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Judicial Independence: The Freedom to Be Fair

Jack Ford, Leo Bowman, Kevin S. Burke, Michael A. Cicconetti, Malcolm Feeley, Steve Leben, Michael R. McAdam, Gayle A. Nachtigal, Tam Nomoto Schumann, and William C. Vickrey

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.

MR. FORD: Judge Burke, 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 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 McADAM: 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: 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 necessarily 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 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 somebody 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 public 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 confusion 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 historical 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 controversial 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 contribution 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 candidate, and we have had judges in California that have been disciplined 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 understand. 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 consideration along with the laws and the Constitution applied, it was clear to me what my judicial duty was . . . , and the public 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 judge, 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 entitled to a vote from a politician?

JUDGE MIKE CICONETTI: Well, Jack, here's the irony. We are to be the safeguards of the First Amendment rights of the individuals 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.

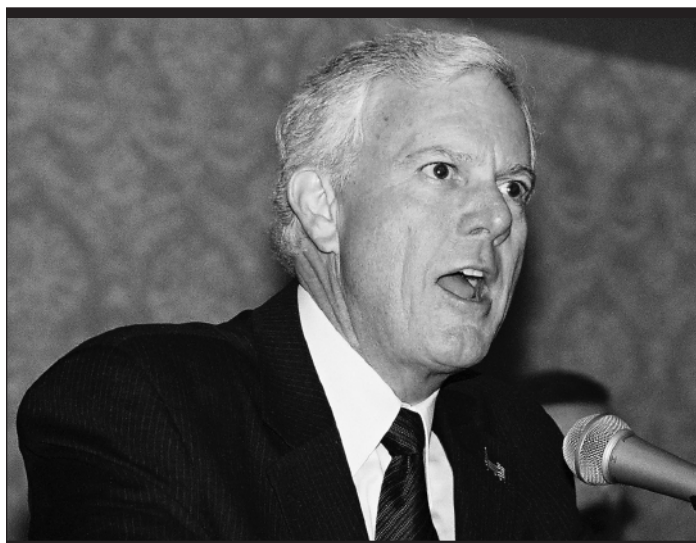
JUDGE BURKE: See, I think that the public doesn't have the right to win in a courtroom. They have a right to be listened to, and we have an obligation to make sure that anybody who comes before me is listened to and can understand what the decision

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

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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 I's, crossing of T's 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 equalized 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

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— Kevin S. Burke

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 substantively 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 micro-manage 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

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 handled 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?

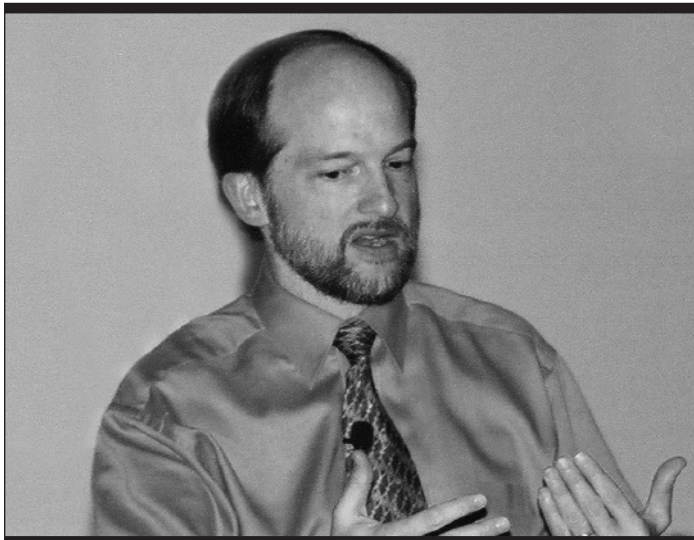
There's been a case in California about resources in the last several years in the operations of the courts, and so I believe we need to do something to protect an independent judiciary in this process. When judges are worried about whether or not a pay raise will go through, they're worried about whether or not the courts are going to have shorter hours of operation, which they have here today, the clerks' offices are cut back, so somebody goes in for a protective service order and they may not be

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 nothing happens. That's a big issue for judges.

The second issue is there are a number of places in the country 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 private practice I'm going to make more money. I like public service, 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

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, qualified, wonderful additions to the bench have to deny the invitation 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.

PROFESSOR FEELEY: Oh, yes, I think so. Most capable public servants are well underpaid for what they would get in the private sector, and that's part of the challenge of public service . . . Like the judge said, we certainly wouldn't want to peg judicial 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 minority view, overpaid, but I think they don't understand.

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

JUDGE CICONETTI: 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 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 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 is 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—jurors, 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-

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?

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



ately handling their cases, and then give a public report before the judge comes up either for retention or reelection, and I think that's something that's important for us to try to get in more states because the public needs that type of information.

MR. FORD: Last question, then: How can we best assure the members of the public that judges are doing their job and that the justice system for the most part is working fine?

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.

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.

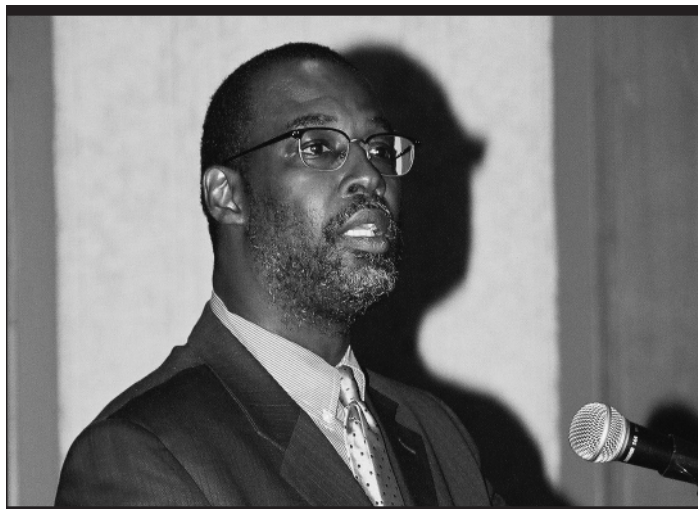
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other people in court, half the population can have involvement inside the walls of our courthouses.

We ought to be able to do a better job at some of the things that Judge Burke and others talked about: educating those who come into our courthouse, having people treated respectfully, giving them an opportunity to critique the system.

We need 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.

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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.

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— Leo Bowman

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.

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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.