University of Nebraska - Lincoln
DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges Association | American Judges Association

12-1-2005

Court Review: Volume 41, Issue 3-4 - Friends of the Court? The Bar, the Media, and the Public

Steve Leben
Johnson County, Texas

John Russonello
Belden, Russonello & Stewart in Washington, D.C.

Malcom Feeley
University of California-Berkeley

Follow this and additional works at: http://digitalcommons.unl.edu/ajacourtreview

Part of the Jurisprudence Commons

Leben, Steve; Russonello, John ; and Feeley, Malcom, "Court Review: Volume 41, Issue 3-4 - Friends of the Court? The Bar, the Media, and the Public" (2005). *Court Review: The Journal of the American Judges Association.* Paper 56.
http://digitalcommons.unl.edu/ajacourtreview/56

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Friends of the Court?

The Bar, the Media, and the Public

Steve Leben, John Russonello, and Malcolm Feeley

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. . . .[1] 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.

The public generally has favorable attitudes for the courts despite all the criticisms. When you ask them favorable or unfavorable, it's consistently favorable, so it's positive. They have positive expectations, but they have a lot of ignorance and distress as well.

For instance, a survey of ours in Pennsylvania recently showed that in a state that elects its judges, 69% of the public either believes that the state judges are appointed or don't know, and nationally, where federal judges are appointed, 55% of the public believes judges are elected or don't know.

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 altitudes 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-

Footnotes

1. John Russonello, *Speak to Values: How to Promote the Courts and Blunt Attacks on the Judiciary*, COURT REVIEW, Summer 2004, at 10.

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.

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

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

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, but 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—adequately, loudly, vigorously, frequently enough—when crazy complaints have been made against judges. They have failed to endorse enough people and vigorously support the judges—the judiciary at times—and they have failed to speak out in the face of outrageous claims. The bar, I think, has failed and one 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.

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 segmentization 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-regardingness 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.

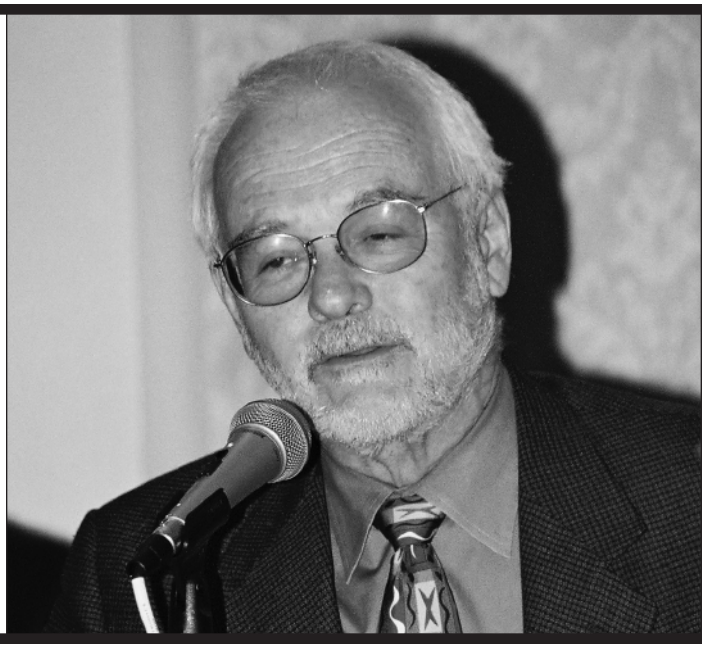
So you can explain nuances to people when we put it before the public and say this doesn't allow judges to take into consideration the circumstances in which a crime was committed. That made them understand and it went from 65% for the public supporting mandatory minimums to 68, 69% opposing mandatory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

> 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*



JUDGE LEBEN: Are there members in the audience who have a public-relations issue in your own court, [or are] having any difficulty with the public understanding what you're doing, understanding decisions or types of decisions, any area in which you would like to get the advice of a consultant on public opinion and how to improve public opinion of your court? . . . .

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.

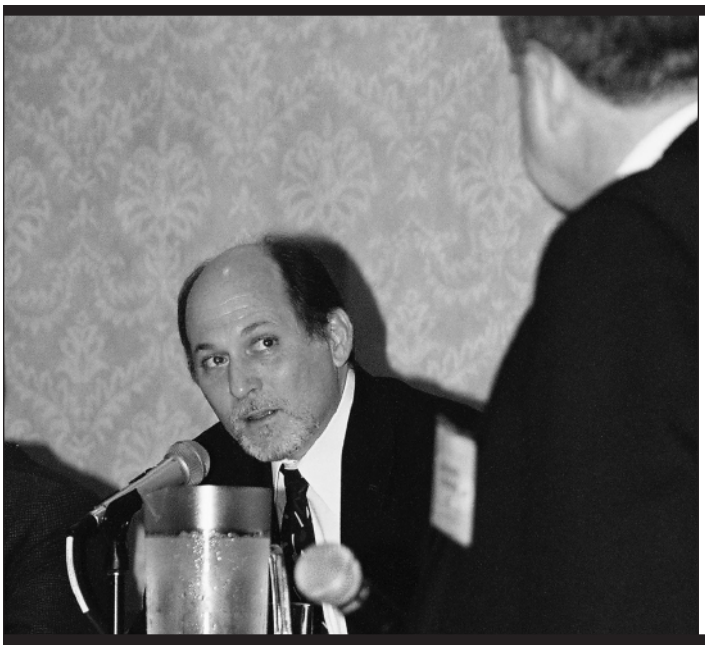
John, in your polling [what] have you seen? Have you raised this issue with the general public? I think the merits poll for Judith Kaye's commission raised it last year. I think in Ohio and perhaps in Pennsylvania, it's been raised in some polls as well. You and I come out of political backgrounds. I 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.