of law at the Boalt Hall School of Law at the University of California-Berkeley and the author of several books about the court system.

Jack Ford is moderator for the syndicated Public Broadcasting Company program Inside the Law and an anchor for Court TV. He previously has worked in network news, including as co-anchor of the Today show’s weekend edition and as NBC’s chief legal correspondent. He has a law degree from Fordham University and worked as an assistant prosecutor in Monmouth County, New Jersey.

Steve Leben is a judge on the Johnson County (Kan.) District Court. He received the Distinguished Service Award from the National Center for State Courts in 2003. He has been the editor of Court Review since 1998 and was the secretary of the American Judges Association in 2003-2004.

Michael R. McAdam is a judge and former presiding judge on the Kansas City (Mo.) Municipal Court. He served as president of the American Judges Association in 2003-2004 and organized the National Forum on Judicial Independence.

Gayle Nachtigal is a circuit court judge in Washington County, Oregon, where she has served as the presiding judge. She has served as a member of the board of directors of the National Center for State Courts and was president-elect of the American Judges Association in 2003-2004.

Tam Nomoto Schumann is a superior court judge in Orange County, California. She has served as a judge for 26 years, first as a municipal judge and later on the superior court. She was recognized as a Pioneer of Judicial Administration and Education by the California Judicial Council and was named Judge of the Year by both the Orange County Trial Lawyers Association and the Orange County Women Lawyers Association.

William C. Vickrey is the administrative director of the Judicial Council of California’s Administrative Office of the Courts. In that position, which he has held since 1992, he directs the operation of most services to the California state court system. He is a past president of the Conference of State Court Administrators and in 1995 received the Warren E. Burger Award, one of the highest honors given by the National Center for State Courts, for his significant contributions to the field of court administration. Before taking his present position in 1992, he served as the administrative director of the courts of Utah from 1985 to 1992.

I don’t think the public understands that judges’ salaries are not competitive. I believe that actually they view judges as being well paid and don’t appreciate that if a judge chose to leave the bench, that they probably could make two to three times more in the private sector.

– Leo Bowman
Editor's Note: There are about 8,500 state general-jurisdiction trial-court judges in the United States; of those, 77% stand for some sort of contestable election and 87% stand for some form of election. There are about 1,250 state appellate judges in the United States; of those, 53% stand for some sort of contestable election and 87% stand for some form of election. (See Court Review, Summer 2004, at 21.) In addition, there are thousands of additional, limited-jurisdiction judges also subject to election. Thus, the rules governing election-campaign conduct by judges are of great significance.

In 2002, in Republican Party of Minnesota v. White, the United States Supreme Court held a broadly written provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from “announcing” positions on issues violated the First Amendment. On remand in that same case in August 2005, the United States Court of Appeals for the Eighth Circuit held two more provisions of the Minnesota Code of Judicial Conduct—the partisan-activities and solicitation clauses—unconstitutional.

Whether the United States Supreme Court again takes the case to provide its guidance or not (a request for review is pending), the Eighth Circuit’s opinion will have broad impact, at least for the near term. State supreme courts will continue their struggles to rewrite codes of judicial conduct to meet both the state interests perceived to apply and the limits being placed upon those codes by the federal courts. And judicial candidates will continue their efforts both to succeed in contested elections and to comply with the codes of conduct.

Therefore, we reprint here substantial excerpts from the Eighth Circuit’s opinion, as well as from the dissenting opinion of three members of that court. We have deleted all of the footnotes and most of the citations. For the few Supreme Court cases cited by the court to which we have retained the reference, they are simply noted by name and year.

**I. BACKGROUND**

Canon 5A(1) and 5B(1), the partisan-activities clause, and B(2), the solicitation clause, rein in the political speech and association of judicial candidates in Minnesota. The partisan-activities clause states, in relevant part:

Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) identify themselves as members of a political organization, except as necessary to vote in an election;

. . . .

(d) attend political gatherings; or seek, accept or use endorsements from a political organization. Section 5B(1)(a) provides that “[a] judge or a candidate for election to judicial office may . . . speak to gatherings, other than political organization gatherings, on his or her own behalf.” (emphasis added). The solicitation clause states,

A candidate shall not personally solicit or accept endorsements.
campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate’s campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

[*746] The facts of this case demonstrate the extent to which these provisions chill, even kill, political speech and associational rights. In his 1996 bid for a seat as an associate justice of the Minnesota Supreme Court, appellant Gregory Wersal (and others working on his behalf) identified himself as a member of the Republican Party of Minnesota, attended and spoke at the party’s gatherings, sought the endorsement of the party, and personally solicited campaign contributions. In response to Wersal’s appearance at and speech to a Republican Party gathering, a complaint was filed with the Minnesota Lawyers Professional Responsibility Board, alleging that Wersal’s actions violated Canon 5A(1)(d). Although the Minnesota Office of Lawyers Professional Responsibility (OLPR) ultimately dismissed the complaint, the complaint accomplished its chilling effect. Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race.

Wersal made a second bid for a seat on the Minnesota Supreme Court in 1998. In 1997 and 1998, Wersal asked the OLPR for advisory opinions regarding the solicitation and partisan-activities clauses. The OLPR’s response was mixed, stating it would not issue an opinion regarding personal solicitation, in light of proposed amendments to the Canon and the fact that there were no judicial elections scheduled that particular year. It also stated that it would enforce the partisan-activities clause. Wersal then initiated this litigation. In the meantime, he was forced to write several letters to individuals who had indicated they would speak on his behalf at Republican Party conventions across the state, asking them not to do so in order to avoid violating Canon 5 and imploring them to “please be patient. I hope for a decision from the Federal Courts soon.” He also had his campaign’s legal counsel advise the chairman of the Republican Party of Minnesota that Canon 5 would prohibit Wersal from accepting or using any endorsement from the party. There is no question that Wersal sought to work within the confines of Canon 5 even as he sought to challenge it—confines that in the most direct of ways restricted his political speech and association, compelling him at one point to end a political campaign.

II. DISCUSSION
A. Judicial Selection in Minnesota
Minnesota has chosen to elect the judges of its courts. . . . Some thirty-three states employ some form of contested election for their trial courts of general jurisdiction, their appellate courts, or both. As federal judges, we confess some bias in favor of a system for the appointment of judges. Indeed, there is much to be said for appointing judges instead of electing them, perhaps the chief reason being the avoidance of potential conflict between the selection process and core constitutional protections. In promoting the newly drafted United States Constitution, Hamilton argued in Federalist No. 78 that if the people were to choose judges through either an election or a process whereby electors chosen by the people would select them, the judges would harbor “too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.” Arguably, concerns about judicial independence and partisan influence, posited by Minnesota as grounds for regulating judicial election speech, are generated, fundamentally, not by the exercise of political speech or association, but by concerns surrounding the uninhibited, robust and wide-open processes often involved in the election of judges in the first place. As Justice O’Connor noted in her White concurrence, “the very practice of electing judges undermines [an] interest in an actual and perceived impartial judiciary.

Yet, there is obvious merit in a state’s deciding to elect its judges, especially those judges who serve on its appellate courts. It is a common notion that while the legislative and executive branches under our system of separated powers make and enforce public policy, it is the unique role of the judicial branch to interpret, and be quite apart from making that policy.

But the reality is that “the policymaking nature of appellate courts is clear.” Courts must often fill gaps created by legislation. And in particular, by virtue of what state appellate courts are called upon to do in the scheme of state government, they find themselves as a matter of course in a position to establish policy for the state and her citizens. “At the [state] appellate level, common-law functions such as the adoption of a comparative fault standard, or the determination of a forced spousal share of intestate property distribution, require a judiciary that is sensitive to the views of state citizens. The courts’ policy-making power is, of course, ever subject to the power of the legislature to enact statutes that override such policy. But that in no way diminishes the reality that courts are involved in the policy process to an extent that makes election of judges a reasonable alternative to appointment.

Without question, Minnesota may choose (and has repeatedly chosen) to elect its appellate judges. . . . [*748] If Minnesota sees fit to elect its judges, which it does, it must do so using a process that passes constitutional muster.
B. The First Amendment and Political Speech

Within this context, Minnesota has enacted Canon 5 in an effort to regulate judicial elections. In White, the Court held the announce clause of Canon 5, which prohibits judicial candidates from stating their views on disputed legal issues, unconstitutional. It falls to us now to determine whether the partisan-activities and solicitation clauses of Canon 5 are acceptable under the First Amendment.

Protection of political speech is the very stuff of the First Amendment. It cannot be disputed that Canon 5’s restrictions on party identification, speech to political organizations, and solicitation of campaign funds directly limit judicial candidates’ political speech. Its restrictions on attending political gatherings and seeking, accepting, or using a political organization’s endorsement clearly limit a judicial candidate’s right to associate with a group in the electorate that shares common political beliefs and aims.

C. The Strict Scrutiny Framework

Political speech—speech at the core of the First Amendment—is highly protected. Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it. The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest. Strict scrutiny is an exacting inquiry, such that “it is the rare case in which . . . a law survives strict scrutiny.”

1. The Requirement of a Compelling State Interest

Precisely what constitutes a “compelling interest” is not easily defined. In general, strict scrutiny is best described as an end-and-means test that asks whether the state’s purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest. As one commentator has said, “the Court’s treatment of governmental interests has become largely intuitive, a kind of ‘know it when I see it’ approach.” A clear indicator of the degree to which an interest is “compelling” is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being “compelling.”

2. The Need for Narrow Tailoring

Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. As with the compelling interest determination, whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative). In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as precisely tailored as possible.

D. Minnesota’s Purported Compelling State Interest

In Kelly, Minnesota argued that Canon 5’s restrictions on judicial candidate speech served a compelling state interest in maintaining the independence, and the impartiality, of the state’s judiciary. Minnesota continues to argue that judicial independence, as applied to the issues in this case, springs from the need for impartial judges. Apparently, the idea is that a judge must be independent of and free from outside influences in order to remain impartial and to be so perceived. Thus, in Kelly, the panel majority understood the two notions, independence and impartiality, to be interchangeable, as the Supreme Court promptly noted in White.

In Kelly, the panel majority analyzed the announce, partisan-activities, and solicitation clauses in light of impartiality as a compelling interest, but failed to define “impartiality.” On appeal, the Supreme Court filled that void by fleshing out its meaning. Justice Scalia reasoned that impartiality in the judicial context has three potential meanings.

One possible meaning of “impartiality” is a “lack of preconception in favor of or against a particular legal view.” Quickly discounting this uncommon use of the word, the Court said it could not be a compelling interest for a judge to “lack . . . predisposition regarding the relevant legal issues in a case” because such a requirement “has never been thought a necessary component of equal justice.” The Court reasoned, first, that it is “virtually impossible” to find a judge who lacks any “preconceptions about the law,” and second, that it would not be desirable to have such a judge on the bench. “Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” We follow the Court’s direction and likewise dismiss the idea that this meaning of impartiality could be a compelling state interest.

A second possible meaning is a “lack of bias for or against either party to a proceeding.” Calling this the traditional understanding of “impartiality” and the meaning used by Minnesota and amici in their due process arguments, the Court explained that this notion “guarantees a constitutional adjudication would be evidence of impartiality, not lack of bias.” We follow the Court’s direction and likewise dismiss the idea that this meaning of impartiality describes a state interest that is compelling.

Being convinced that protecting litigants from biased judges is a compelling state interest, we turn to the “narrow tailoring” examination of the partisan-activities clause under this particular meaning of judicial impartiality. Because this meaning directs our attention to parties to the litigation rather than to ideas and issues, we analyze the regulation in this context before turning to other possible definitions of impartiality. We consider whether the partisan-activities clause actually addresses this compelling state...
interest and, if so, whether it is the least restrictive means of doing so.

In White, the Supreme Court found that the announce clause failed the narrow tailoring aspect of the strict scrutiny test, holding “indeed, the clause is barely tailored to serve that [lack of bias] interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues.” Thus, the Court found that clause was not narrowly tailored because it failed to advance a compelling interest. The same is true for the partisan-activities clause.

1. Unbiased Judges and the Narrow Tailoring of the Partisan-Activities Clause

In one sense, the underlying rationale for the partisan-activities clause—that associating with a particular group will destroy a judge’s impartiality—differs only in form from that which purportedly supports the announce clause—that expressing one’s self on particular issues will destroy a judge’s impartiality. Canon 5, in relevant part, forbids a judicial candidate from identifying with a political organization, making speeches to a political organization, or accepting endorsements from or even attending meetings of a political organization, all of which are the quintessence of political associational activity. And beyond its importance in bringing about those rights textually protected by the First Amendment, association, as earlier noted, is itself an important form of speech, particularly in the political arena. . . . Inasmuch, then, as the partisan-activities clause seeks, at least in part, to keep judges from aligning with particular views on issues by keeping them from aligning with a particular political party, the clause is likewise “barely tailored” to affect any interest in impartiality toward parties. Thus, the Supreme Court’s analysis of the announce clause under this meaning of “impartiality,” to wit judicial bias, is squarely applicable to the partisan-activities clause. . . . [*755]

We recognize that the difference between the direct expression of views under the announce clause and expressing a viewpoint under the partisan-activities clause through association, is that the latter requires the aligning of one’s self with other like-minded individuals—that is, the members of a political party.

Political parties are, of course, potential litigants, as they are in this case. Thus, in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in favor of that litigant. Yet even then, any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party. That is because the associational activities restricted by Canon 5 are, as we have pointed out, part-and-parcel of a candidate’s speech for or against particular issues embraced by the political party. And such restrictions, we have also said, do not serve the due process rights of parties. . . .

And in those political cases where a judge is more personally involved, such as where [a] redistricting case is a dispute about how to draw that judge’s district, and even in those cases discussed above that merely involve a political party as a litigant, recusal is the least restrictive means of accomplishing the state’s interest in impartiality articulated as a lack of bias for or against parties to the case. Through recusal, the same concerns of bias or the appearance of bias that Minnesota seeks to alleviate through the partisan-activities clause are thoroughly addressed without “burning the house to roast the pig.” . . . .

Therefore, the partisan-activities clause is barely tailored at all to serve any interest [*756] in unbiased judges, and, at least, is not the least-restrictive means of doing so. Accordingly, it is not narrowly tailored to any such interest and fails under strict scrutiny.

2. Impartiality Understood as “Openmindedness,” and the Partisan-Activities Clause

The third possible meaning of “impartiality” articulated by the Supreme Court in White, and the one around which its analysis of the announce clause revolved, was “described as openmindedness.” The Court explained, This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so.

The Court stopped short, however, of determining whether impartiality articulated as “openmindedness” was a compelling state interest because it found that, even if it were, the “woeful[] underinclusiveness” of the clause betrayed any intended purpose of upholding openmindedness.

We conclude that the partisan-activities clause is likewise “woefully underinclusive,” calling into question its validity in at least two ways. First, it leads us to conclude, before even reaching a compelling interest inquiry, that the announce clause, the partisan-activities clause was not adopted for the purpose of protecting judicial openmindedness. Second, under a compelling interest analysis, the clause’s underinclusiveness causes us to doubt that the interest it purportedly serves is sufficiently compelling to abridge core First Amendment rights. We conclude that the underinclusiveness of the partisan-activities clause causes it to fail strict scrutiny. [*757]

a. Underinclusiveness Belies Purported Purpose

Underinclusiveness in a regulation may reveal that motives entirely inconsistent with the stated interest actually lie behind its enactment. . . . The underinclusiveness manifests itself in the inherently brief period of speech regulation during a political campaign relative to the many other instances in which a judicial candidate, especially an incumbent who is a candidate, has an opportunity to speak on disputed issues. The Court
reasoned that if the purpose of the announce clause were truly to assure the openmindedness of judges, Minnesota would not try [*758] to address it through a regulation that restricted speech only during a campaign since candidates’ views on contentious legal issues can be and are aired in the many speeches, class lectures, articles, books, or even court opinions given or authored before, during or after any campaign.

The same is true of the partisan-activities clause. The announce clause bars a judicial candidate from stating his views on disputed issues though “he may say the very same thing . . . up until the very day before he declares himself a candidate.” The partisan-activities clause bars a judicial candidate from associating with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for non-judicial offices) up until the day he begins his run for a judicial seat. A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness. The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity. And, history indicates it will be rare that a judicial candidate for a seat on the Minnesota Supreme Court will not have had some prior, substantive, political association. In sum, restricting association with a political party only during a judicial campaign, in supposed pursuit of judicial openmindedness, renders the partisan-activities clause “so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”

As for the appearance of impartiality, the partisan-activities clause seems even less tailored than the announce clause to an interest in openmindedness. While partisan activity may be an indirect indicator of potential views on issues, an affirmative enunciation of views during an election campaign more directly communicates a candidate’s beliefs. If, as the Supreme Court has declared, a candidate may speak about her views on disputed issues, what appearance of “impartiality” is protected by keeping a candidate from simply associating with a party that espouses the same or similar positions on the subjects about which she has spoken? . . . . Given this “woeful underinclusiveness” of the partisan-activities clause, it is apparent that advancing judicial openmindedness is not the purpose that “lies behind the prohibition at issue here.” [*759]

b. Underinclusiveness Betrays “Compelling” Claim

While it is not necessary for us to reach the question of whether judicial openmindedness as defined in White is sufficiently compelling to abridge core First Amendment rights, we note that the underinclusiveness of Canon 5’s partisan activities clause clearly estab-

lishes that the answer would be no. Whether Minnesota asserts a compelling state interest in judicial openmindedness is substantially informed by the fit between the partisan-activities clause and the purported interest at stake. A clear indicator of the compelling nature of an interest is whether the state has bothered to enact a regulation that guards the interest from all significant threats.

We are guided on remand by the law enunciated in White, and the Court’s words bear repeating: “[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” By its own terms, Canon 5’s restrictions on association with “political organizations” apply only to “associations of individuals under whose name a candidate files for partisan office”—political parties. Yet, if mere association with an organization whose purpose is to advance political and social goals gives Minnesota sufficient grounds to restrict judicial candidates’ activities, it makes little sense for the state to restrict such activity only with political parties. There are numerous other organizations whose purpose is to work at advancing any number of similar goals, often in a more determined way than a political party. Minnesota worries that a judicial candidate’s consorting with a political party will damage that individual’s impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party’s policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the constitutional, legislative, public policy and procedural beliefs of organizations such as the National Rifle Association (NRA), the National Organization for Women (NOW), the Christian Coalition, the NAACP, the AFL-CIO, or any number of other political interest groups. . . . [*760] Yet Canon 5 is completely devoid of any restriction on a judicial candidate attending or speaking to a gathering of an interest group; identifying herself as a member of an interest group; or seeking, accepting, or using an endorsement from an interest group. As a result, the partisan-activities clause unavoidably leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited, and thus Minnesota’s argument that it protects an interest of the highest order fails.

c. Underinclusiveness Not Indicative of a Legitimate Policy Choice

The panel majority in Kelly did not find the underinclusiveness of the partisan-activities clause troublesome. It viewed it as a legitimate policy choice: “when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment.” Association with political parties, goes the argument, is a greater threat to judicial openmindedness than association with interest groups because political parties have more power “to hold a
candidate in thrall.” But to determine [*761] whether Minnesota has shown that association with political parties poses a greater menace to judicial openmindedness than association with other political interest groups, it is necessary to do at least some analysis of the two supposed threats. While the opinion in Kelly purports to examine the “threat” posed by political parties, it contains no discussion of any comparable danger advanced by association with special interest groups, despite ample record evidence that suggests the influence of these special groups is at least as great as any posed by political parties.

Minnesota has simply not met its heavy burden of showing that association with a political party is so much greater a threat than similar association with interest [*762] groups, at least with evidence sufficient for the drawing of a constitutionally valid line between them. As a result, cases granting some degree of deference to legislatures who seek to attack one form of a problem before addressing another form are not applicable here. . . . [*763]

3. The Solicitation Clause

We now turn to an analysis of portions of the solicitation clause. The solicitation clause bars judicial candidates from personally soliciting individuals or even large gatherings for campaign contributions. “In effect, candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements.” And as the majority conceded in Kelly, such restriction depends wholly upon the subject matter of the speech for its invocation. Judicial candidates are not barred from personally requesting funds for any purpose other than when it is “related to a political campaign.” Restricting speech based on its subject matter triggers the same strict scrutiny as does restricting [*764] core political speech. . . .

Moreover, the very nature of the speech that the solicitation clause affects invokes strict scrutiny. This is because the clause applies to requests for funds to be used in promoting a political message. It bears repeating that “it can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” And promoting a political message requires the expenditure of funds. . . .

Since strict scrutiny is clearly invoked, the solicitation clause must also be narrowly tailored to serve a compelling state interest. Minnesota asserts that keeping judicial candidates from personally soliciting campaign funds serves its interest in an impartial judiciary by preventing any undue influence flowing from financial support. We must determine whether the regulation actually advances an interest in non-biased or openminded judges. Appellants challenge only the fact that they cannot solicit contributions from large groups and cannot, through their campaign committees, transmit solicitation messages above their personal signatures. [*765] They do not challenge the campaign committee system that Canon 5 provides under which candidates may establish committees that may solicit campaign funds on behalf of the candidate. “Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.” [Minn.] Canon 5, subd. B(2).

a. Unbiased Judges and the
Narrow Tailoring of the Solicitation Clause

We first consider whether the solicitation clause serves an interest in impartiality articulated as a lack of bias for or against a party to a case. Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case. It seems unlikely, however, that a judicial candidate, if elected, would be a “judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case],” based on whether that litigant had contributed to the judge’s campaign. That is because Canon 5 provides specifically that all contributions are to be made to the candidate’s committee, and the committee “shall not” disclose to the candidate those who either contributed or rebuffed a solicitation. Thus, just as was true with the announce clause and its fit with an interest in unbiased judges, the contested portions of the solicitation clause are barely tailored at all to serve that end. An actual or mechanical reproduction of a candidate’s signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request. In the same vein, a candidate would be even less able to trace the source of funds contributed in response to a request transmitted to large assemblies of voters. So, the solicitation clause’s proscriptions [*766] against a candidate personally signing a solicitation letter or making a blanket solicitation to a large group, does not advance any interest in impartiality articulated as a lack of bias for or against a party to a case.

b. Openminded Judges and the
Narrow Tailoring of the Solicitation Clause

We next consider whether the solicitation clause as applied by Minnesota serves an interest in impartiality articulated as “openmindedness.” Put another way, would allowing a judicial candidate to personally sign outgoing solicitation letters, or to ask a large audience to support particular views through their financial contributions, in some way damage that judge’s “willingness to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case”? We think not. Given that Canon 5 prevents a candidate from knowing the identity of contributors or even non-contributors, to believe so
would be a “challenge to the credulous.” Thus, Minnesota’s solicitation clause seems barely tailored to in any way affect the openmindedness of a judge. Accordingly, the solicitation clause, as applied by Minnesota, cannot pass strict scrutiny when applied to a state interest in impartiality articulated as openmindedness.

III. CONCLUSION

In White, the Supreme Court invalidated the announce clause and remanded the case to this court. Upon further consideration of the partisan-activities and solicitation clauses in light of White, we hold that they likewise do not survive strict scrutiny and thus violate the First Amendment. We therefore reverse the district court, and remand with instructions to enter summary judgment for Appellants.

LOKEN, Chief Judge, concurring in part and dissenting in part.

I concur in Parts I, II.B, II.C, II.D.1, and II.D.2 of the opinion of the court. I concur in Part IV of Judge John R. Gibson’s dissent and therefore dissent from the holding that Appellants are entitled to summary judgment invalidating the solicitation clauses. I otherwise concur in the judgment of the court.

COLLOTON, Circuit Judge, with whom GRUENDER and BENTON, Circuit Judges, join, concurring in part and concurring in the judgment.

I concur in Parts I, II.B, II.C introduction, II.C.2, II.D introductory text, II.D.1, II.D.2.a, II.D.2.c, II.D.3, and III of the opinion of the court, and in the judgment of the court.

JOHN R. GIBSON, Circuit Judge, with whom McMILLIAN and MURPHY, Circuit Judges, join, dissenting.

The Court today strikes down the partisan activities clauses and the solicitation restriction as a matter of law, by summary judgment, ruling that the interests at stake are not compelling and that the clauses of Canon 5 are either too broad, or not broad enough, to justify their own existence. Preserving the integrity of a state’s courts and those courts’ reputation for integrity is an interest that lies at the very heart of a state’s ability to provide an effective government for its people. The word “compelling” is hardly vivid enough to convey its importance. The questions of whether that interest is threatened by partisan judicial election campaigns and personal solicitation of campaign contributions, and whether the measures Minnesota has adopted were crafted to address only the most virulent threats to that interest, are in part factual questions, which we should not decide on summary judgment. [*767] Finally, the Court today adopts an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat. For these reasons, I respectfully dissent.

I.

The partisan activities clauses and the solicitation restriction each serve an interest that is and has been recognized as compelling—protecting the judicial process from extraneous coercion.

A.

In the district court, the Minnesota Boards argued that the state’s compelling interest was in protecting judicial independence and impartiality, concepts that were not further defined, perhaps because the Boards considered their meaning apparent. When the announce clause was before the Supreme Court, the opinion authored by Justice Scalia determined that further definition and analysis were essential in order to determine whether impartiality was a compelling state interest and whether the announce clause was narrowly tailored to serve that interest. Justice Scalia divined three possible meanings for judicial “impartiality.” The last meaning was “open-mindedness.” . . . Because the announce clause was “woefully underinclusive” to serve any interest in judicial open-mindedness, Justice Scalia concluded that Minnesota had not adopted the announce clause in order to further such an interest; he therefore found it unnecessary to consider whether preserving “judicial open-mindedness” was a compelling state interest. Since White, the New York Court of Appeals has held that judicial open-mindedness is a compelling interest because “it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard.”

After White, by order of December 9, 2003, the Minnesota Supreme Court created an Advisory Committee to review its Canons 3 and 5 in light of White. . . . Following the Committee’s report, the Minnesota Supreme Court held its own hearing and received public comment. In September 2004, the Minnesota Supreme Court amended Canon 5 to add a definition of impartiality that explicitly includes open-mindedness:

“Impartiality” or “impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

Canon 5E (as amended Sept. 14, 2004).

The Court today discusses open-mindedness as if the concern were to protect [*768] judicial candidates from experiences that would affect their subjective frame of mind. Thus, the Court holds that the state’s interest cannot be served by measures that only limit the candidate’s conduct during a campaign, not before: “The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.”

This answers the easy question but ignores the hard one. The threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election. This is a fundamental distinction between the partisan activities and solicitation clauses, on the one hand, and the announce clause, which was at issue in White. A central tenet of Justice Scalia’s opinion in White was that the announce clause regulated a candidate’s relation to issues, not people. The partisan activities and solicitation clauses
regulate how certain speech affects a judicial candidate’s relations with people, and organizations of people, not the candidate's relations with issues.

Our Court’s concern with temporal underinclusiveness is largely a result of its failure to address the threat to open-mindedness from external pressure. The threat to open-mindedness results from allowing the candidates to incur obligations during a campaign that can affect their performance in office. . . . Once the partisan activities clauses are gone, one may expect that party involvement will become the norm, so that recusal [*769] would be pointless, since all judges would be similarly compromised.

B.

“Open-mindedness,” in Justice Scalia’s terminology, is in reality simply a facet of the anti-corruption interest that was recognized in Buckley v. Valeo (1976) and subsequent campaign finance cases. . . . Corruption is a sufficiently serious threat to our institutions that the government may (1) seek to prevent it before it happens and (2) act against it in intermediate forms that are more subtle than bribery and explicit agreements.

Admittedly, the concern with corruption in the campaign finance cases focuses on payment of money. While the solicitation clause also deals with money-raising, the partisan activities clauses do not, which distinguishes them from the campaign finance cases. Nevertheless, the Supreme Court’s decision in United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers (1973) demonstrates that the concern with corruption and undue influence is not limited to obligations resulting from payments of money. Letter Carriers recognized the danger partisan allegiances posed to neutral administration of justice. That case upheld restraints imposed by the Hatch Act on executive branch employees’ political activities, in part because of the effect partisanship could have on the performance of their duties . . . . The need for “neutrality” identified in Letter Carriers is even more important for the judicial branch than the executive. . . . [*772]

C.

Although in White Justice Scalia observed that the parties and this Court appeared to make no distinction between the concepts of judicial “independence” and “impartiality,” in its September 14, 2004 [*773] order, the Minnesota Supreme Court explained its decision not to amend the partisan activities clauses partly by relying on the need for separation of powers: . . . “As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.” The separation of powers interest is a concern for institutional independence that is distinct from concern for impartiality in any of the senses identified by Justice Scalia. . . . Even the narrowest notion of federalism requires us to recognize a state’s interest in preserving the separation of powers within its own government as a compelling interest.

D.

The extent and severity of the threat to the state’s interests are factual questions that must be proven empirically. In the proceedings in the district court, the Boards adduced sufficient evidence of that threat so that summary judgment for the plaintiffs would not have been appropriate. But recent events make it far less appropriate that our Court should enter judgment as a matter of law on questions of fact as to which there is no record before us.

The record below contained the affidavit of a former governor of Minnesota who stated that he had a lifetime of experience in understanding how Minnesota citizens “think and feel” and that partisan judicial campaigns would lessen Minnesotans’ confidence “in the independence of the judiciary.” A former Chief Justice of the Minnesota Supreme Court stated that partisan judicial campaigns would “put pressure on judges to decide cases in ways that would impress the judge’s supporters favorably.”

But far more important to our holding today is the fact that the Minnesota Supreme Court has recently reconsidered the provisions of Canon 5 at issue here, held hearings, and received public comment . . . . [*775]

The Court today errs grievously in issuing a ruling that strikes the provisions based on the 1997 factual record without considering the September 2004 record before the Minnesota Supreme Court. Since the holding is based on a factual record that antedates the most recent version of Canon 5, one must question whether the Court’s holding today even applies to the current version of Canon 5, based as it is, on a 2004 factual determination which the Court does not take into account.

E.

The Court today holds that Minnesota’s interest in judicial open-mindedness is not a compelling interest because the solicitation and partisan activities clauses are “underinclusive,” meaning that they do not address all “significant threats” to the state’s asserted interest. The Court today says that underinclusiveness of a regulation will establish that the state’s purported interest is not compelling . . . . However valid that reasoning may be in cases where the asserted interest is novel or questionable, it is not valid here because the interests at stake in this case have already been recognized as compelling. Compelling interests cannot be negated simply because a particular measure adopted in their name is deemed ineffective. The Court today acknowledges that avoiding judicial bias that denies litigants due process is a compelling interest, whether or not a particular measure furthers it effectively. Likewise, protecting the integrity of the states’ courts has long been recognized as compelling, and by the same reasoning, that interest cannot be negated simply because a particular measure may not protect it fully. . . . [*776] It is a misreading of the Supreme Court’s underinclusiveness discussions, and, most significantly, a nonsequitur as well, to say that the interest in judicial integrity could be reduced to insignificance because Canon 5 does not go far enough to protect it.
Preserving judicial open-mindedness, and the appearance of it, should be recognized as the same compelling state interest in avoiding corruption interest that was identified in *Buckley v. Valeo* and the campaign finance cases. Though it is the same anti-corruption interest, the need to protect that interest is more urgent and vital in the context of the judiciary because in that context outside influences threaten litigants’ due process interest in adjudication in accord with the law and the facts of their case. A further state interest in preserving the separation of powers between state branches of government should also be recognized as compelling. The Minnesota Supreme Court has recently re-examined Canon 5 and clarified that the Canon is meant to protect those state interests. Judicial integrity and separation of powers are interests of the highest importance in guaranteeing the proper functioning of state government and we have no warrant to deny their importance.

II.

A.

Though the Court today errs in holding that underinclusiveness of a regulation can negate the importance of the state’s interest in the integrity of its judiciary, underinclusiveness does indeed point to a different problem—it raises an inference of pretext. Even where an asserted governmental interest is undeniably compelling, a failure to fully address threats to that compelling interest can be evidence of pretext. The governmental actor may have missed the target because it was not aiming at it, but was actually seeking to accomplish some other, impermissible goal . . .

The Supreme Court has twice upheld speech restrictions on strict scrutiny review where the measure was tailored to [*777*] address only the most critical threat to the governmental interest, even where some threat to the asserted interest remained unaddressed. See *Austin v. Michigan State Chamber of Commerce* (1990), and *McConnell v. FEC* (2003). . . . [*778*]

B.

The question at issue in our consideration of the partisan activities clauses, as in *Austin*, is whether there is a “crucial difference” in the threat posed by some entities that justified regulating them while leaving others unregulated. To rebut the inference of pretext, the government must show that the speech it has burdened poses a different, more serious threat to its asserted interest than the speech it chose not to regulate.

Recently, the Supreme Court has held that the differences between political parties and other interest groups could warrant differential regulation of the two kinds of groups. This distinction between political parties and other interest groups was at issue in *McConnell*, where the Court considered Title I of the Bipartisan Campaign Reform Act, which imposed restrictions on political parties’ fund-raising activities that were not imposed on interest groups, such as the National Rifle Association, the American Civil Liberties Union or the Sierra Club. The plaintiffs contended that the distinction violated Equal Protection. The Court held the distinction was permissible, because Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group . . . Congress’ efforts at campaign finance regulation may account for these salient differences.

Before the district court, the Boards contended that special restrictions on judicial [*779*] candidates’ reliance on political parties were necessary to protect Minnesota’s tradition of non-partisan judicial elections, which dates from the enactment in 1912 of the statute making Minnesota judicial elections non-partisan.

The Minnesota Supreme Court greatly amplified that explanation when it decided to reject the Advisory Committee’s proposed revisions to the partisan activities clauses in September 2004. The supreme court order stated, “We conclude that the restrictions on partisan political activity contained in our Code of Judicial Conduct are too important to undermine based on the possibility that they may be vulnerable to constitutional attack, particularly as we are convinced that there are sound bases for their constitutional validity.” The court then reviewed the history of Minnesota’s commitment to non-partisan judicial elections.

The movement towards non-partisan judicial elections was a reform movement meant to insulate judges from the party machines that had captured the state courts during the late nineteenth and early twentieth centuries. Between 1910 and 1958, eighteen states adopted non-partisan judicial elections. Among states that elect their judges, the majority use nonpartisan elections; currently, twenty states have nonpartisan elections for at least some of their judgeships, as opposed to fifteen who have at least some partisan elections. Among the states with non-partisan judicial elections, there [are] a wide variety of measures to enforce the non-partisan character of the election; some states have few such measures, but many have measures similar to those at issue here. Thus, the idea that [*780*] non-partisan campaigns might protect the judiciary from improper external pressures is hardly a novel idea, but must be placed within a broad national reform movement that still has significant sway within the states . . . [*781*]

The hearing the Minnesota Supreme Court held before the 1997 amendments to Canon 5 included consideration of whether partisan activities restrictions should be limited to political parties as defined in Canon 5 or whether they should apply to other advocacy groups. There was testimony on both sides of that issue. In addition to the testimony of Judge Meyer (which the Court quotes [in a footnote]) and others against the definition adopted, DePaul
Willette testified:

Let's assume that the rule is not in place and two candidates in a race; one is endorsed by the republican party, one is endorsed by the democratic party. What do we have? We have a party race. It's not a nonpartisan contest. We have a party contest which will lead us, in my judgment, to the kind of fund-raising and the problems that Illinois and Texas are facing today with multi-million dollar budgets for people who want to retain or gain judicial positions.

Willette's testimony also refutes the idea that the Minnesota Supreme Court intentionally failed to address the threat from partisan activity by single-issue interest groups. Willette testified that one reason single-issue interest groups were not included in the partisan activities clauses is that single-issue groups would require a commitment that would have been banned under the announce clause at the time. Obviously, the announce clause can no longer play any role in the regulatory scheme; however, the Minnesota Supreme Court's expectation that the announce clause would serve to moderate a candidate's relation with interest groups was reasonable at the time and therefore tends to show that the partisan activities clauses were effective at the time adopted. Moreover, the invalidation of the announce clause has apparently had a profound effect on the pressures on judicial candidates in that it is apparently apparent that the announce clause at the time. Obviously, the announce clause can no longer play any role in the regulatory scheme; however, the Minnesota Supreme Court's expectation that the announce clause would serve to moderate a candidate's relation with interest groups was reasonable at the time and therefore tends to show that the partisan activities clauses were effective at the time adopted.

Once again, the most pertinent evidence about the thinking behind the current Canon 5 is evidence that has not yet been presented to the district court. . . . [*782]

McConnell demonstrates that the distinction between political parties and other interest groups could be defended as a valid response to "salient differences" between the kind of threat each sort of organization poses to the state's interests. In addition to its institutional experience with nonpartisan judicial elections since 1912, in 1997 the Minnesota Supreme Court had before it some evidence validating the distinction between political parties and other interest groups, and some challenging that distinction. It resolved that conflict, concluding that political parties posed the greater threat. The conclusion was reaffirmed in 2004 by a committee of lawyers and scholars charged with the task of scrutinizing Canon 5 for constitutional problems, and later by the Minnesota Supreme Court. Our Court errs in concluding as a matter of law that the distinction between political parties and other interest groups is pre-textual. The evidence as to this distinction is best considered by the district court on remand.

III.

Our Court's underinclusiveness analysis goes astray by failing to recognize a compelling interest and by failing to allow the Boards to rebut the inference of pretext. Sections I & II, supra. But the signal failing of the Court's underinclusiveness analysis is that it envisions a kind of strict scrutiny that simply cannot work when [*783] applied to real cases because it does not take into account the need for limited deference to the state's attempt to solve the problems that besiege it.

“Deferece” is not a word we associate with strict scrutiny review, but there is indeed a place for limited deference, as shown in the recent case of Grutter v. Bollinger (2003) (“The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.”). There are three reasons why we should employ some limited deference to the judgment of the state of Minnesota in this case, if after remand, we were satisfied that the judgment was well-supported by cogent evidence and the possibility of pretext had been rebutted.

The Court's primary reason for striking the partisan activities clauses today is that the provisions are underinclusive. The main thrust of the narrow-tailoring requirement is directly to protect speech rights by avoiding an infringement broader than the need to protect the government's interest: “The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished.” Exacting, de novo review by the courts to assure that the government has chosen the least restrictive alternative directly protects the individual's speech right. The objection that a measure is underinclusive, on the other hand, cuts in the opposite direction; it being the command of the First Amendment not to abridge the freedom of speech, one is at first surprised to learn that a law can offend the First Amendment because the law does not forbid enough speech. The vice in an underinclusive law is not that the underinclusiveness directly suppresses speech but that it raises a suspicion of pretext—which is just an inference, and which can be rebutted by sufficient evidence. Even in questions subject to strict scrutiny, there simply has to be some room for judgment about how wide to cast the net, and it should be apparent that it is more offensive to the First Amendment for a measure to be too broad than to be too narrow. The problem with applying the same kind of exacting, de novo review to underinclusiveness as we do to overinclusiveness is that the two requirements form a Catch 22 situation, in which a drafter's very effort to avoid overinclusiveness makes the measure vulnerable to attack for underinclusiveness. . . . [*784]

A second reason for some limited deference is that this is a case of competing constitutional interests, so that what-
ever protection is afforded First Amendment interests comes at the expense of due process and separation of powers interests. . . .

Finally, this is a case in which the parameters of the evil addressed cannot be outlined with a high degree of precision. The difficulty is that the threat to governmental interest is not from unambiguously evil conduct, but from behavior that forms part of a continuum with desired behavior—-attempts of the citizenry to make their voices heard in their government. The critical and difficult question posed by this case is that the danger to judicial neutrality comes from that sometimes salutary behavior, at the point at which participation in the democratic process becomes undue influence over judicial decisionmaking, preventing a judge from acting as the law's representative, rather than as the representative of a political patron or donor. That point will vary from candidate to candidate, according to whether he or she is stubborn or persuadable, experienced or naive, young or old, poor or independently wealthy, ambitious or modest. No law can account for all these imponderables without restricting some candidate who would not have been swayed by temptation or leaving some candidate at liberty to compromise himself. . . . [*785]

. . . . When Congress grapples with such a protean concept as "undue influence on an officeholder," the Supreme Court applies strict scrutiny in such a way as to acknowledge that Congress' task requires exercise of some judgment. In contrast to the Supreme Court's approach, our Court today takes a bludgeon to a state's attempt to solve a delicate problem.

IV.

The futility of requiring unattainable precision is illustrated by our Court's treatment of the solicitation clause. The basic scheme of the solicitation clause is to erect the campaign committees as a barrier between the candidate and contributor. As recently as 2002, all but four of the states that had judicial elections prohibited candidates from personally soliciting campaign contributions. The Court today [*786] seems to implicitly approve the concept of the campaign committee as a barrier between contributors and the judge or would-be judge. Yet, in effectuating the concept, there are necessarily details which could be moved an inch one way or another. It is clear that for the candidate to sign letters himself is one way to hack at the wall between the candidate and contributor—presumably, that is why Wersal wants to do it. It is perhaps true that the entire wall would not fall down, but it would be somewhat less effective in achieving the goal of removing personal obligation from the candidate-contributor relation. If each detail of the scheme must be proved as critical, rather than as forming a part of a scheme that works, then each detail, and therefore the scheme as a whole, is foredoomed.

Moreover, while the Court's ruling today seems to attack only one small aspect of the solicitation-restriction scheme, the ruling contains the seeds to strike the whole scheme. Today Wersal asks only to sign solicitation-restriction letters and to personally ask for money from large groups. However, the Court states that any candidate can flank the campaign committee's confidentiality obligation simply by looking up public records showing who contributed to whom. In light of the Court's underinclusiveness analysis, this reasoning will likely require us to condemn the entire scheme as soon as the next plaintiff asks us to.

In sum, though strict scrutiny must, of course, be strict, it must, at least in some instances, be applied with limited deference to the decisionmaker's exercise of judgment. If we pretend that it is otherwise, we adopt a model for strict scrutiny under which no state's attempt to deal with certain problems can survive, and so very real and dangerous problems must be left unaddressed. Every place where the line is drawn is arguably either overinclusive, because too much activism is restricted, or underinclusive, because too much threat to judicial open-mindedness is tolerated. The courts then occupy the enviable position of not being required to say in advance what line would be permissible, but of being privileged to veto every possible legislative attempt to draw the line because it would have been possible to draw the line somewhere else. If strict scrutiny is simply a way to strike down laws, in which any law is doomed as soon as we invoke strict scrutiny, it is a charade. That is not how the Supreme Court has applied strict scrutiny, nor should we adopt this flawed methodology in our Circuit. Instead, where the states or other branches draw the line in a place which the governmental actor can defend, with convincing evidence, as the place where the threat to its interest becomes the most acute, the measure should pass strict scrutiny, though it might have been possible for another hypothetical decisionmaker to have moved the line an inch in one direction or another.

V.

There can be no question that the interests at stake here are compelling. There are questions of fact-first, as to whether the threat to those interests posed by partisan involvement in judicial elections and personal solicitation of contributions are [*787] severe enough to warrant the measures taken by the Minnesota Supreme Court and second, as to whether the particular remedy chosen was truly selected for the asserted reason. I would remand to the district court for trial of these factual questions in light of new evidence of the Minnesota Supreme Court's most recent deliberations on the subject. If the defendants prove by convincing evidence that the threat was as they assert and that the clauses were adopted to remedy that threat, I believe the clauses should be upheld as constitutional. Today's ruling invalidates Minnesota's current attempts to preserve its courts' integrity and public repute without any evidence having been heard on the most recent rule amendments. At the same time, our ruling in effect dooms any future attempt as well by adopting a form of strict scrutiny that no measure will pass. I therefore respectfully dissent.

AJA's National Forum on Judicial Independence formed the basis for this Inside the Law program shown on PBS stations throughout the United States. Producers took material from the final AJA panel discussion (found at pages 54-64 of this issue) and interviews of some of the speakers from other panels. Court TV's Jack Ford moderated the one-hour program, which was supported by a grant from the Joyce Foundation.

The DVD can be ordered from Recorded Books, (800) 638-1304, for $29.95. A limited number of free copies are available to AJA members. They can be ordered while supplies last from the Association Management Division at the National Center for State Courts, (757) 259-1841.

There will no doubt be additional materials and publications concerning court security, given recent events. The National Center for State Courts convened a "security summit" following the Atlanta courthouse shooting earlier this year and has a follow-up session planned for November 2005. For those wanting a good starting point, the Court Security Guide, revised from its initial publication 10 years ago, may be helpful.

Copies may be ordered from the Association Management Division at the National Center for State Courts at (757) 259-1841.

PUBLICATIONS


The National Association for Court Management (NACM) has put out a new edition of its Court Security Guide. The booklet contains a variety of checklists to help local courts assess their own security situation. Areas of concern addressed include the courthouse perimeter, public and staff areas, and courtrooms. In addition, several other topics, including handling high-profile cases and workplace violence, are covered. And there are materials concerning the basics of security plan development, audit, and review.

In Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the United States Supreme Court held the provision of Minnesota's Code of Judicial Conduct precluding judicial candidates from "announc[ing] his or her views on disputed legal or political issues" unconstitutional under the First Amendment. On remand in August 2005, the United States Court of Appeals for the Eighth Circuit has held the Code's "partisan-activities" and "solicitation" clauses unconstitutional under the First Amendment. The Eighth Circuit held that the state interests advanced—maintaining the independence and impartiality of the judiciary—did not provide sufficient support for the restrictions on speech and association under strict-scrutiny analysis. Three members of the 15-member court dissented, urging an evidentiary hearing; a fourth dissented in part.

Although a request for review by the U.S. Supreme Court is expected, the decision has immediate importance within the seven states of the Eighth Circuit and may well have nationwide importance. We reprint excerpts from the decision beginning at page 66.